Chapter 2

Plural Legal Orders: Concept and Practice

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This chapter examines how we think about questions of plurality and the relations between legal orders. It does so through a specific history of the engagement between Indigenous legal orders and the Australian common law from the perspective of the latter. This chapter approaches legal plurality through the specific lens of thinking, both conceptually and practically, with jurisdiction. It looks at the ways in which the technology of jurisdiction has worked to obscure Indigenous legal orders and hence plurality. The chapter notes the increasing division between the approach of the High Court of Australia to plurality – as a matter to be contained or ignored - and the increasingly careful histories being written of our plural pasts and present.

Key words: plurality; plural legal orders; pluralism; jurisdiction; sovereignty; Indigenous; Aboriginal

Introduction

In early 2020 the High Court of Australia handed down its decision in *Love v Commonwealth* ('*Love*').[1] This case concerned the citizenship status of two Aboriginal men. Both were born overseas (Papua New Guinea and New Zealand respectively). Both had lived in Australia most of their lives on Australian residency visas. Neither had taken out Australian citizenship. Each had one parent who was/is both Indigenous and an Australian citizen. Mr Thoms identifies as Gunggari and is a native title holder. Mr Love identifies as Kamilaroi. Both had been convicted of assault charges. Following their release from gaol the Commonwealth cancelled their visas and determined to deport them. Both men resisted. Love and Thoms argued that by virtue of their Aboriginality ('by descent, self-identification and community acceptance') and deep on-going connection with Country, they could not be deported. They could not be considered as 'aliens' (i.e. not subjects or citizens) under the *Constitution*. In effect their connection to Country meant that they could not be 'strangers nor foreigners to Australia'.[2] Rather, they argued, they fell into a new category of status: 'non-citizen, non-aliens'.

By a narrow majority, the High Court held that Aboriginal Australians could not be considered 'aliens' and hence could not be deported. The majority based their decisions on a recognition of First Nations' deep connection to Country. For Gordon J the 'fundamental premise from which the decision in *Mabo v Queensland [No 2]* proceeds – the deeper truth – is that the Indigenous peoples of Australia are the first peoples of this country … European settlement did not abolish traditional laws and customs …. Assertion of sovereignty did not sever that

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1 [2020] HCA 3.

2 Summary of arguments by Kiefel CJ, ibid, para. [21].

connection'.[3] Nevertheless, this finding, did not lead Gordon J or the other members of the majority to any recognition of Aboriginal sovereignty or polities or, even, to make any comment on the status or nature of those 'traditional laws and customs'. They were content to recognise the plaintiffs' deeper connections within the existing Australian polity and legal framework. For the minority, however, a deeper matter was at stake: to recognise the plaintiffs as 'non-citizen, non-aliens' would be to potentially disrupt the narrative of singular national sovereignty. According to Kiefel CJ if to be a 'non-citizen, non-alien' required a decision by the Elders that a person was Aboriginal and held that status, then to allow this would effectively be to give credence to their laws as determinative, and to therefore attribute to the group 'the kind of sovereignty which was implicitly rejected by *Mabo [No. 2]* … and explicitly rejected in subsequent cases'. Gageler J similarly rejected parts of the plaintiffs' 'argument [which] come perilously close to an assertion of Aboriginal and Torres Strait Islander sovereignty'.[4] In the end, all the judgements either skirted around or, more straightforwardly, rejected any recognition of legal plurality.

The history of legal plurality in Australia has not simply been one of the recognition or not of Indigenous jurisdictions.[5] The modern Australian nation is a place of significant plurality, and always has been. Chinese immigrants, arriving in numbers from the mid-nineteenth century, diverse European immigrants and, more latterly, those from the middle east and beyond, have bought varied traditions, cultures and laws with them. These also raise questions about whether and how we conceptualise and incorporate varying laws within the Australian legal system. The chapter, however, focuses on the relations between Indigenous laws and that law brought with the first colonists – the common law. This is because it is the relations between these laws which has been an ongoing matter of contestation across the period of white colonisation and which continues to provide the clearest lens through which to examine how legal plurality has been conceptualised, practised and contained (or not) as a matter of law and of history.[6] Over the period since first white settlement, courts and law-makers have struggled to articulate the relations between Indigenous laws and settler law. Despite initial attempts to do so in the first part of the nineteenth century, much of Australia's legal history has been characterised by either, at best, attempts to contain Indigenous jurisdictions or, at worst, a simple denial of their existence and force.

In the twenty-first century the gap between the on-going narrative of a singular national law under singular sovereignty, and the reality of continuing Indigenous legal orders, has become increasingly difficult to maintain. Moreover, the legal story of our origins and of that singular law is becoming ever less tenable in the face of detailed and careful histories of (legal) engagement between Indigenous and settler laws. It is primarily the 'problem' of the

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3 Ibid, para. [289] (Gordon J).

4 Ibid, para. [25] (Kiefel CJ); Gageler J at para. [125].

5 In this chapter the word 'plurality' is preferred to 'pluralism'. The latter is intimately connected with a particular understanding of legal pluralism that emerged from the work of anthropologists and sociologists in the mid-twentieth century. The word 'plurality' and the phrase 'plural legal order' return the language to that of the law. Halliday also argues for the use of 'plurality' rather than 'pluralism'. He similarly locates the history of 'legal pluralism' in that era and scholarship. For Halliday the word 'plurality' better reflects the kind of concrete, granular, highly contextual histories undertaken in recent years by historians, while avoiding specific connections with some of the problems of legal pluralism scholarship, particularly related to the broad, often a-contextual, meaning of 'law' and to a 'bounded' notion of the State: P. Halliday, 'Laws' Histories: Pluralism, Plurality, Diversity', in L. Benton and R. J. Ross (eds.) *Legal Pluralism and Empires, 1500-1850* (New York University Press, 2013) pp. 261-277, p. 268.

