ABORIGINAL SOCIETIES AND
THE COMMON LAW
Aboriginal Societies and the Common Law

A History of Sovereignty, Status, and Self-Determination

By

P.G. McHugh, PH.D. (Cantab)

Senior Lecturer in the University of Cambridge, Tutor at Sidney Sussex College and Ashley McHugh Ngai Tahu Visiting Professor of Law at Victoria University of Wellington

OXFORD UNIVERSITY PRESS
for Ashley and Andrew
Preface

This book attempts to explain the ways over time that the law of the incoming colonialist polity has shaped its relations with the aboriginal peoples and polities of North America and Australasia who were inhabiting those lands at the time of colonization. These jurisdictions share a common history wherein the permanent settlement by an anglophone community displaced the indigenous tribes. The newly-arrived, upstart white polity was as an arriviste. In a short while it arrogantly claimed authority not only over its own community but the tribes as well. Eventually it proclaimed itself a nation with a distinct international status precluding any that the tribes might claim or exercise. The effectiveness of that claim was, of course, an outcome of the physical supremacy it had achieved over the tribal societies. It was a claim that the arriviste polity made not only through the physical reality of its actual ascendance but mentally, through its transplanted constitutional system and the laws generated by it. These were based upon the English common law. The tribes were engulfed by this system and once marginalized, perforce had to resort to it in order to validate their claims and eke as much as they could from their condition as colonialized people. Against their will, all the tribal nations of North America and Australasia became enclosed within the constitutional compass of the arriviste polity and its common law and had no choice but to fend inside it. And so began the dynamic encounter between common law legalism and aboriginal polities clinging doggedly to their customary forms of association and identity.

As a result of those shared features the common law jurisdictions of North America and Australasia have experienced an historical parallelism that runs from colonial foundation through to the end of the twentieth century and into the present. This is a history of those commonalities. In a very broad and open sense it is a history of the idea of Anglo law itself. The way in which law has engaged aboriginal culture reveals starkly the changing anglophone vision of itself as a polity in time and geographical space. The projection via law of anglophone values onto the aboriginal speaks out on most pages of this book. It becomes particularly the case as each jurisdiction acquires a stronger (and, in some cases, emergent) national identity in the late nineteenth century.

It is a history that starts with the broad imperial canvas of the First British Empire before the American Revolution, starting with the late Tudor plantation of Ireland and adventure into the New World. As each settler polity obtains a clearer and distinct identity of itself in the nineteenth century, indeed as some come into existence and rapidly form the proto-nationalist consciousness common (and sometimes rampant) to all, the stream becomes more braided. Nonetheless strong parallels remain as we begin to map and follow these separate national histories from the nineteenth century, the latter half especially. Overarching themes were still as evident and resonant in the final quarter of the twentieth century when tribal peoples re-grouped and made the political resurgence that became so noticeable and frequently controversial. In that recent period law remained at the heart of the encounter between two forces each of which proclaimed their own inherent legitimacy. There was on one hand the constitutional ambit of the
common law—the concern of this book—and, on the other, the custom-based reach of the renascent tribal. Legalism became an even more dominant mode of encounter in the political turbulence of the last thirty years of the twentieth century as aboriginal claims regained controversial prominence on the national agenda. This legalism grew in intensity and ferocity, particularly in the 1990s, as the (mostly though not entirely) resolved questions surrounding the legal recognition of aboriginal rights spawned downstream issues of rights-management and -integration.

I have tried to describe the intense legal development of the last three decades in an historical manner rather than give a synthesized account of the state of doctrinal art at the millennium. The monitor of the modern-day law of aboriginal rights is constantly blipping with new cases, legislation, settlements, and other forms of legal activity. I felt it was better to give an account of the historical parallelism and pathways so as to clarify the tendencies and momentum behind the apparent turbulence of contemporary legalism. In all jurisdictions the law surrounding aboriginal rights and claims carries an historical momentum that is vital to a full understanding of its eddying and mounting complexity. Frequently it seems to me that Anglo lawyers fail to bring to this area a sense of the historicity of their own manner of thought and the historical contours of the intercultural legalism in which they are participating. History demonstrates the centrality but it also shows the limitations of Anglo law in that encounter. It warns against investing that legalism with too transcendent and redemptive a quality. That was a tendency into which I surely lapsed as a keen young scholar with perhaps too starry-eyed a view of what the common law could do for aboriginal peoples. Legal scholars who taught and gave me time in the early 1980s, such as Alex Frame, Brian Slattery, Howard McConnell, and DV Williams, gently guided me towards a more realistic and historicized sense of the role (and negotiability) of law.

This book concentrates on the themes of sovereignty, status and self-determination. The primary concern is with the response by the arriviste common law legal system to the continuing reality of aboriginal political forms and organization. How did Anglo rules for the exercise of legal authority—what western lawyers call a constitution—accommodate the aboriginal polities within the space it called a jurisdiction? How did that aboriginal presence affect the exercise of constitutional authority within this jurisdiction? To what extent did those laws recognize the aboriginal polity and individual as such? This is the question of status. How have laws recognized and facilitated—if at all—the ongoing integrity of the tribal polity? This is the question of self-determination. How has the response to those questions changed over time? How have aboriginal polities been allowed to exist in the host legal system and what has been their bill of (legal) health?

This book does not deal specifically with the history of land and treaty rights although those are touched upon throughout. This book began as the first volume of two, and it may be that eventually I write the follow-up that looks directly at those important aspects of the history of common law engagement with tribal peoples. Just how the common law through time has viewed the integrity of the tribal polity itself is enough of a question, and indispensable to addressing those questions of the particular rights tribes might hold.

I have written this as a history to the end of the twentieth century but there is much material in the later chapters from the first years of the new, present one. There were significant legal developments in recent years and references to these have been
included in the text. Some—such as the Cobell litigation in the United States, the foreshore and seabed controversy in New Zealand, the Powley case regarding Métis rights in Canada, and proposed abolition of ATSIC in Australia—were still playing at the time the manuscript was finished. Doubtless a new edition of this history may be necessary in five or so years as the hectic legalism of the past fifteen morphs into another shape where new themes replace today’s modish ones of ‘governance’, ‘capacity building’, and ‘reconciliation’. Those themes already have a history of their own—albeit a short and very modern one—and it may be that later generations view them as scornfully as we now regard the policy of ‘assimilation’, which was, after all, Anglo officialdom’s prevalent policy stance in all jurisdictions until the early 1970s. This is the realism about the limitations of legal thought and doctrine and the acknowledgment of the historicity of both about which I spoke moments ago. In this area the truism that the goals and values that laws reflect in their own time change is particularly pointed.

In writing this book I have been supported by my colleagues at the University of Cambridge (particularly Professor Malcolm Grant, Mr Martin Dixon, Mr JC Collier, Dr Charles Harpum, and Professor ATH Smith) and in Sidney Sussex College (the late John Thornely and the late Dr Geoffrey Marston especially). The staff at the Squire Law Library, especially David Wills and Peter Zawada, have given valuable help with materials. The Yorke Fund has generously made a grant towards the cost of research and publication of this book. Colleagues in other universities have also assisted and encouraged. In New Zealand I must thank Professors Peter Watts (and Stephanie and Susanna), Michael Taggart and Andrew Sharp (and Bridget) at Auckland, Professor Matthew Palmer (and Ruth) and Campbell Mclachlan (and Rhena) at Victoria, and Professor Mark Francis (at Canterbury). I have enjoyed invaluable and ongoing discussion with Professors JGA Pocock (Johns Hopkins), whose influence and support have been enormous, and Ben Kingsbury (New York), as also Professors Jonathan Lamb and Bridget Orr (Vanderbilt).

The Right Honourable Sir Douglas and Lady Beverly Graham were particularly supportive when the book was gestating during their Cambridge visit immediately after his retirement from New Zealand politics (1999). I am also grateful for the help I received as a young scholar from Ken Hingston and the Ngati Pikiao people (including more recently Annette Sykes), Lord Cooke, Justice Ed Taihakurei Durie, and Sir Hugh and Lady Freda Kawharu, and Sir Tipene O’Regan.

