The History of Recognition of Aboriginal Customary Law in Australia

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Frances Forbes Society Tutorial 3.3.26

Milirrpum v Nabalco [1971] FLR 141

Blackburn J:

> ‘The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influences. If ever a system could be called government of laws and not of men” it is shown in the evidence before me.’

From 1788

Illustrating the lack of understanding

- Inga Clendinnen's reading of the spearing of Phillip by Benelong

- Barangaroo asking Phillip if she could have her baby in government House

At what point is there recognition as fact or as law?

R v Wedge [1976] 1 NSWLR 581

- Aboriginal man indicted for murder of another Aboriginal man
- Could ACL be used to resolve the case?

Rath J follows *R v Murrell and Bummarea* [1836] 1 Legge 72 and holds no

Judges – Forbes CJ and Dowling J agreed with Burton J

Burton J in *Murrell*

- ‘That although it might be granted that on the first taking possession of the Colony, the Aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty….Offences committed in the Colony against a party were liable to punishment as a protection to the civil rights of that party…if the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction in the case.’

Rath J not exposed to

- *R v Bon Jon* [1841] *Port Phillip Patriot and Melbourne Advertiser*
- *R v Ballard or Barrett* [1829] *NSW Supreme Court*

And assumed he should follow *Williams v A-G (NSW)* [1913] 16 CLR 404; *Randwick Corp v Rutledge* (1959) 102 CLR *54* which held land entirely vested in the Crown with sovereignty.

Were they binding?

R v Ballard [1829] NSWSC

Forbes CJ in *Ballard:*

‘It has been the policy of the Judges, & I assume of the Government, in like manner with other Colonies, not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives.’

And

‘By the law of England the party accused is entitled to his full defence. Then how could this beneficent principle be acted upon, where the parties are wholly unacquainted with our language, laws & customs? I am not prepared to say, that the mode of administering justice or repairing a wrong amongst a wild savage people, is not best left to themselves.’

R v Ballard 1829

Dowling J agreed with Forbes CJ

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

They appear to have changed their minds in *Murrell*

Bonjon, 1841

Willis J, judge in Port Phillip Bay

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

What is law? anthropologists

Generally see law more broadly than lawyers

Give us more substance eg AP Elkin

The problem of interpreting – into English, and Aboriginal people using English to mean other things eg kinship

What is law? lawyers

- Blackstone, Austin, Bentham, Kelsen, Fuller etc – generally don't seem to fit ACL (positivist, institutionals)
- Elizabeth Eggleston uses Hoebel

'a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting'

- My preferred: 'the critical characteristic of law is that its rules will be enforced in a way that is regarded by the people of the polity as legitimate – that is, they are enforceable by the legal system on its own.

Substance of ACL

- 300-600 nations and language groups >>> no single customary law
- Some patterns – Dreaming, merging of religion and law – more later
- Evidence of substance from
  - Anthropologists
  - Native title cases
  - Criminal law cases (including about change) eg *Walter Elfred Rogers*
  - Cases on inheritance, burial etc
  - Very little directly from Indigenous people, but beginning
  - WALRC view – 'the issue of what constitutes ACL should be left to Aboriginal people themselves, in particular those people in each Aboriginal community whose responsibility it is to pronounce upon and pass down the law to future generations

Types of Recognition

Law or fact?

Crawford for ALRC report 1986

incorporation – eg sentencing

as exclusion (of common law) - rare

as translation or giving equivalent effect eg ACL marriage, native title

as adjustment or accommodation - eg use of procedural powers to protect secrecy

Authority

- Common law authority – how do we recognise it?
- ACL – how do we recognise it?
  - Anthropologists
  - The correct person in the community who has authority to speak on that particular thing
  - The need for permission and use of secrecy to protect knowledge

Examples from Bell:

‘My daughter just turned 41 years old and I haven’t told her any of our tradition or lifestyle. She wasn’t ready for the knowledge I had from my grandmother’

‘Like good scholars everywhere Ngarrindjeri cite their authorities and sources when they tell stories…’

Ambellin Kwaymullina ‘The question a legal system founded in narrative sovereignty asks…is:…what are your stories…can you enumerate your relationships and in so doing explain both your rights and responsibilities?’

Developing recognition in civil and succession Australian law

- Recognition that ACL continues to govern people's lives in both traditional and non-traditional communities is still important to keep in mind.
- Generally functional recognition, incorporating ACL
- First - Recognition of Aboriginal customary law marriage

Recognition of Aboriginal Kinship as law

- Kinship dictates obligations
- Western – bloodlines, linear timeline
- ACL common patterns – easy adoption, circular time, classificatory kinship – eg same sex siblings' children = children – obligations extend further
- Translation issues eg 'child' and 'mother'
- *Eatts v Gundy* [2014] QCA 309 – not recognised for succession purposes

Recognition in intestacy

- Past prohibitions on making wills
- 1934 and 1939 Qld – recognised need but did not use ACL to distribute – all power to Protector
- Community Services (Aborigines*) Act 1984 (Qld) –similar'
- 1936 WA – all Indigenous intestate estates (if no legal marriage) given to Chief Protector to distribute (legal marriage recog 1972)
- 1972 Act WA - a regulation to be made to provide for ACL – regulation dubious cos minimal recognition of customary law
- NT – could apply to court for plan of distribution acc to ACL – if not married under Marriage Act.

NSW Intestacy:
Pt 4.4 Succession Act 2006

S101 - Indigenous deceased intestate

s133 - application including scheme of ACL ('laws,customs, traditions and practices' applying to particular community of the deceased

S134 – court may make order - if 'just and equitable'

Tasmanian scheme very similar

In Estate of Wilson [2017] NSWSC 1

Turned on recognition of kinship

Lindsay J:

Read ‘laws, practices, traditions, and practices’ as ‘practically equivalent ‘ to ACL, but should be read in the context of the distribution of the intestate estate.

- not to be read as a complete system of law
- ‘just and equitable’
- Concerns about creating an expensive jurisdiction

What is being recognised?

- ACL as law or fact?
- Irene Watson ‘ native title does not free me to be who I am, a being of my own people’s own Raw Law’
- Marcelle Burns – ‘Native title…does not recognise authority over people or the system of law which gives meaning to those rights’
- Treating the legal system ACL as authoritative in itself?
- Incorporating into common law?

Recognition of ACL as standalone- the perfect being the enemy of the good?

- *Wilson* – 'just and equitable' – incorporation into the common law
- ALRC's view is being met – partial, specific
- What is the alternative?
  - Personal status law systems?
  - Territorial reserves like US?

Terri Janke ‘s *True Tracks*

- 10 principles –including respect, self-determination,
- indigenous people to be primary interpreters of their cultural heritage, properly attributed
- Respect for secrecy of sacred and ritual knowledge

Not suggesting incorporation of these principles into law, but attention may well lessen mistakes and allow reasonable incorporation of ACL into Australian law.

Your views?