6 The word 'contained' is adopted from Halliday, ibid, p. 267.

containment of Indigenous laws which has continued to pressure the modern vision of singular sovereignty and singular law which courts still insist underpins the Australian polity. The concern of all the judges in *Love* – in stepping around or directly engaging with sovereignty – is testament to this. It is in the continued care to reinscribe the sole sovereignty (and hence jurisdiction) of the Commonwealth of Australia that we find the displacement or obfuscation of Indigenous jurisdictions and hence of plural legal orders.

This chapter considers how we have approached legal plurality through the specific lens of thinking with jurisdiction – conceptually and practically. Jurisdiction is one of the persistent technologies of law, and hence of colonial governance, which have worked to displace or obscure First Nations' laws. Underneath the legal regime established by the assertion of sovereignty by the British a raft of other laws continued. The chapter opens by explaining why jurisdiction is the lens through which this chapter examines that plurality; it considers the shift in the mid-nineteenth century to thinking not of jurisdiction but of 'customary laws' and the problems of containing those laws; and finishes with an examination of the movement back to jurisdiction in the twenty-first century and the increasing divide between the way in which courts think about plurality and the careful histories of plurality being undertaken by historians. Throughout, the chapter points to the on-going problems posed to any recognition of plural legal orders by the constant re-inscription of a particular construct of singular sovereignty and territorial jurisdiction.

Plurality in the Nineteenth Century: Taking Jurisdiction

In 1788 the Australian continent was a place of diverse legal plurality. This was so in a number of ways. First, there were hundreds of language groups and Indigenous nations, each with their own laws and with their own ways of organising relations between those laws. Second, New South Wales may have been the newest colony in the Empire, but in becoming part of the British Empire it became part of an Empire itself characterised by considerable legal diversity. Moreover, the Colonial Office was familiar and, more importantly, comfortable with legal plurality in colonies (including Indigenous plurality). Third, those who arrived with the first fleet brought with them their law – in particular the common law – from England, a place which at the time was itself was one of diverse legal plurality. As Tamahana puts it 'legal pluralism ... is a common historical condition'.[7] As are plural legal orders. Thus, laws and legal traditions, both local and from across the globe, met in the new place of the colony of New South Wales. As Douglas and Finnane have noted, while European settlement may have commenced in 1788, the story of the assertion of jurisdiction over Indigenous Australians was a predominantly nineteenth century story.[8]

Yet for many years legal histories of Australia supposed the opposite. It was assumed that British law (and in particular the English common law) was the only law of the colony; Indigenous peoples had no laws recognisable as such. Histories of New South Wales were rarely situated within the broader frame of the British Empire, let alone part of a global history of encounter. Even if it was conceded that Australia's First Nations had laws recognisable as such to the British at European colonisation, the legal orthodoxy for many years was that they were long gone, extinguished – along with any rights to land – by the forces of that colonisation.

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7 B. Z. Tamahana, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, 30 (2008), 375-411, 376.

8 H. Douglas and M. Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire*, (Palgrave MacMillan, 2012).

Rather, the Australian continent was, so the story went, one of no law, into which the common law arrived and became the only law of the land, and in which Britain's sovereignty was uninterrupted.

Thinking with Jurisdiction

In 1998 Bruce Kercher's Colonial Case Law Project reintroduced scholars to long-forgotten decisions of early courts concerning the status of Aboriginal Australians and their amenability to the common law.[9] As Kercher revealed, over a 20 year period the courts in New South Wales heard a number of cases, all involving crime, in which the court considered whether or not Indigenous Australians could be tried at common law. The re-discovery of these decisions came at an opportune moment. Just a few years before, the High Court of Australia had, in *Mabo v Queensland (No. 2)* ('*Mabo (No. 2)*'), finally recognised that a form of enforceable rights to land, vested in Indigenous Australians, and to be known as native title, had survived the annexation of New South Wales by Great Britian.[10] However, in *Mabo (No. 2)*, Brennan J also held that on acquisition of sovereignty the common law had become the law of the new colony and of all within it. While native title rights might have survived annexation (or to put it another way, not been extinguished) the Court made it clear that this was really an exception. It did not purport to suggest that Indigenous laws generally should be recognised.

The decision in *Mabo (No. 2)* was critical in three ways for recent scholarship on legal plurality. First, although the High Court of Australia did recognise that enforceable native title rights had survived annexation, it did so in a way which stepped around any recognition of Indigenous sovereignty or laws more broadly. In so doing, *Mabo (No. 2)* not only reinforced the orthodox account of our legal origins, but more deeply embedded it. Second, the story of the legal origins of New South Wales in *Mabo (No 2)* caused historians to pause. Was the orthodoxy of *Mabo (No 2)* really an account which reflected our origins? Did it really accord with the practices of law in the early colony? These issues, and indeed the early cases presented by Kercher, had been considered before, but the confluence of the decision in *Mabo (No. 2)* and Kercher's presentation of new material on these cases gave new impetus to legal historians to revisit the early colonial period.[11] Third, for many, this confluence re-oriented the frame through which legal historians considered the relations between peoples and laws in the colonies. It did so through a returning of questions of legal plurality to a traditional language and technology of the common law: jurisdiction.

In the late 1990s and 2000s a variety of scholarship brought jurisdictional thinking to the fore. Rush re-turned us to the language of jurisdiction in *Mabo* and *Wik* even before Kercher's discoveries; McHugh discussed jurisidiction in the early period in a comparative context in *Aboriginal Societies and the Common Law*. Dorsett, and Dorsett and McVeigh, re-connected the questions of jurisdiction and sovereignty in different historical periods with contemporary

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9 B. Kercher, 'R v Ballard, R v Murrell, R v Bonjon', *Australian Indigenous Law Reporter,* 3(3) (1998), 410-425; B. Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales', *Indigenous Law Bulletin*, 4(13) (1998), 7-9.