Practical help in the form of hospitality during research expeditions came from Bill Hastings and Jeremy Baker, Professor Jamie Hart and professor Leland Burns (and Shinji), Derek Drummie and Rory Morrison-Smith, Josephine Barnao McHugh, Guy Lawson and Maya Kaimal, Peter Adam and Facundo Bo, Nina and Paul Barnao, Patrick and Nicky McHugh (and family), John and Jenny McHugh (and family), Jody and Andy Scott (and family), Max Cryer (whose etymological skills and wit are unsurpassed), Jane Wrightson, and Bruce Young. It is not usual to thank someone who positively conspired against completion of this book as did Laurence Malice. For a good portion of the 1990s his distraction was so powerful that as my attention danced elsewhere there settled imperceptibly a more rounded sense of the new legal directions then being taken and described in this book.

This book has been supported by a group of remarkable women whose cumulative wisdom, deep sense of social justice, and good-humoured tolerance have replenished the
gap left by my late mother, Pauline. Anna Yeatman has provided gentle comment from a social sciences perspective, and more besides. Few Pakeha of the generation of the Honourable Margaret Wilson have been as committed and tireless in their effort to bring justice and honour to relations with Maori. More than anyone, she realizes the difficulty of this process and the imperfection of the outcomes. Amanda Mackenzie Stuart and I have kept abreast with one another in a friendly race to the publication post, although her forthcoming book on Consuelo Vanderbilt, Duchess of Marlborough, will be vastly more glamorous. Trish Sarr, whose determination resulted in the publication of _Kokiri Ngatahi—Living Relationships_, and my half-sister Kathy Meade have looked at this book in draft with a warm but critical eye. If their advice has not been heeded and the text remains too dense it is not for their lack of counsel and plain talking. Janice Fairholm has kept me proximate to the straight and narrow. Germaine has always challenged the dominance of the legal perspective. Her robust and refreshing reminders of the limitations of (male) legalism have been pointed, often funny and always deeply humane: ‘White Fella Jump Up—The Shortest Way to Nationhood’ (2003) _11 Quarterly Essay_ 1–78 is one of her most provocative and compassionate pieces. My godmother and aunt, Mary Wood, a big-hearted woman of indomitable energy and bold leadership, founded Innushare. During the late 1980s and early 90s this Ontario women’s organization supported the aboriginal women in Davis Bay as they struggled to rebuild a devastated community where male alcoholism and teenage suicide were rife. I cannot thank my sisters Stephanie McHugh Steiner and Josephine Willis and their families fully enough, as well as my aunt Patricia.

My late father, Ashley (Chick), practised Maori land law in Gisborne, New Zealand for many years before appointment to the Maori Land Court bench. He did this at a time when such issues were poorly heeded by the New Zealand legal profession. In Poverty Bay he forged a close relationship with Ngati Porou and Rongowhaakata. On the bench, he presided over the Waitangi Tribunal’s hearing of the Ngai Tahu claim (1990–93), the first under its extended ‘historical claim’ jurisdiction. The _tangata whenua_ of the North Island’s east coast honoured him before burial (September 1999) and my family by an evening of _karakia_ (prayers) and remembrance at the famous Poho-o-rawiri marae (meeting place). At his burial, Ngai Tahu acknowledged his _mana_ as _Mahakuri_ (great rock) by placing some precious _pounamu_ (greenstone) beside him at rest with my mother. These were rare honours for a Pakeha (non-Maori) who had been raised in childhood poverty in the Ngaio Valley and who as a teenager had seen at first hand the destructive aftermath of war in Japan. My father spent his working life with the strong selfless sense of public service that so marked his generation and those he worked with and admired, like Professor Gordon Orr (who sat with him and co-drafted the Ngai Tahu Report). He died peacefully in his sleep in Rarotonga whilst presiding over the Cook Islands’ Court of Appeal. In his honour Ngai Tahu have endowed a Visiting Chair at his alma mater, Victoria University. This book is dedicated to his memory and to the principles he embodied. It is also dedicated to my partner Andrew who has suffered the process and washed the dishes with his irrepressible and sunny patience, humour, and love.

P.G. McHugh

_Sidney Sussex College_
_18 February 2004_
Contents

1. Introduction ................................................................. 1

SOVEREIGNTY

2. The Juridical Status of Non-Christian Polities (to the End of the Eighteenth Century) .................. 61
3. Aboriginal Sovereignty and Status in the ‘Empire(s) of Uniformity’ ........................................ 117

INTERMEZZO

5. Aboriginal Societies and International Law: A History of Sovereignty, Status, and Land ............. 289

SELF-DETERMINATION

7. The ‘Era of Recognition’ During the 1970s and ‘80s—Foundations for a Modern Jurisprudence ........ 366
8. Moving Beyond Recognition: Aboriginal Governance in the Turbulent 1990s ......................... 427
9. Living Together Less Contentiously—The Jurisprudence of Reconciliation in the 1990s ............... 539

Bibliography ................................................................. 612
Index .............................................................................. 647
1

Introduction

This book is an historical account of the encounter between the aboriginal peoples of North America and Australasia and the common law that British colonialism transplanted into their lands. Gradually, as the tribal societies variously engaged with and, eventually, were overwhelmed by the colonialist polity, the common law system provided the sole means through which the tribes’ political integrity and other aspects of their tribal culture—such as those concerning land—might be peacefully vindicated. This dependence was not there at the outset of each tribal nation’s experience of Anglo-settler colonialism, but it was an established fact of tribal life at the end of the twentieth century. All tribal nations travelled from a state of actual independence of the settler polity and its law-ways to reliance upon its validation of their being so that they might participate in the national (and global) economy. This is a history of the role of the common law in the journey of those many tribal nations from apart-ness under their own institutions to the inescapable, and for most, the cold reality of life inside the compass of common law constitutionalism.

It is an inquiry into how these introduced legal systems with their common heritage through time have perceived these indigenous tribal communities and persons as a result of their being there *ab origine* (there at the beginning). Law was somehow present in the full range of imperial and colonial settings over time and place. It engaged with a variety of interacting factors—social, economic, political, and cultural—and, as it did, it both influenced events and was influenced by them. The dynamics of its development over time and application to non-Christian societies were enmeshed with those wider factors.

That history of encounter is usually regarded as commencing with settlement of the New World in the early seventeenth century; however there has been a recent tendency to start with the late Tudor pacification and plantation of Ireland. Increasingly the Irish are being seen as the first indigenous society to experience English (later British) plantation and permanent settlement. The history begins at a time when aboriginal peoples remained politically ascendant over their own territory and when the common law had yet to embark full-scale on its epic voyaging and transplantation by the anglophone settler polities that over time became proud and powerful independent nation states. The history ends at the beginning of the twenty-first century as each jurisdiction accommodated claims and renewed enterprise by its aboriginal peoples who were still recovering from and adjusting to life inside the colonial condition. This resurgent aboriginalism, with its militancy, stand-offs, land claims and dramatic, often-incendiary rhetoric (and white contra-rhetoric), captured considerable public attention and controversy.
Aboriginal relations regained a vastly more prominent and influential position in national politics. Law and history (the latter carrying the strong sense of the former) were and remain at the centre of that profile. This, then, is a history spanning more than four centuries of common law legalism and cultural encounter.

The history starts as a general one, looking at how legalism shaped the Crown’s engagement with non-Christian societies from first tentative encounters in the Tudor period to the more sustained activity of the ‘second’ British and republican American Empires in the nineteenth century and after. Throughout that general history of encounter there appeared recurrent themes and questions as Anglo-American colonialism dealt with the fact of aboriginal presence and political organization. These themes played out variously according to the time, non-Christian society and imperial interests involved. Some native societies, those of North America and Australasia in particular, suffered permanent displacement by the newly arrived (arriviste) anglophone community, whereas others in West Africa, Asia, and the Pacific had a less permanent though far from inconsiderable experience. In those latter regions where climate and tropical disease discouraged large-scale settler colonization, the effects of British imperialism continued to resonate long after the white rulers had finally sailed away.

Aspects of all these encounters are relevant here; however it is the former group of territories—that those that became the settler-states of North America and Australasia—that are of particular concern. These jurisdictions have shared strong and linked threads of experience and legalism from the arrival of Crown sovereignty and through these countries’ colonial and early national periods up to the modern day. Permanent white settlement, much of it based on pastoral agriculture, and the ensuing dominance of common law legalism have given these countries a strong historical correspondence. The history of these particular jurisdictions and the strong parallels that allow, indeed encourage, a multi-jurisdictional history emerge from the general history of Crown relations with non-Christian societies at large. This history of parallels and common themes pulls into focus as each settler-polity acquires increasing constitutional self-consciousness and capacity, the Americans overwhelmingly by revolutionary rupture in the late eighteenth century; those of Canada, Australía, and New Zealand more peacefully and gradually a century later. The commonality of the white settlement jurisdictions in North America, Australasia and (to a more problematic extent) southern Africa was obvious by the beginning of the twentieth century. Other zones of British imperialism experienced more erratic patterns in which the formation locally of a distinct constitutional identity apart from the metropole was more vexed than in the white settlement colonies. These issues of colonial autochthony grew in prominence after the loss of the American colonies in the mid-eighteenth century. Usually the thorniness of those issues in regions such as Ireland and the East Indies reflected the British inability to trust the native inhabitants in the exercise of a local governmental authority. This distrust and reluctance did not extend so markedly to the white settlement colonies wherein the achievement of local representative institutions had something of an air of inevitability. In its relations with these colonies, most of which took root after the loss of the American, the lesson of revolutionary breach ran deep in British practice throughout the nineteenth century.
Out-population of the native inhabitants in North America and Australasia by anglophone settlers put these regions into a shared historical trajectory in which law played a core role.

In this history, or rather through these many histories of encounter and exposure to British colonialism, legalism runs arterially and with a strong continuity across the several jurisdictions. Of course those themes changed and played out differently over time with the character of British (and American) imperialism itself. An account of that legalism starts as a history of British imperialism’s encounter with non-Christian societies at large to become more latterly a comparative history of particular jurisdictions sharing—and frequently divided by—a common legalism. What follows is an historical topography of common law legalism across time and in the geographical spaces it could reduce and encompass by the simple term ‘jurisdiction’.

For over four centuries officials serving the imperial interest managed the acquisition and erection of sovereign authority (imperium) in non-Christian territory and over the native societies. How, by the metropolitan sovereign’s own law and manner of proceeding, was an imperium over such communities and in such lands obtained and erected? This question recurred throughout more than four centuries of English, then British imperial activity and, in different ways, arose in all theatres, the Asian and sub-continental, American, African, Australasian, and Pacific. This inquiry into the manner by which the Crown (the title given to the metropolitan, imperial sovereign) claimed sovereign authority for itself in non-Christian lands prefaces particular downstream explanations of how that imperium, once established, was subsequently exercised and its consequence for the indigenous population and polities of the settlement territories. That prefatory inquiry occupies the first two chapters of this book. It requires a broad geo-historical survey of British imperialism comprehending the Crown’s dealings with non-Christian societies at large and over time. Following chapters look more specifically at the exercise of that imperium in North America and Australasia. In other words, the first two chapters consider the history of the means by which the Crown claimed and achieved through its own laws an imperium over non-Christian people and territory. At that juncture the legal fate of those other non-Christian parts is left for a more detailed examination of how Crown sovereignty and law as transplanted in the white settlement colonies of North America and Australasia constructed its own sense of aboriginal presence.

Once the Crown imperium was in place, questions surrounded the manner and character of its exercise. The formal assertion by the Crown and its functionaries of sovereign authority—the raising of a flag—was mere ceremonialism that could never of itself truncate the ordinary lives and identity-practices of tribal societies. To what extent, then, did the arriviste sovereign’s laws recognize, if at all, the continued integrity of the aboriginal polities and their law-ways? Since that continued integrity was undoubtedly a fact of colonial and national life, and one that continued to be so in the twenty-first century, was it accommodated legally? How—if at all—through time were the aboriginal communities and their members recognized within the new and alien constitutional system as holding a distinct legal position matching the actual continuance of their tribal lifestyle? What, in other words, has been the legal status of the aboriginal group and its members under Crown imperium? If status describes a
condition of aboriginal being acknowledged by law, has it correlated with the actual identity-practices of aboriginal life under Anglo colonialism?

These questions of sovereignty and status have underpinned legal relations between aboriginal societies and the common law from the start. They occurred at the outset of what initially for white settlers was a perilous and precariously colonial enterprise. The questions recurred as the settler polity consolidated its political authority and mastery over aboriginal societies. Military force had a lot to do with it, and was often shown up by the ingenuity, tenacity and sheer desperation of aboriginal resistance. But legalism was also at the heart of the intellectual armoury of white domination, particularly in the suppressive ‘twilight century’ after the massive disposessions of the late nineteenth century. At this time—once the aboriginal peoples had been truly subdued physically—white lawfare1 assumed a new, more meddlesome role inside tribal life. Law shored up the sovereignty of the settler-state and now defined (in an abridging manner) the status of the aboriginal polity and individual. At the end of the next century, sovereignty and status continued to surround issues of constitutional and legal authority in the North American and Australasian common law jurisdictions. The legitimacy of the settler-state’s assertion and exercise of constitutional authority over indigenous peoples was still being questioned and tested, indeed now more vocally and strenuously than before. Aboriginal groups and individuals continued to press as their ancestors had done for legal recognition of their special position and rights as first inhabitants of the territory. But these demands were now articulated through the experience of the intervening century of cohabitation with common law legalism. Like it or not, they had no option but to participate inside the common law constitutionalism that had engulfed them.

Sovereignty and status are, therefore, compendious terms signifying enduring issues for the common law systems of the settler-states. For aboriginal peoples these matters have also represented a constant struggle. Essentially the terms spotlight the arriviste legal system’s accommodation (or otherwise) of the territory’s aboriginal societies as organized polities under a customary system. This is a history of these fundamental questions at the heart of the encounter between aboriginal societies and the common law system(s).

1. Law and colonialism—an historical topography

Law gave the anglophone a way of seeing aboriginal peoples both as organized groups and as individuals. It provided a key intellectual means by which the arriviste dealt with the fact of aboriginal presence. Sometimes that response involved a wilful blindness, as in the terra nullius fiction developed in Australia to explain its constitutional foundation. But that extreme refusal to see and speak of aboriginal presence has been unusual in the history of Anglo-American legalism. Somehow the common law has articulated its awareness of their presence. This is a history of those processes of articulation.

Of course the way in which the common law apprehended and gave legal expression to that presence was always a function of the demands made upon the language by

---

those inside and able to use it. Inevitably those demands changed through time, as did
the nature of the linguistic community itself, as the colonialist venture turned from
projection to permanence and took a nationalist turn late in the nineteenth century.
The legal articulation of aboriginal presence shifted both as the language itself changed
and as those using it acquired a more intimate connection to aboriginal society. Law
influenced events and was influenced by them.

Over the past fifteen years a considerable literature of law and colonialism has
grown. Comaroff has described the topos of the first phase as 'rather crude'. In this first
'fluorescence' law was depicted in cold light as the brute instrument of an arriviste
polity and as a tool for governing and pacifying colonized peoples. This 'soon produced
its own antithesis'. This next phase reacted against that brutalizing tendency. It empha-
sized the agency of the colonized and their capacity to resist and adapt in the teeth of
this overwhelming legalism. When 'they begin to find a voice, people who see them-
selves as disadvantaged often do so either by speaking back in the language of the law
or by disrupting its means and ends.' These two phases are characterized by Comaroff
as poles with the more recent historiography encompassing both. Law has become
regarded 'convergently and ever more consensually, both as an instrument of domination
and as a site of resistance.'