10 (1992) 175 CLR 1.

11 S. Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip, 1841-1851', *Historical Studies*, 22 (1987), 313-335; B. Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842', Journal of the Royal Australian Historical Society, 59 (1973), 264-269; S. Cooke, 'Arguments for the Survival of Aboriginal Customary Law in Victoria: A Casenote on R v. Peter (1860) and R. v. Jemmy (1860)', *Australian Journal of Legal History*, 5 (1999), 201-241; H. Reynolds, Aboriginal Sovereignty: Three Nations, One Australia?, (Allen and Unwin, 1996), pp. 70-71.

native title cases. Ford's work carefully unpacked the colonial period in New South Wales and Georgia and introduced the language of jurisdiction to a new generation of historians. Her *Settler Sovereignty* brought to the fore the importance of the assertion by colonial administrators and judges of juridiction over *inter se* crime to the project of sovereignty formation in the Australian colonies. Douglas and Finnane added a careful examination of jurisdiction and sovereigny in the later period through a consideration of criminal law and colonial violence.[12] Kombumerri/Munaljarlai jurisprudent Christine Black reminded us that Indigenous laws are laws of relationships.[13] At the same time, world historian Lauren Benton introduced the idea of 'jurisdictional politics' in her key work *Law and Colonial Cultures*.[14] Benton described the ways in which, in the early modern period (and beyond), 'jurisdictional jockeying' of imperial legal orders provided rhetorical and legal strategies through which actors could position themselves, in various ways, in and against these orders. She described how jurisdictional regimes were never static and how conflicts between them changed jurisdictional boundaries. This fluidity, and the conflicts it could engender, were productive of different legal orders. Each scholar, through slightly different frameworks, and responding to slightly different concerns, re-oriented or returned matters of plurality and plural legal orders to the first question of law: that of jurisdiction.

Early Cases

Prior to Kercher's recovery of early New South Wales court decisions, our understanding of the early period had been dominated by the decision of the Supreme Court of New South Wales in 1836 in *R v Murrell* ('*Murrell*').[15] *Murrell* was the case best remembered from the early period, mainly because it had been published in a series of nominate reports by Legge, although not until 1896.[16] When Kercher uncovered the early decisions of *R v Ballard* ('*Ballard'*) and *R v Boatman* ('*Boatman'*) he also published new versions of the decision in *Murrell*, based on a wider range of sources.[17] These did not change what we understood the outcomes of the case to have been, but these newer accounts were more nuanced and detailed, and provided more grist for historians' mills.

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12 P. Rush, 'An Altered Jurisdiction: Corporeal Traces of Law', *Griffith Law Review*, 6 (1997), 144-168; S. Dorsett, 'Since Time Immemorial: Jurisdiction, Native Title and the Case of Tanistry', *Melbourne University Law Review*, 26 (2002), 32-59; P. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*, (Oxford University Press, 2004); S. Dorsett and S. McVeigh, 'Just So: "The Law Which Governs Australia is Australian Law"', *Law and Critique*, 13 (2002), 289-309; S. Dorsett and S. McVeigh, *Jurisdiction* (Routledge, 2012); L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*, (Harvard University Press, 2010). Douglas and Finnane, *Indigenous Crime and Settler Law*.

13 C. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence*, (Routledge-Cavendish, 2010), p. 184.

14 L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900,* (Cambridge University Press, 2001). While this work introduced the term to many scholars it was not the first or only use of the term by Benton. See, for example, L. Benton 'Making Order out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands', *Law & Social Inquiry*, 26 (2001), 373-401 and, more latterly, L. Benton *A Search for Sovereignty: Law and Geography in European Empires, 1400-1800*, (Cambridge University Press, 2010).

15 (1836) 1 Legge 72 ('*Murrell*')

16 *Ibid.*

17 *R v Ballard* [1829] NSWSupC 26 ('*Ballard'*); *R v Boatman* [1832] NSWSupC 4 ('*Boatman'*); *R v Murrell and Bummaree* [1836] NSWSupC 35.

In *Ballard*, the Attorney General sought the direction of the Supreme Court as to whether an Aboriginal person could be prosecuted for the murder of another Aboriginal person, 'both having been in a savage state at the time of the transaction in question'.[18] Ballard had allegedly killed another Aboriginal man called Borrondire, or Dirty Dick, near the Domain, not far from Sydney. While Indigenous Australians had been prosecuted in the years prior to this case, this was the first prosecution of an Indigenous defendant for the murder of another Indigenous person. The previous cases (few though they were) were not *inter* se and had involved at least one European. In those decisions, the Court was of the opinion that the common law applied.[19] Some three years later, the same question again came before the Court, in the case of *R v Boatman*. In both *Ballard* and *Boatman*, the Court took the same approach to the matter: that the prisoner ought to be discharged for want of jurisdiction. That the matter was one of jurisdiction was clear to the Court in both cases. In *Boatman*, Dowling J commenced by asking counsel 'if he renewed his objection to the jurisdiction of the court in this case?' When Counsel indicated that he did because it was 'in his opinion, a most important question, whether the aboriginal natives were subject to our laws', Dowling J responded that 'the regular course of proceedings was to plead to the jurisdiction'.[20]

Ballard and *Boatman* were decided in an early period, not just in the history of New South Wales, but in terms of global jurisprudence on the subject. The New South Wales Supreme Court had little guidance on the matter. Even had they been decided, cases such as those of the United States Supreme Court in *Cherokee Nation* would not yet have been available in New South Wales.[21] Very few colonies in North America, for example, claimed jurisdiction over Indigenous peoples, and certainly not with any consistency.[22] Forbes CJ noted in *Ballard* that this 'is a case sui generis, and the Court must deal with it upon general principles, in the absence of any fixed known rule upon the subject'. That the matter was one of jurisdiction, then, was hardly surprising. The English common law had always existed alongside a multiplicity of other jurisdictions and their courts: not just the well-known courts of Chancery, Admiralty or Ecclesiastical but myriad others – feudal courts such as manorial courts; borough courts in towns; palatinate courts; and topically specific courts such as the stannary courts, which regulated tin mining in Cornwall, and the courts of the forest. At the time of the annexation of the colony of New South Wales, the jurisdiction of the common law had achieved considerable dominance in England, but it is often forgotten that many of these other jurisdictions continued to function well into nineteenth century. In the late eighteenth century there were still hundreds of local courts and, as Arthurs reminds us, altogether these bodies disposed of many more cases than the central Westminster Courts.[23] England was a place of plural laws.

Plurality of laws, and the contestations between them, were, therefore, familiar territory for the legal fraternity in the late eighteenth and early nineteenth centuries. It is hardly surprising, then, that in considering the meeting of laws in the new colony of New South Wales, the judges

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18 *Ballard*, ibid, unpaginated.

19 *R v Lowe* [1827] NSWKR 4; *R v Tibbs* [1824] TasSupC 1. See also *R v Mow-watty* [1816] NSWKR 2. On this see L. Ford and B. Salter 'From Pluralism to Territorial Sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales', *Indigenous Law Journal,* 7 (2008), 69-86.

20 Boatman, unpaginated. See also McHugh, Aboriginal Societies, p. 161; Ford, Settler Sovereignty.

21 *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

22 See Ford, *Settler Sovereignty*.

23 See generally H. Arthurs, 'Special Courts, Special Law: Legal Pluralism in Nineteenth Century England', in G. Rubin and D. Sugarman (eds.), *Law, Economy and Society: 1750-1914: Essays in the History of English Law* (Professional Books, 1984).

simply reiterated the same questions as characterised practice in England: did the common law have jurisdiction, or did that more properly belong to another law? This, of course raised questions about the nature of Aboriginal laws. If there were no other 'law' then the common law properly had jurisdiction. This matter proved difficult for the early judges. Aboriginal laws were clearly so foreign that they could not be said to be 'laws' within the understandings of English trained judges. But neither did they believe that they had an automatic right to intrude on the 'customs and habits' of other peoples. As Forbes CJ noted in *Ballard*:

> It is known as a matter of experience that the savages of this part of the globe, have a mode of dressing (sic) wrongs committed amongst themselves, which is perfectly agreeable to their own natures & dispositions, and is productive, amongst themselves, of as much good, as any novel or strange institution which might be imparted to them.[24]

If relations between laws, and hence legal plurality, is thought of as a question of jurisdiction, how do we define jurisdiction? In modern law we tend to think of jurisdiction as being a simple matter of procedure – in which court, for example, should I commence my action? The answer to this might simply be a prosaic matter of determining the monetary limit of the particular court. But engaging jurisdiction is more meaningful than simply bringing something within the business of that court. Jurisdiction is key to the ordering of law (and laws). Jurisdiction is about the authority of law: it is about who or what speaks in the name of the law. For the common law, the key site from which the law has always spoken is the courts. Thus, for a court to declare that it has jurisdiction has the effect of bringing someone or something to the law administered by that court. It binds those persons or things to that law.[25] For the courts in *Ballard* and *Boatman* to declare they did not have jurisdiction was to say that the matter did not belong to the common law: it more properly belonged to another law (regardless of how they viewed that law as somehow less 'civilised' than that of the colonisers).

Boatman and *Ballard* demonstrate another important matter about jurisdiction and plurality. In both cases the dominant modality through which jurisdiction was conceived was that of personal jurisdiction. For the court, the colonisers brought the common law with them, as their personal law and the laws of the First Nations remained personal to First Nations peoples. It was only when these laws met that issues arose of how to manage legal encounter. A system based predominantly on personal jurisdiction clearly makes plurality easier to observe: there are multiple bodies of law. A shift to another mode – that of territorial jurisdiction – does not necessarily result in a loss of plurality, but it can make that plurality harder to see.

This shift in mode of jurisdiction is most clearly seen in the 1836 decision in *Murrell*. When Jack Congo Murrell was charged with the murder of another Aboriginal man, Bill Jabbingee, (or Jabingi, or Jabenguy), his counsel pleaded that the court had no jurisdiction to try the matter. Unlike in *Ballard* and *Boatman*, the argument was not successful. Burton J delivered the judgement of the court. Burton was of the opinion that most of the eastern half of the Australian continent was in the actual possession of the Crown and therefore that as the 'English Nation has obtained and exercised for many years the rights of Domain and Empire over the country thus possessed … the law of England is the law of the land'.[26] This left no room for another law. Thus, in enacting the *Australian Courts Act 1828* (Imp), the British Parliament had, as an

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24 *Ballard,* unpaginated.

25 Dorsett and McVeigh, *Jurisdiction.*

26 *Murrell*, unpaginated.

act of sovereignty, he maintained, asserted jurisdiction over a defined area with respect to a range of matters which included crime. *Murrell* therefore signalled an important shift – from a mode predominantly of personal jurisdiction to a preferred mode of territorial jurisdiction. Importantly for subsequent developments, the judgement also assumed that territorial jurisdiction followed the acquisition of sovereignty.[27] That *Murrell* would take this path was not a foregone conclusion. In other parts of the British Empire, imperial and local administrators had recognised that plural jurisdictions, including those of the Indigenous inhabitants, were compatible with British sovereignty. India and New Zealand are examples.[28] What set Australia apart was the view of Burton J (and others, including the Colonial Office) that Indigenous Australians were lower on the scale of civilisation compared to their counterparts in other places in the Empire. For jurisdictional purposes, therefore, there was no other relevant law. Thus, in one movement, Burton J both instituted the common law as the only law of the territory and inscribed a model of singular sovereignty.