Certainly those two poles describe a dialectic that operated once law was being
consciously applied to regulate aboriginal peoples' affairs in an instrumentalist man-
ner. The peak period for that mentality was the late nineteenth century when what
I will be terming the 'Empire(s) of Uniformity' imposed aggressive policies of assimila-
tion on tribal peoples. Yet the goal embodied in those laws was remarkable as much for
its ultimate failure of achievement as arrogance of design. Aboriginal peoples did not
regard themselves as 'subjects' of a distant monarch simply because a flag had been
raised on their shores or because a proclamation had been nailed to a tree. The rude
health of many aboriginal polities at the end of the twentieth century, and the recovery
of others, was a sign that those laws, for all their disruption and impact (much but not
all of which was negative), did not accomplish the assimilation they ostensibly sought.
It was one thing to implant a policy into law; another to make it happen. Aboriginal
peoples did not assimilate simply because laws were enacted on the basis they should
shed their 'backward' tribalism. That failure was a result of their resistance, adaptation,
and dogged persistence as well as the fact that once the settler state had got what it mostly
wanted—their land—the policy in those laws was pursued lackadaisically and unevenly.

The result was that even where the settler state practised lawfare against the tribes,
the actual experience of those laws showed the shortfall between official expectation
and outcome: Canadian First Nations did not enfranchise into voting citizens; Maori
fractionated the tenancy-in-common imposed on group land ownership into minus-
cule uneconomic shares; few Australian Aborigines actually 'came under the Act' giv-
ing officials intrusive authority over their daily lives but drifted in and out of its reach.
Instrumental laws had to operate in a human setting and that was messier and less
tractable than the gesture of lawmaking itself suggested. This legalism either failed or
limped, and that fate itself spawned a new legalism and then another and then another.

Ibid.
The settler-state’s will to dominate and the aboriginal’s mood to resist indeed described a dialectic powering legal growth, as Comaroff observed.

However there was much more to the common law legalism shaping the nature of anglophone colonialism than generation of that simple dialectic, key as it was. Comaroff suggests that cultures of legality were in many respects constitutive of colonialism. That legality had numerous dimensions many of which interplayed. Law shaped colonialism in a multi-faceted way.

First, ‘it was by appeal to a specifically legal sensibility that the geography of colonies was mapped, transforming the landscape of others—typically seen by Europeans as wilderness before it was invested with their gaze—into territory and real estate; a process that made spaces into places to be possessed, ruled, improved, protected.’3 The notion of a ‘colony’ itself represented a complete juridical entity. This apprehension of space and its reduction to a manageable format through law can be seen in the legality surrounding British acquisition of an imperium in territory occupied by tribal peoples. The Crown was always determined to demonstrate and facilitate the lawfulness of colonization. Although the expression of that legality changed over the course of nearly three centuries from settlement of the eastern seaboard of the New World early in the seventeenth century to colonization of the western in British Columbia in the middle of the nineteenth, that imperative remained remarkably consistent. Through law the colony became a being in itself and inside an imperial system, just as later in the story federalism turned states and provinces into distinct beings.

Secondly, it was by means of legal instruments ‘that economic rights, entitlements, and proprieties were established, that labor relations and contracts were promulgated and policed, that material interests were negotiated.’4 This has certainly been a major function of anglophone legalism in shaping relations with tribal peoples: tribal land was allotted in North America, negotiable scrip vested in mixed-blood individuals in Canada, shares created in aboriginal corporations in Alaska, Australia, and New Zealand. By such means law calculatedly commodified aspects of aboriginal life. The process by which law commodified and textualized5 aboriginal life became a continuous one. It reconfigured in the twenty-first century as land claims settlements in all jurisdictions transformed a relationship with ancestral land based on unwritten custom and tribal spirituality into a new textuality. Indeed some detected a rapid increase in the commodification of aboriginal life in the last decades of the twentieth century as there spread a new legalism based upon emergent juridical notions of ‘aboriginal rights’. In the eyes of some, this intense legal activity was the late twentieth-century equivalent of muskets and bibles.

Law also operated to define aboriginal being. It was ‘under legal provisions that the “nature” of colonial subjects was constructed, ethnicized, and racialized, their relations to other human beings, to the earth, and to their own cultural practices delineated.’6 All jurisdictions developed laws of status defining who or what qualified as an aboriginal group or individual in a legal sense. These laws culled those whom the state deemed

unqualified or problematic, such as (notoriously) the person of mixed blood. These laws also set out codes for the governance of aboriginal society, a phenomenon that continued in the new century as tribal nations—often at the insistence of the state before assets in claims settlement could vest—consciously rebuilt themselves through constitutional experiment and innovation. There, again, the perimeters of a customary system with its own negotiability and permeability were textualized and new border controls put in place. These laws inevitably had an impact upon the way in which aboriginal peoples regarded themselves, others, and the tribal polity itself.

Law also ritualized the power of the state, ‘to invest [it] with an aura of power and to draw their citizenry into a community of consenting clientage.’7 Legal ritualism spanned the ceremonials of treaty-making in earlier centuries through to the fervent litigiousness of aboriginal culture in the last decade of the twentieth. Through those processes the constitutional authority of the settler state legitimated and reinscribed itself upon aboriginal peoples. Law provided both the venue and modality of tribal peoples’ engagement with the arriviste, reminding them, ultimately, of whose terms were governing the encounter.

In the encounter with aboriginal societies, then, anglophone legalism served colonialist ends in a variety of ways. To the extent that these legalities achieved such ends it was by a continual and messy process of invention, reinvention, and improvisation often as aboriginal peoples themselves did likewise. The bi-polarity of domination and resistance created a stormy and changeable weather pattern in the history of Anglo-American legalism. ‘[F]ar from being a crushingly overdetermined, monolithic historical force, colonialism was often an undetermined, chaotic business, less a matter of the sure hand of oppression—though colonialists have often been highly oppressive, nakedly violent, unceasingly exploitative—than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home.’8 At any given time in any particular setting the anglophone legalism that articulated aboriginal presence may have been polythetic (made of many things), but it was also a process in which those various elements were constantly reconfiguring often, if not usually, as a result of aboriginal agency.

2. Aboriginal histories and the common law

Throughout their experience of colonialism aboriginal peoples were generating their own histories of themselves as a political group. All societies originate a memory of themselves in time and place. Beleaguered by Anglo colonialism, the histories aboriginal peoples told themselves formed into tales of loss and of attempts to stem the haemorrhaging of their authority within and over their own territory. Although these aboriginal histories were located inside the embattled experience of colonialism, they were not, however, the histories of passive victimhood. That depiction of aboriginal history is not consistent with the bi-polar spectrum described by Comaroff. All aboriginal communities told powerful and moving histories of their retention of autonomy and decision-making even in the teeth of the most oppressive policies and

---

7 Ibid. 8 Ibid 311.
practices of the settler-state. At all stages, aboriginal peoples were making choices and developing strategies to mitigate, escape or adapt to the new, increasingly grim reality of white encroachment on their land and traditional authority.⁹ Aboriginal histories of the post-contact period have therefore been more than tales of loss and depletion, though there is a large and sad amount of that. They have also been proud tales of adjustment, innovation, and defiance.

The legal history that this book gives—the historical topography of anglophone legalism—could not have happened without that consistent pattern of resistance. This book does not give an account of those histories of resistance. These are histories from inside aboriginal culture that I do not attempt to relate. Rather the perspective of this book is that of the common law mind and language system itself and its apprehension of aboriginal being. The existence and effectiveness of those aboriginal histories is an essential element in the history of common law legalism, because they demonstrated that legalism was a site of intercultural struggle and contestation. They provided the friction that generated legal movement and change.

At the end of the twentieth century the legacy of displacement continued to haunt the indigenous peoples in the common law jurisdictions of the United States, Canada, Australia, and New Zealand. By that time they were re-asserting their aboriginal identity and seeking a restoration to their former position of political power and presence. In these more recent times the controversy frequently flared up, igniting into confrontation and violence at places like Wounded Knee, Oka, Wave Hill, and Bastion Point. Sometimes it took powerful symbolic form, in marches across the country to capital cities where tent embassies were pitched as, yet again, white politicians laid promises across their weary but angry trek. Increasingly during the last quarter of the twentieth century, this legacy also presented itself before courts. In these public settings aboriginal peoples re-asserted the unique autonomy and identity that their own histories had always proclaimed. Seizing the public ear they also presented the negative aspect of those histories, decrying their unjust and continual mistreatment by the settler-state, its legal system not least. These histories and their continuing all-too-apparent legacy of marginalization and impoverishment brought shame on the settler-states. The injustices they presented demanded correction. The aboriginal histories became the foundation for claims against the settler-state.