None of this meant that plurality somehow went away. The decision in *Murrell*, that Aboriginal Australians were amenable to the common law, did not mean that Indigenous laws ceased to exist or, to use more modern terminology, were extinguished. Burton J's decision had nothing to say (and nor could it have) about the continuance of laws within other juridictions: it simply meant that the common law would not recognise them. There is little doubt that the effects of colonisation on Indigenous culture and laws was drastic, but the damage done does not mean that Indigenous jurisdictions did not in many places survive, even if compromised. As Noel Pearson once put it, for Indigenous Australians their law is simply a 'social reality'.[29] Nor did the decision in *Murrell* mean that challenges to the jurisdiction of the common law courts suddenly ended. But they waned and eventually more or less ceased.[30] From the point of view of settler law , therefore, the effect of *Murrell* was to obscure Indigenous jurisdictions – not to extinguish them, but to remove them from easy (legal) sight. The construct of territorial jurisdiction made it hard to see a law other than the common law, while the shift to sovereignty rather than jurisdiction as the predominant idiom through which to consider Indigenous claims made it harder to find a language through which to articulate legal encounter. As the century wore on, courts found it increasingly difficult to think with jurisdiction without also assuming a co-extensive sovereignty. It is this elision which has proven so problematic for legal plurality.

Containing Plurality

The demise of challenges to the jurisdiction of the courts did not end questions about plurality; nor did it end plural practices. It did, however, change the terms of jurisdictional engagement. From the mid-nineteenth century until well into the twentieth century the most significant way we thought about legal relations between laws was through the accommodation of 'customary law'. The use of the term 'customary law' was clearly pejorative – while anthropologists acknowledged the continued existence of tribal laws and ways of life (they could hardly do

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27 A similar conclusion was reached by the Court of Civil Jurisdiction in Western Australia in *R v We-war [1842] WASupC 7*, sourced from *The Perth Gazette and Western Australian Journal,* 8 January 1842, 2-3, although that court did not often choose to exercise its jurisdiction over crime *inter se.*

28 S. Dorsett, *Juridical Encounters: Maori and the Colonial Courts, 1840-1852* (Auckland University Press, 2017).

29 N. Pearson, 'The Concept of Native Title at Common Law' *Australian Humanities Review*, 5 (1997), online at www.australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/.

30 See, for example, *R v Jemmy* (1860); *R v Peter* (1860), both in Cooke 'Arguments for the Survival of Aboriginal Customary Law in Victoria'.

other as it was clear that Indigenous practices were alive and well across country) that acknowledgement did not mean that for most 'customary laws' were considered to have the same status as the Australian common law or that this acknowledgement included the idea that these practices amounted to, or flowed from, legally autonomous Aboriginal jurisdictions.

Customary Law

From the mid-nineteenth century, across many parts of the north of Western Australia, the northern parts of Queensland and the Northern Territory in particular, it was clear that the assertion of jurisdiction over crime was in itself not sufficient to manage high levels of inter-racial conflict. From the 1840s onwards, particularly in Western Australia, an increasingly interventionist approach was taken towards dealing with Aboriginal offenders. Having established jurisdiction over Indigenous offenders, including over *inter se* crime, some states, such as Western Australia, took the opportunity to fashion regimes for managing this crime. In 1849, for example, Western Australia introduced summary jurisdiction regimes for dealing with Aboriginal offenders.[31] As Douglas and Finnane relate, one way in which 'custom' emerged as important as the nineteenth century progressed was as a factor mitigating culpability for crime. By the late part of the century it was accepted in Western Australia, for example, that Indigenous custom was a reason for mitigating punishment, most commonly in the form of commuting death sentences, particularly in *inter se* cases.[32] This recognition was, of course, a further example of exercising jurisdiction over Indigenous offenders in *inter se* matters. Allowances for custom were made at the discretion of the state legal system and its administrators. As Douglas and Finnane further relate, the content of the custom was not particularly relevant; a reference to custom sufficed as a mitigating factor.

In other places, the extent to which custom was taken into account depended on how far Aboriginal crime intruded on settler space. In Queensland, the greater the intrusion the 'less interest there was in identifying some customary force as impelling Aboriginal actions'. Douglas and Finnane suggest that South-East Queensland, for example, 'still hosted spaces of shared jurisdiction and differented custom'. And that '[c]riminal cases may be seen as the places where those competing juridictions and ways of life were brought into uneasy confrontation'.[33] Importantly, however, the decision of settler authorities to prosecute or not, or to take into account jury suggestions of leniency was determined by colonial authorities. Whatever recognition was given to custom, however perfunctory, was, in an era when sovereignty and jurisdiction were largely uncontested, a matter for the colonisers. Nevertheless, the ways in which Aboriginal peoples across Australia experienced the exercise of jurisdiction varied significantly as did the effect of the exercise of that jurisdiction on Aboriginal laws.

As Halliday has noted, the late nineteenth century was a time of containment of plurality.[34] In many diverse locations around the Empire, early legal recognition of Indigenous jurisdictions had fallen away. As McHugh has noted, in the 'settler' colonies, Aboriginal societies were increasingly 'contained within specific statutory regimes' as policies of protection and

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31 Douglas and Finnane, *Indigenous Crime and Settler Law,* pp. 78-79. See *An Ordinance to Provide for the Summary Trial and Punishment of Aboriginal Native Offenders in certain cases 1849* (WA).