These claims became the more stark as the end of the twentieth century loomed and each jurisdiction variously celebrated events—most usually disengagements from the imperial apron string—regarded as foundational to their anglophone identity as a political community. Centenaries, bicentenaries, and sesquicentenaries commemorated events of constitutional origin central to the settler-state’s vision of itself as a distinct community existing in time and organized by (the common) law. Behind that national self-congratulation and flag-waving there circulated a greater historical sensitivity within the settler-state as to the cost of the nationhood being commemorated. These national reawakenings to the past treatment of aboriginal peoples were well in train by the time of those celebrations, which, nonetheless, spotlighted the

unfinished—and, perhaps, unfinishable—legacy of colonialism. All nations saw that their self-congratulation had to be tempered with an honest awareness of past failings of the native population. National protest became as much a feature of these celebrations as self-praise. All settler-states, rightly proud of their constitutional heritage founded on the common law, faced these claims and protest. Courts issued landmark judgments as other political institutions of the settler-state established procedures to resolve aboriginal claims. This institutional accommodation of aboriginal claims put the past into politicized and politicizing places. By directly addressing the colonial and early national past and the aboriginal claims arising from those times, each jurisdiction sought, however imperfectly, to draw a line under its previous injustices, thoughtlessness, and negativity. They struggled to re-calibrate those relations, to put aboriginal peoples inside a new history from which their dismissal or exclusion would not recur. As the various settler-states celebrated their own endurance as a political community, the situation of their aboriginal people reminded them of its cost—and its frailty.

These commemorative events and pricked consciences were continuations of a process of national self-examination beginning to grip all jurisdictions during the late 1960s. The Anglo-American world was in the heady throes of the civil rights movement and the war in Vietnam, as well as heading into the Oil Crisis and, for the ‘Old’ Commonwealth countries, entry of Britain into the European Community. Alongside the post-war dissolution of British colonialism in Africa, the Caribbean, India, and the Pacific, the United Kingdom’s accession to the Treaty of Rome in 1972 interred forever the lingering, increasingly nostalgic Anglo-Commonwealth idea of the British Empire as a community under a single Crown. These uncertainties sparked a fresh round of questioning of the nature of political authority and the role as well as situation of the state, a consciousness that inevitably took a constitutional dimension. That momentum continued through the final quarter of the century, becoming what one writer called the era of the awakening from ‘the long sleep of public law.’

Reassessment of the position of aboriginal peoples wove into that broader reappraisal of the foundations of public law within each jurisdiction.

Since the colonial and early national periods, municipal courts had treated governmental relations with aboriginal peoples as a ‘political’ and non-justiciable matter in the hands of the executive. By the late 1970s that fortification of executive conduct from judicial enquiry was beginning to crumble (as in other spheres of national public law). The American Supreme Court breathed new life into the doctrine of residual tribal sovereignty (1978). In Canada it resulted in the constitutional entrenchment of ‘existing aboriginal rights’ (1982), a bold step no other jurisdiction could match. In all jurisdictions, landmark court judgments were handed down recognizing the inherent ‘aboriginal rights’ of the indigenous peoples, including rights to their traditional land still in occupation and use (common law aboriginal title). The mood of the Anglo settler-community and its institutions of governance—executive, court, and legislature—had become more sympathetic and, buoyed by the courts, aboriginal claims thumped onto the national agenda.

---

12 Constitution Act 1982, section 35.
This litigation proliferated from the early 1970s, its tempo growing with the approach of the millennium. Like the claims processes to which it became harnessed, it put the myriad aboriginal histories of loss and deprivation under a juristic microscope. Not only courts but specialist tribunals, such as the Waitangi Tribunal in New Zealand, Australia’s Native Title Tribunal and the British Columbia Treaty Commission, were established to consider aboriginal claims. Historic injustice and presence over traditional territory became the foundations—controversial to be sure—13—for entitlement to state reparation or corrective action. The histories aboriginal groups had carried and told of themselves now had a new and vital legal role to play.

As the twentieth century wound to a close, aboriginal claims-making generated a fin de siècle jurisprudence of engagement, involving government, court, the specialist tribunals, and the broader administrative apparatus of the state. It also drew in interested third parties including landowners who saw the claims as threatening their titles. It attracted potential developers of what was often the resource-rich land under claim. Although the detail varied from one jurisdiction to another, this claims jurisprudence gave considerable weight to the events of the past at issue and requisite to the maintenance of a claim in the present. Aboriginal histories, once the tale the group told itself, now took centre-stage for a much wider audience. Their stakes were raised as they became more than the tale told within the group to validate and shore its internal authority. They became the foundation of legal entitlement in the Anglo-settler legal system itself.

The jurisprudence of claims gave the misery of the aboriginal past a new, decidedly modern resonance—a legal one where certain factual configurations carried enormous potential impact. Aboriginal histories became funnelled through new non-indigenous criteria of credibility, channelled through tubes of relevance and irrelevance, distilled into bottles of crystallized evidence or dashed down outlets of unsustainability. It resulted in the formation of legal criteria of proof relating to continuity of aboriginal groups’ social organization and practices and their maintained territorial presence. That evidence would, in turn, be poured into legal moulds categorized, for example, as ‘proof of continuous presence’ or ‘extinguishment’. This new, highly formative law, with its ever-increasing probative requirements and doctrinal rules, could determine the success or otherwise of an aboriginal group’s claim to continued property rights or political authority over and within their own community. This historic evidence was thus frequently essential to their attempt to secure recognition de jure or de facto customary practices that were being exercised daily under their own inherent authority and without previous benediction of state law. In other words, they sought legal recognition of the day-to-day facts of their life wherein tribal property rights and authority continued to be recognized. The key notion of aboriginality became the axis of this process of legal recognition. It was directed towards the acceptance and resolution of claims that simultaneously sought correction of historic injustices and formal recognition of the continuing integrity (including traditional ownership rights) of tribal culture and communities. The legal systems frequently separated these demands,

addressing historical claims in a manner and through mechanisms separate from contemporary claims. For aboriginal peoples, however, the two were inseparable.

Through the various processes of legal recognition, the aboriginal and colonial pasts became not just descriptions of loss but foundations for entitlement, rehabilitation, and reparation in the modern world. Inevitably that brought politicization of the aboriginal and colonial pasts. These histories became sites of huge dispute, usually before court or tribunal using legal criteria of scrutiny. They were picked over in detail by lawyer and historian, the professional role of each frequently confused and virtually interchangeable, with both intent on demonstrating the presence or otherwise of the requisite past injustice, territorial presence, traditional law-ways or whatever probative requirement the law set. These histories became, as one writer aptly termed it, ‘juridical.’ They were contested not only by the state itself, anxious to have proof set at a legal standard, but also between and within aboriginal groups themselves.

In this claims-world of the late-twentieth century, and so much as it is possible to generalize, a new approach towards their own history emerged in aboriginal society. Ways of describing their communities’ pasts left an earlier style of narrative centred on heroic defiant individuals—the classic historiography of a highly oppressed people. Instead they took a more asset- and resource-based turn. Publicly at least there receded the Messianic forms that had emerged during the late nineteenth century when traditionalism and Christianity had syncretized and charismatic native prophets had promised redemption. The new asset-centred style in which aboriginal peoples presented their past to the outside world was tailored to a broader, non-member constituency—the secular, transactional needs of the claims market. More intimate and mystical histories intended to remain within the group doubtless continued, but the public face of aboriginal history-production had become more attuned to this new audience.

For aboriginal peoples in the last quarter of the twentieth century the institutionalization of their claims reasserted both the dominance of anglophone law and its potential, at least as marketed to them, as a means of deliverance. It told them an old story. It promised that law, once a blunt instrument of their oppression, could be used to their advantage to enhance rather than dissolve their group and individual identity. It could put them inside a new history of accommodation and re-provision. By issuing such promise, the claims process recycled rather than ameliorated the historical experience of aboriginal peoples. Secular redemption through law, the ringing message of the late nineteenth century, was (they were still being told) nigh. In that sense the redemptive possibilities of the common law remained as much peddled to them at the end of the twentieth as in the nineteenth century. As observed already, it required production of their own juridical histories of sustained presence in their traditional territory.