32 Douglas and Finnane, ibid*,* pp. 80-81.

33 Ibid, 83.

34 Halliday, 'Laws' Histories: Pluralism, Plurality, Diversity', p. 267.

assimilation were increasingly imposed.[35] McHugh charts the rise, particularly post-federation, of statutory regimes applying to Indigenous Australians. As he outlines, these statutory regimes regulated Indigenous lives, but did not acknowledge any collective form of Aboriginal organisation. This was not surprising, given the low view most administrators held of the levels of 'civilisation' of First Nations peoples in Australia.[36] Such views, of course, ensured that the second half of the nineteenth century and first half of the twentieth remained not only an era in which little or no evidence of thinking about legal plurality could be seen in legal policy-making, but in which 'customary law' was generally supressed, left to the arena of sentencing law.

In the 1970s, debates over legal pluralism intersected with renewed engagement with 'customary law'. As Douglas and Finnane note, positive political support for 'land rights and (limited) self-determination was the context for the emergence of customary law as a governmental object, a possible sphere of recognition'.[37] One of the most significant institutional responses to this re-engagment was the 1986 Report of the Australian Law Reform Commission (ALRC) into the 'Recognition of Aboriginal Customary Laws'. Although many of its recommendations were never implemented, the Report continued to be influential for several decades, and to provide a point of engagement for scholars from a variety of disciplines. As suggested by the title, the remit of the ALRC was to consider whether it was desirable to 'apply Aboriginal customary law to Indigenous people, generally or in particular areas or to those living in tribal communities only'.[38]

If legal pluralists at the time contested how they might understand 'law', the ALRC was largely content to assume that it was unnecessary to define it, simply stating that while Indigenous laws differed across the continent, 'some basic generalisations can be made. In particular, it can be said that mechanisms for the maintenance of order and resolution of disputes, that is, a system of law, existed within Aboriginal groups'.[39] Moreover, extensive public hearings, often undertaken in remote communities, confirmed for the Commissioners that 'there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines'.[40] The ALRC further pointed to the first land rights case, the 1971 decision in *Milirrpum v Nabalco*, and the judgment of Blackburn J, as authority for the premise that 'customary law' and 'law' were to be understood broadly and that the institutions and traditions of the Aboriginal plaintiffs indeed amounted to a system of law.[41] This was not the view of all contributors. The well-known anthropologist TGH Strelow told the ALRC that '"[t]rue tribal law" is probably dead everywhere. It could not change, for there were no

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35 McHugh, *Aboriginal Societies and the Common Law*, p. 215; A. Nettelbeck, *Indigenous Rights and Colonial Subjecthood: Protection and Reform in the 19th Century British Empire* (Cambridge University Press, 2019).

36 McHugh, ibid, 277. For a detailed picture of this period see Douglas and Finnane, *Indigenous Crime and Settler Law.*

37 Douglas and Finnane, *Indigenous Crime and Settler Law,* pp. 4-5, citing J. M. D. Kirby, 'THG Strewlow and Aboriginal Customary Laws', Adelaide Law Review, 7 (1980), 172-199.

38 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, (ALRC Report 31, 1986), online at www.alrc.gov.au/publication_recognition-of-aboriginal-customary-laws-alrc-report-31/, Terms of Reference.

39 Ibid, para. [37].

40 Ibid, paras. [38] and [100].

41 Ibid, para. [102] citing *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 266-268 (Blackburn J).

aboriginal agencies that had the power to change any of the traditional norms'.[42] What was left, it seemed, for Strelow, was some kind of synthetic law. This was a view rejected by many who gave evidence to the ALRC and which would be unlikely to find favour now.

The ALRC recommended that customary laws be recognised: because it in turn recognised the reality of Indigenous lives lived according to their laws; because of the inherent justice of doing so; and because it mattered to those whose laws had been long denied.[43] In the end, however, while the ALRC Report was broad and suggested significant change, few recommendations were instituted. The Report suggested a number of ways in which recognition could occur: by incorporation of specific customary laws into the general law in some form; by allowing Indigenous Australians to live according to their own laws, unless a matter is specifically excluded; by recognition as accommodation (eg in sentencing); or by codification of customary law.[44] Each of these, of course, suggests a different scope for the accommodation or recognition of (in the ALRC's terms) 'customary laws', and hence different degrees of legal plurality. All, however, remind us that the degree to which legal plurality is acknowledged, accommodated, recognised or given space in which to operate remains a matter within the jurisdiction of the State and is shaped by that jurisdiction.

Reinscribing Sovereignty

In the second half of the twentieth century Indigenous plaintiffs again began to challenge the jurisdiction of the courts and to argue that they were not amenable to the common law. Rather, plaintiffs argued, they should be subject to their own laws. While not phrased in quite the same manner, these challenges were essentially the same as those in the early cases of *Ballard*, *Boatman* and *Murrell*. The same technique is evident: an argument for denial of jurisdiction based on there being 'another law'. Only one of these cases, the decision of Rath J, in *R v Wedge*, referred to *Murrell*. Rath J dismissed an argument that Wedge was not subject to the jurisdiction of the New South Wales Supreme Court on a charge of murder. Not only did Rath J find the arguments in *Murrell* convincing, but he also saw the challenge to jurisdiction as a challenge to the authority of the Supreme Court of New South Wales, and the body of law it administers - the Australian common law.[45]

What is arguably the most important decision on jurisdiction and sovereignty was not, however, about criminal law. Rather, it concerned land. As previously noted, in 1992, in *Mabo (No 2)*, the High Court of Australia determined that enforceable rights to land, to be known as native title, had survived the annexation of the Australian continent by Great Britain. That case laid down the rules for recognition of native title and for its extinguishment. The finding that native title existed, however, did not result in any concurrent recognition of legal plurality. Quite the opposite. The trick for the judges was to craft a decision which recognised native title, but did so in a way which allowed no cracks in the construct of singular sovereignty of the Australian Nation. Thus, sovereignty – and a particular model of sovereignty – lay at the heart of the case.