---


15 In New Zealand Judith Binney has been given powerful histories of this essentially intimate character, as for example her account of the ‘afterlife’ of Te Kooti in Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki (Auckland: Bridget Williams Books, 1995) 505 et seq (epilogue and appendices), and ‘Te Umutaoroa—The Earth Oven of Long Cooking’ in Histories, Power and Loss (n 14 above) 147.
These they had to brandish in the marketplace of the claims world. Yet since these claims and the histories supporting them rested on a group-specific basis, the claims processes also politicized aboriginal histories by setting one claimant group against another. The inherent inter- and intra-tribal contestation of aboriginal society naturally surfaced in the claims arena where the financial stakes were often high. Amongst claimant groups and inside particular ones, a claims disposition unfurled contention and dissension that would normally have otherwise been contained within the realm of aboriginal political life. In official settings like court and tribunal, it not only pitted aboriginal claimants against the state, but frequently against other claimant groups as well. It often put the claimant group at odds within itself. In commodifying and politicizing the aboriginal past, the claims process had the paradoxical effect of confirming the historical experience of colonialism as well as promising delivery from it.

The late twentieth-century enlargement of the institutional settings in which aboriginal histories were recounted not only transformed the way in which those stories were told. As intimated already, it exposed those histories to more sceptical, not necessarily sympathetic audit. A supposition of inherent authority carried by narrators within the group itself disappeared when the ear lacked the empathy of kin and culture. Indeed, the clinical procedures of the adversarial system demonstrated a ruthless capacity to deny the claimant histories practical consequence by privileging its own Eurocentric notions of historical veracity. The aboriginal histories might have been aired and their performability recognized, but their actual credibility was set against standards that were not their own. Judges allowed aboriginal claimants to take the court’s stage—it gave them full airtime and accommodated, indeed encouraged the tribal pageantry that accompanied these histories—but, at the end of the day, the adversarial instinct usually kicked in. The performance of tribal history was not the same as acceptance.

The *Delgamuukw* case in Canada, decided at the very end of the twentieth century, illustrated this tendency for aboriginal histories to suffer in trial. The Gitskan and Wet’suwet’en people of British Columbia claimed an area of 58,000 square kilometres under a common law aboriginal title. At trial (1991) Justice McEachern found that the claim based upon historic occupancy had failed and that all aboriginal rights had been extinguished. Faced with a veritable mountain of documentation and evidence, much of it given orally (and some ceremonially) by the indigenous peoples themselves, he admitted frustration at determining how to absorb it all and decide its admissibility.¹⁶ ‘There are,’ he said, ‘many relevant, interfluent histories.’¹⁷ As it was, the ‘history’ he constructed was one that tended to depict the claimants as victims of history caught distantly and bemusedly in a succession of European-dominated events. That sequence included gold rushes, Mormon immigration, smallpox epidemics, the arrival of the telegraph, and the circumstances of British Columbia’s admission to the Confederation. This not only put the First Nations on the periphery of someone else’s history, but denied their agency in the experience of it.¹⁸ That is, Justice McEachern did not

---


¹⁸ By contrast see Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890* (Vancouver: University of British Columbia, 1977) who stresses Indian adaptation and control, particularly in the pre-Confederation period.
characterize their history as one of active engagement with European activity, so much as their being swept up in the overwhelming tide of history, an inexorable and rising sea swamping the aboriginal as passive witnesses to their own irrelevance. This was a ‘tide of history’ that (inferentially) his judgment also could not resist. As it was, the Supreme Court of Canada held (1997) that the trial judge had undervalued the oral histories of the Gitskan and Wet’suwet’en. It quoted the Report of the Royal Commission on Aboriginal Peoples (RCAP) (1996):

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notion of social progress and evolution [as the non-Aboriginal tradition]. Nor is it usually human centered in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one—and not necessarily the most important—element of the natural order of the universe. . . . [T]here are many histories, each characterised in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.19

The rules of evidence had to be applied so that oral histories were on ‘an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents’.20 The Supreme Court tried to mitigate the scepticism of the adversarial process and its preference for the strictly adducible, but, as one commentator observed, even then it still perpetuated features common to all North American courts faced with aboriginal histories. These were the tendencies to inscribe clear boundaries on events, seek concrete evidence in the form of written documentation often kept only by non-aboriginal parties, and failure to emphasize the dynamism of relations between First Nations and non-Aboriginal peoples.21

One can peer over the fences of each jurisdiction and find major cases of the 1990s where the same tendencies operated to neutralize aboriginal histories and ultimately the claims they were supporting.

In Australia that tendency appeared in judicial preference for documentary evidence, including the highly tendentious ruminations of self-interested missionaries and colonial agriculturalists, over oral clan-nation evidence. In the Yorta Yorta case (1998) Justice Olney found that the claimant group could not prove sufficient continuity of presence and political organization but by 1881 had ceased as a polity.22 Unlike the northern Aboriginal people whose historical continuity manifestly did not require proof,23 in the southern more settled regions this proof of the group’s political identity became crucial. Simultaneously disowning the capacity to engage in historical anthropological judgment whilst also rendering it, he held that the Yorta Yorta had been ‘washed away by the tide of history’. This judgment quickly generated considerable

20 Ibid 1069.
Introduction

criticism for its failure to accommodate the oral evidence and the overall failure of counsel to emphasize aboriginal adaptation and regrouping as white settlement enveloped their land. It is contrasted with that of Justice Lee in *Ward* (1998) who emphasized aboriginal dynamism and adaptation. These contrasting approaches showed pointedly that judicial attitude towards aboriginal historical evidence carried considerable importance for the success or otherwise of the claim. Interpretation of historical evidence inevitably required the weighing of the material and in doing so there remained the anglocentric tendency to see aboriginal people as passive and doomed witnesses to the tide.

In the United States one commentator identified the same disposition in the *Mashpee Tribe* case. The Mashpee Wampanoag of New England, by the nineteenth century a small tribe of several hundred, had doggedly kept their identity through centuries of white dominance. Tired of increasing residential encroachment onto their hunting and fishing grounds, in the late 1970s they sued on their aboriginal title. In response the local town denied their existence—and, hence, standing—as a tribe. At trial, and confirmed on appeal, it was held that they were not a tribe because at key historical dates there was no evidence of the requisite political coherence. Included in those dates set by the court were some that fell in the mid-nineteenth century when Mashpee organization was ebbing. This was characterized as ‘a contest between oral and literate forms of knowledge’:

In the end the written archive had more value than the evidence of oral tradition, the memories of witnesses, and the intersubjective practice of fieldwork. In the courtroom how could one give value to an undocumented ‘tribal’ life largely invisible (or unheard) in the surviving record?

The same dismissive attitude towards the credibility of indigenous history was also evident in the Supreme Court’s controversial refusal in *Rice v Cayetano* (2000) to recognize the native Hawaiians as a distinct tribal people. The majority gave a selective rendition of Hawaiian history—what the dissent described as ‘the repetition of glittering generalities that have little, if any, application to the compelling history’ of the islands and their indigenous peoples. Again, like the Canadian and Australian courts,


25 T Murray, ‘Conjectural Histories: Some Archaeological and Historical Consequences of Indigenous Dispossession in Australia’ in I Lilley (ed), *Native Title and the Transformation of Archaeology in the Post Colonial World* (Oceania Monograph 50, Sydney: University of Sydney, 2000) 75 was ‘struck by the lack of information about the specifics of the experience of Aboriginal people since white settlement, specifics which could have bolstered the Yorta Yorta’s case…’.

26 David Ritter, ‘No Title Without History’ in Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 81.


30 *Rice v Cayetano* 120 S Cr at 1062.
the bench neglected historical evidence of the continued integrity of native political forms throughout their engagement with colonialism. The majority depicted indigenous Hawaiians as powerless, caught in historical forces as overwhelming (and belittling) as a Pacific cyclone.\(^{31}\) Historical impotence thus supported excluding them from the constitutional status of mainland tribes.