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42 Ibid, para. [119].

43 Ibid, para. [127].

44 Ibid, paras.[198]-[208].

45 *R v Wedge* [1976] 1 NSWLR 581, 586-7.

At the outset, the Court made it clear that sovereignty was non-justiciable: in other words that it did not have the power to reconsider any matters relating to the lawfulness of Britain's acquisition of sovereignty. However, while it could not question this, the consequences of that acquisition of sovereignty were within the remit of the Court and the judgment was structured around these consequences. According to the Court, all rights to land – both Indigenous and non-Indigenous – flow from the moment of assertion of sovereignty. Most pertinently, at the moment of acquisition of sovereignty the imported common law became the law of the territory, not just the personal law of the colonists, but of all, including First Nations. The description of sovereignty offered by the High Court, and by Brennan J in particular, was similar to that in *Murrell* and was that which is now considered the orthodox account: sovereignty (and hence jurisdiction) is co-extensive with the modern state, and indivisible – the entire power of the state has to be vested in a single locus, a centralised legal authority. This left no room for any recognition of First Nations' sovereignty or, it seems, law.

While sovereignty lay at the heart of the decision in *Mabo*, the case is not conducted through the language of jurisdiction.This was a consequence of determining that the common law became the law of the territory. For the High Court singular sovereignty equated to singular law. There was, therefore, no need to consider the jurisdictional relations between laws. Despite the absence of the language of jurisdiction, as noted, one result of the decision in *Mabo* was a resurgence in thinking about and with jurisdiction. This resurgence was not just evident in the work of scholars. In the years immediately following *Mabo* a number of cases were brought challenging the jurisdiction of Australian law. In each case those challenges were not only dismissed, but the High Court was quick to reiterate its particular model of singular sovereignty and co-extensive territorial jurisdiction. *Walker v New South Wales*, for example, concerned an application by summons to dismiss a statement of claim by which Walker, a member of the Noonuccal nation, claimed that his actions should be governed by customary Aboriginal criminal law, rather than Australian criminal law. Hearing the application at first instance, Mason CJ dismissed any suggestion that customary criminal law survived either English 'settlement' or the introduction of the general provisions of English criminal law. Specifically, he noted that 'English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it'.[46] Thus, while, across the nineteenth and twentieth centuries, courts had commonly referred to customary law, at least for mitigation of sentences, it was clear that that law held no real juridical status for the courts. Rather, the relations between laws could, at best, be understood as adjectival. In other words, where the settler courts exercised jurisdiction over crime, any reference to custom simply described it as a matter of evidential fact, rather than giving it any recognition as an autonomous body, or autonomous bodies, of law.

What was begun in *Mabo (No. 2)* was entrenched a decade later in *Members of the Yorta Yorta Community v Victoria* (*'Yorta Yorta'*).[47] As in *Mabo (No. 2),* in *Yorta Yorta* sovereignty was the lynchpin of the court's reasoning. In that case, concerns to delimit the power of Indigenous laws vis-a-vis the colonising power led to the re-inscription of singular national sovereignty and an emphatic denial of legal pluralism in the Australian legal system. *Yorta Yorta* concerned an application for native title over an area which straddled the New South Wales/Victorian border. For the majority in the case, the key point of departure was again the assertion of sovereignty by Great Britain. This was so for two reasons. First, native title is evidentially

46 *Walker v New South Wales* (1994) 182 CLR 45, [6].

47 *Members of the Yorta Yorta Community* v *Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*')

based on those customs and traditions of the claimant which existed at sovereignty and which survived the change in legal regime and which continue to be practised.[48] Second, although there were multiple normative systems at sovereignty – indigenous and non-indigenous – thereafter one must be dominant. The logic of state sovereignty requires this. Further there can be no 'parallel law-making':

> [u]pon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.[49]

In *Yorta Yorta* the narrative of sovereignty was presented in stark terms. The assertion of sovereignty by the British Crown 'necessarily entailed' that thereafter there could be 'no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and...that is not permissible'.[50] The question never addressed is that of what is the status of Indigenous laws or, as the court puts it, other normative orders, post-British sovereignty? The inevitable conclusion remains that 'customary law' is simply not viewed as law in the way that the common law is. Such a stark conclusion reflected the increased concerns of the High Court in the decade post-*Mabo* to inscribe and control its narrative of singular sovereignty. The majority opinion in *Yorta Yorta* virtually precluded serious curial consideration about how to re-think relations of laws in Australia for almost two decades.

Post-*Yorta Yorta*, therefore, there were two possible ways to imagine legal plurality. The first is that as a result of that decision there is no Indigenous or Aboriginal law as such post-sovereignty, merely a normative system which is less than law, maybe custom, in which case no meeting point between laws is possible. Or, second, there are laws, but they run in parallel to the common law, and hence never meet unless a meeting point is built between them.[51] Caught by the original determination in *Mabo* that native title originated in Indigenous laws and customs, not the common law, the High Court was forced to find an intersection between laws: one which remained faithful to *Mabo*, but also to *Yorta Yorta*. The High Court took a hybrid approach – Indigenous custom or norms were denied law making capacity, but nevertheless native title required a meeting point between Indigenous law and the Australian common law. While once that meeting place might have been the common law itself, the High Court preferred to locate that meeting point in the *Native Title Act* 1993 (Cth). In both *Western Australia v Ward* and *Yorta Yorta*, the High Court mandated that post the enactment of the *Native Title Act* '[a]n application for determination of native title requires the location of that intersection [between common law and Indigenous law and custom], and it requires that it be

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48 This was prefigured some months earlier in *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward'*), where the majority noted that '[t]he assertion of sovereignty marked the imposition of a new source of authority over the land': 94 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

49 *Yorta Yorta*, [43].