In New Zealand history has been used more idealistically but equally as practically. By the English version of the Treaty of Waitangi (1840) Maori had ceded the sovereignty of the islands to the Crown. However, the subtler Maori version (\textit{te Tiriti}) signed by most chiefs ceded the \textit{kawanatanga} (transliterally the ‘governorship’) leaving the \textit{rangatiratanga} (the authority of the chiefs over their own people). Both versions guaranteed Maori property rights, a promise that became better recognized in the breach than observance and, as a result, the foundation of many historical claims. As New Zealand addressed these claims at the end of the twentieth century, Maori histories took a juridical turn. They became \textit{Tiriti}- and asset-centred, constructed in terms of obligations, duties and rights. In some quarters also, the Waitangi Tribunal especially, the Treaty was elevated retrospectively into the template of a utopia or Eden that the Crown failed to deliver through mis-management, arrogance, and indifference.\(^{32}\) The Treaty became seen as the intersection of many histories, those of Maori and the \textit{arriviste} white polity.\(^ {33}\) Since constitutions not only describe the character of public authority but put it inside an idealizing framework the apprehension of which naturally changes over time, this use of the Treaty as a foundational constitutional document was consistent with a long pattern of western constitutionalism, the American form not least. However it also had the similar effect of sparking counter-narratives, highly conservative histories of ‘original intent’ giving the past a limiting rather than enabling role.

In all common law jurisdictions, then, history became a legal battleground, as much used against as for aboriginal peoples. Its report carried enormous practical consequences in the pursuit of claims. The common thread in all jurisdictions was the tendency for legal institutions (tribunals included) to render historical accounts that deprived aboriginal people of agency in their experience of colonialism. Judges removed aboriginal agency by sweeping them into the relentless tide of history—inferentially, the march of civilization—that they were unable—inferentially, too primitive—to resist. By another version, that agency was depicted as being taken by a Crown breaching its formal promise or by precipitate action (as when the United States intervened in Hawaii). But the histories of the constitutional system, to the extent they carried an account of aboriginal autonomy and status, were essentially stories of its loss. If the constitutional history tradition of the settler-states carried any recognition of aboriginal peoples it was to marginalize or remove them from the tale of origins.\(^ {34}\)

3. Law and history

The treatment of the aboriginal past by the common law raises the broader question of how the common law treats its own past. Indeed the awkward pouring of aboriginal histories into moulds set by the legal requirements of the late twentieth-century claims process and litigation itself demonstrated an enduring feature of common law reasoning. This is its tendency to depict the past in terms of the requirements of the present. This remains a strong feature of legal method in the present day, especially (it will be suggested) in its handling of aboriginal claims.

As a language the common law has but a rudimentary, undifferentiating way of dealing with the past. This feature has, if anything, been accentuated by the late nineteenth-century positivization of its method with the insistence upon the retrieval of ‘commands’ from the record of the past. Legal positivism was the highly influential late nineteenth-century movement that purported to render law a ‘science’. The lawyer’s task was the forensic and objective role of extracting the legal rule or command contained in the mass of legal sources. These sources, which under the classical form of the common law had been varied and not strongly ordered into a hierarchy, were now simply the ‘positive’ law of statute and case report. Although this emphasis upon the production of a rule with the requisite authority and genealogy to solve a present-day problem had also been a feature of classical common law method, it was enhanced considerably by the change into the positivist mode of thought. The common law was, has always been, and remains essentially ahistorical: by its enduring reasoning processes an un-obsolete authority, from, say, 1774 is presumed to have as much probative and argumentative value as one from 1880 or 1973. Time only becomes important to common law reasoning if the particular authority has been superseded.

Late in the nineteenth century Albert Venn Dicey, famous Victorian commentator on the British constitution, and the renowned legal historian Frederic William Maitland described the difference between the common lawyer and the historian. Intellectually the two writers were as chalk and cheese. However each saw that whilst the lawyer and historian were both engaged in forensic enquiry into the past, their goal differed. For Dicey, lawyers saw the past for normative guidance into a world that ‘is’. Maitland saw the common lawyer’s interest in the past as no more than a trawling for the authority of precedent. Both men saw that the historian required evidence and was concerned with questions of origin and what ‘was’, matters that did not strictly concern the lawyer. To put it another way, the common lawyer was concerned with problem-solving in the present, the historian with problem-solving in the past.

Although the difference between the common lawyer and historian is easily put, there is a point from which both species start and towards which they eventually re-converge—that being recognition of the contestability of the past. That process also interested Michael Oakeshott, who did not bifurcate approaches towards the use of the past into the self-contained professional categories of the common lawyer and historian.

What mattered to him was not one's professional calling so much as the attitude brought towards the use of the past.

In an influential essay Oakeshott identified three attitudes towards the past—the practical, scientific, and contemplative. A practical approach understood the past 'merely in relation to ourselves and our own current activities'.

The practical man reads the past backwards. He is interested in and recognises only those past events which he can relate to present activities. He looks to the past in order to explain his present world, to justify it, or to make it a more habitable and a less mysterious place. The past consists of happenings recognised to be contributory or non-contributory to a subsequent condition of things, or to be friendly or hostile to a desired condition of things.

This 'practical' use of the past has been described both as 'whig' and 'presentist'. It consists of seeing the past in terms of the requirements of the present. Andrew Sharp made the same point when he described the product of this attitude towards the past as 'juridical history'. Juridical history put the past to practical ends, reconstituting it in terms of the modern-day notions of rights and duties in currency in deliberative fora of court and tribunal.

In his famous essay on historiography (meaning the way in which history is written) *The Whig Interpretation of History* (1931), Sir Herbert Butterfield excoriated the 'whig' technique. It facilitated what he termed the ' pathetic fallacy '. This, he said, arose as 'the result of abstracting things from their historical context—estimating them and organising the historical story by a system of direct reference to the present'. A whig technique, then, superimposed the grid of the present over the past. It used the past practically. Similarly Jens Bartelson described 'presentist' technique as coming naturally where there is 'an insistence on timeless criteria of reconstruction and validity in history':

Since these criteria themselves necessarily are presumed to be without history, past events and ideas, whenever they appear to be true or rational to the historian, are explained or made intelligible with reference to this very rationality or truth, whereas that which appears to be false or irrational must be accounted for in causal terms as deviances from the timeless and objective standards laid down or uncritically accepted by the historian.

History, or a manner of describing the past, that is 'presentist' or 'whiggish' held these features:

It characteristically begins by taking an institution or an idea from the present together with the contemporary role, function or purpose presently used to justify that institution or idea, and then describes its historical development *as if* this purpose or role had governed its emergence and transformation right from its origin onwards. Or, if whiggish history deals with something absent in or remote from the present, it does so by accounting for that institution or practice in

---

38 Ibid 153.
categories totally foreign to it, _as if_ these understandings ideally _should_ have been available to the past, were it not for the ‘limits of that age’, while neglecting the categories used by the agents in that past to describe themselves and their own practices and institutions. Whiggish history hinges on this possibility of re-educating the dead . . . , and then engages them in a conversation with these re-educated dead on presumably timeless matters, forcing them to answer questions that are ours. That is, presentism finds its Archimedean foothold _above_ history; the owl—allegedly shot down—is now instead firmly fixed in the celestial ceiling, scornfully contemplating past mistakes in view of present standards blown into timeless truths . . . 42

That whiggish or presentist technique has allowed the common law, particularly in its modern reasoning processes, to construct doctrine—a body of substantive law—around a notion of immanence according to which all law is already and previously ‘made’. The judge’s role is the passive one of ‘declaring’ what that law already is and always has been, with the doctrine of precedent or _stare decisis_ at its core.