50 S. Dorsett and S. McVeigh, 'An Essay on Jurisdiction, Jurisprudence and Authority: The High Court of Australia in Yorta Yorta', *Northern Ireland Legal Quarterly*, 59 (2005), 1-20.

51 This part relies in part on S. Dorsett and S. McVeigh, 'Section 223 and the shape of Native Title: The limits of jurisdictional thinking' in L. Ford and T. Rowse (eds.), *Between Indigenous and Settler Governance* (Routledge, 2014), pp. 162-173.

located by reference to the *Native Title Act*.'[52] Over the last almost 20 years the *Native Title Act*, and in particular s 223, has provided the intersection between laws. Section 223 defines 'native title' for the purposes of the Act and, therefore, defines what the meeting point can look like and what native title can encompass. The relocation of the intersection from the common law to statute, however, does not change the quality of that meeting: it is still one of jurisdiction and of the jurisdictional practices of the Australian common law. As it defines native title s 223 functions as a jurisdictional device. As any claim must be for rights and interests that meet the definition in that section, it is the words in s 223 (and how they have been interpreted by the courts) which ultimately determines what can and what cannot belong to law, in this case to Australian law.[53] To locate the intersection in s 223 reinscribes the Australian nation as the relevant sovereign body: it is according to Australian law, and specifically that section, that the determination of the character, nature and extent of native title is determined.

Ironically, *Yorta Yorta* was decided at the same moment that historians were increasingly turning to re-examining and re-considering histories of legal plurality. Just four years after Kercher's publication of *Ballard* and *Boatman* and the same year as Benton placed 'jurisdictional politics' at the centre of imperial legal histories, the decision in *Yorta Yorta* signalled an increasing bifurcation between the history set out in court decisions and the granular, detailed, work of legal historians. At the same time as scholars, such as Kercher and Ford, were uncovering our plural past, the High Court was reinscribing a neat tale of our legal origins which left out the story of the messy, complicated uneven nature of the assertion of jurisdiction and sovereignty over the Australian continent, let alone the continuing reality of Indigenous jurisdictions. This story is predicated on an elision of jurisdiction with sovereignty that has shaped the way we characterise legal relations between laws since *Murrell*. The Court's refusal to acknowledge that there is a meeting of laws – Indigenous and non-Indigenous – does not, of course mean that there is no meeting. It merely means that it is one that the High Court refuses to acknowledge.

Conclusion

In Australia relations between laws are conducted through the idiom of sovereignty. The modern model of singular sovereignty, co-extensive with territorial jurisdiction, works to obscure legal plurality. Legal relations could, as previously mentioned, be organised in other ways. Around the British Empire multiple jurisdictions frequently sat under singular sovereignty and in other places, such as Canada, legal regimes from different traditions – there civil law and common law – work side by side today. Undoubtedly this jurisdictional plurality also has led and continues to also lead to difficult questions about how to organise relations between those laws, but it reminds us of the contingency of the way Australian courts have, since *Murrell*, chosen to inscribe a particular understanding of sovereignty and territorial jurisdiction. Yet, despite continued re-inscription plural legal orders refuse to remain contained. The loss of the language of juridiction has left courts with no way of giving a voice to Indigenous legal orders and, it seems, in any case they have no willingness to do so. Moreover, there is an inherent instability built into the High Court's edifice of singular sovereignty. This is amply demonstrated by the decision in *Love*, the case with which this chapter opened. In *Yorta Yorta* the High Court maintained that post-sovereignty there could

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52 *Yorta Yorta* 439 (Gleeson CJ, Gummow and Hayne JJ); *Ward* 65–6, 69 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

53 For one history of how this section was interpreted over its first almost 20 years see P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011).

only be one law-making entity; the Australian common law. This left, as we saw, questions as to how we might understand the juridical nature of First Nations' laws, Aboriginal jurisdictions having been largely reduced to an adjectival relationship with Australian law. Yet at the same time, in *Love*, that a decision might need to be made by an elder as to membership of their community was enough to ensure that the three judges in the minority refused the claimant's case because the capacity to make such a decision might imply that they were doing so according to another law. That would amount to a crack in the nation's singular sovereignty. In effect, this constituted a recognition and simultaneous denial of another legal order. By contrast, the majority simply ignored the possibility of plurality. They contained plurality by refusing to acknowledge that any other legal order might be at stake. In some ways the characterisation of sovereignty and consequent legal order in *Mabo (No. 2)* was not suprising. As noted once by Tully, uniformity was a hallmark of the 'liberal promise' of modern constitutionalism in the late twentieth century.[54] What is more surprising, however, is the clinging to that model in the twenty-first century, against the intellectual force of post-colonial consciousness and the persistent calls for reconciliation.

Can we then find a way of thinking about relations between laws that allows us to genuinely reconcile plural legal orders? It seems that this may not be possible without questioning the sole sovereignty of the Australian nation and the pre-eminence of territorial jurisdiction. It may be that the era prior to *Murrell*, in which modern modes of sovereignty and jurisdiction were not set, remain the closest we will get to achieving that legal plurality. There are, of course, many practical measures that can be taken – the ALRC Report outlined some ways in which Indigenous jurisdictions could be, in part at least, integrated into the Australian legal system. However, without an acknowledgement that sovereignty was never ceded and a commensurate recognition of the force of Indigenous jurisdictions, any mechanisms for such integration will always ultimately remain within the remit and jurisdiction of the State. For the forseeable future, however, plural legal orders may well continue to be obscured by the ongoing task of containing that plurality. Legal plurality will continue, as in *Love*, to be hidden in the interstices of decisions concerning Indigenous Australians and the legal regimes which support those decisions.

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54 J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995).