The doctrine of precedent rigidified during the nineteenth century:

In the nineteenth century rush to transform the institutions of the common law, the right of action is created, the need to choose one’s writ is abolished, the court of appeal is erected and case reporting made _official_. The law can now be found written _on the page_. The judgments lengthen. The judges respond, in part at least, to new expectations. There are some indications of conceptual difficulties with the idea of _stare decisis_; they are largely swept aside. The judges must be the equivalent of the new continental legislators. By the end of the nineteenth century, the House of Lords, now a highest appeal court, is bound by its own decisions.43

That late nineteenth-century change in legal thought and practice has been further described this way:

The basic elements that were dominant by the end of the century were the equality and autonomy of individuals (and legal entities generally), a division between the public and private realms, and the paramountcy of the common law and the courts. Powers, including legislative powers, were paradigmatically spheres that had sharp boundaries, and within these boundaries powers could be exercised without restraint or limit. The function of courts was to determine when these boundaries had been exceeded; this function was objective, autonomous and apolitical. Legal reasoning was distinctive, and sharply separated from politics . . . 44

In this world:

Judges found facts and applied the appropriate general rule, and the scientific process ensured that there would be only one appropriate rule, even though applying it might be difficult and debatable. The common law was autonomous . . . This autonomy was fortified by a sense that lawyers, especially judges, were the custodians of the legal science and the process of making law from these values and applying it.45

---

44 R Risk, ‘Constitutional Thought in the Late Nineteenth Century’, in Dale Gibson and W Wesley Pue (eds), _Glimpses of Canadian Legal History_ (University of Manitoba Legal Research Institute, 1991) 205, 209.
45 RCB Risk, ‘A.H. Lefroy: Common Law Thought in Late Nineteenth Century Canada: On Burying One’s Grandfather’ (1991) 41 University of Toronto L Rev 307, 313 (noting how the positivist grandson,
These passages implicitly describe two important aspects of the late nineteenth-century transformation of the common law episteme or system of knowledge. First, legal positivism became the hegemonic mode or character of common law thought and language practised exclusively by a trained and increasingly more self-disciplining professional elite. Secondly, there was in late nineteenth-century legal thought and practice a distinct orientation in the application of that mode towards the servicing of individual liberty. In that sense it is possible to distinguish positivism—the method of thought and expression—from 'legal liberalism'—the end of the application of that reasoning. This distinction is important because positivism continued to flourish as the dominant mode of common law reasoning long after the goals embodied in legal liberalism had been diluted. That weakening of legal liberalism was itself an outcome of the predicates of positivism as a method, with its emphasis upon the normative superiority of legislation. In the past century national legislation has embodied contrary principles of welfarism and state economic interventionism undreamt in the late nineteenth-century heyday of legal liberalism. However though the individualist outlook has had a weakened—though, of course, never submerged—presence in legal reasoning, positivism with its emphasis upon law as a tool of prediction and control has continued to thrive in legal practice and law school. After World War II, judges and the professional culture about them became ever more willing to acknowledge the element of creativity within the common law system. Nonetheless the guiding intellectual method (everywhere, except in modish pockets of the legal academy) remained concerned with the arrangement of legal authority. Legal thought retained its positivist core.

Thus twentieth-century lawyers would massage and mould authority, law and the facts expressing that law—the common law’s past—around their preferred outcome to the case before them. A common law argument, be it judgment, opinion, or legal text, thus represented and remains an attempt to reduce the common law past to harmonic integrity from which the bad is banished and the best re-validated. Those unhelpful moments or maverick judicial players became ‘exceptional’, ‘renegade’, or ‘aberrations’ to be marginalized by distinguishing or, in extremis, overruling. The legal past thus became a version of the legal present:

The common law’s past was rather the continuing consolidation of a perpetual present which was somehow out of time. In this sense the common law abandoned the search for the [its]


In its classical period during the seventeenth and eighteenth centuries the common law was also a more general language of political debate, as the influential publications of eminent historians Professors JGA Pocock and Bernard Bailyn have shown.
origin: that was lost, irrevocably, in time beyond memory. ‘History’ was about harmony, not
difference, about the ‘conforming’ of the present to the past (and to the future)… Time without
temporality permitted the repeated effacement of the origin. Like Charles Wesley’s God, the
common law collapsed temporality into a simultaneity which neither needed nor cared about
origins, and which could treat on one footing the distance from the present of two or two
hundred years.47

Positivization accentuated that whiggish tendency. Today legal reasoning retains the
modernist preoccupation with authority and the source of a legal rule even if the sys-
temic stranglehold of positivism has loosened. The wide variety of sources permitted
by classical common law reasoning has been reduced essentially to two—statute and
case-law. The common law remains, as classically it did in Coke’s time, a language using
the present as the grid through which the past is seen. The common law past is still a
highly practical one, yet it is also a language that sets great store by the experience of
that past. In that sense, it is language that paradoxically is at once traditional or back-
ward looking yet unable to think except in terms of the pressing present. As the famous
phrase goes—and, not unconnectedly, one also applied to aboriginal societies—it steps
forward looking backwards.

The distinction between lawyer and historian (as seen by Maitland and Oakeshott)
describes respective spheres that the author believes have become confused in many
modern-day attempts to describe the history of relations between the settler-states and
aboriginal peoples.48 Lawyer and historian may both use the past as their subject-matter
but that commonality disguises essential differences: the lawyer seeks to resolve con-
temporary problems whereas the historian seeks to explain bygone contingency.
Whilst they re-converge in the sense that both accept the interpretative contestability
of the past, each has different goals.

Frequently in the field of aboriginal claims these separate types of inquiry are conflated,
making the historian into an advocate and vice versa. Both use the past in a practical
manner. The application of the common law doctrine of aboriginal title provides a
graphic and important example of the distinction between legal and historical inquiry.
During the 1970s Anglo-American courts began articulating a doctrine of common
law aboriginal title. As formulated, the doctrine was designed to protect extant aborig-
inal rights over traditional territory, these ranging from rights of exclusive occupancy
through rights to hunt, forage, and roam. The doctrine was conceived as a way of
recognizing customary rights that continued to be exercised in the present day. In order
to do that it required proof of historical continuity and narratives of unbroken associ-
ation with the territory. Reference to this funnelling use of aboriginal histories has been
made already. Yet, for the courts this did not represent an exercise in historical

47 W Murphy, ‘The Oldest Social Science? The Epistemic Properties of the Common Law Tradition’
48 Similar observations in the Australian context see Rob McQueen, ‘Why High Court Judges Make
Poor Historians’ (1990) 19 Federal LRev 245, 264; Adrian Howe, ‘A Poststructuralist Consideration of
Property as Thin Air: Mabo—A Case Study’ (1995) 2 Murdoch University Electronic J Law
Australian Courts in Native Title Cases’: a paper presented to the ‘Property Rights in the Colonial
Imagination and Experience’ Conference, University of Victoria, February 2001 (online at http://www.
colonialpropertycolloq.law.uvic.ca/papers/Stuckey.htm).
reconstruction (or reduction) so much as signify proof of past aboriginal association with the land that combined with a pattern of official behaviour to justify a legally-validated continuance in the present day. In other words, the concern of aboriginal title litigation was not with accurate historical depiction but with marshalling certain facts from the past as to sanction a contemporary state of affairs.

Yet, this late twentieth-century doctrine has been given an historical as well as legal role. It has been applied retrospectively as though it described historical truth. Some historians, particularly those anxious to support (and active in) modern-day aboriginal claims, have seen the tenets of the late twentieth-century doctrine as though they were also a formed code in previous centuries. Henry Reynolds, the Australian historian, has been the most prominent exponent of that tendency. Other historians, like him, have adopted what were primarily legal accounts of common law aboriginal title made by lawyers to a legal audience as though the principles were consciously present—or should have been—in the minds of historical actors, officials especially.

Reynolds’ work has not been without controversy, especially at the end of the 1990s when Aboriginal policy attracted considerable international attention (and opprobrium) at the time of the Sydney Olympic Games. The Games came midst the heated aftermath of the Wik judgments of the High Court (handed down in December 1996) as the Howard Government put through legislation trimming the reach of the case. Less politically motivated critiques of Reynolds’ work have shown that he practises a form of juridical history, but the same observations have also been made of the histories generated in claims processes in New Zealand and treaty claims in Canada.


50 For a critique of this presentism in my early work (which, in lame self-defence, did not aspire to be historical so much as legal) as well as that of Reynolds see Mark Hickford, ‘Making “Territorial Rights of the Natives”: Britain and New Zealand, 1830–1847’ (University of Oxford D Phil, 1999), and Damen Ward, ‘A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia’ *History Compass* 1 (2003) AU 049 001–023.


53 Mark McKenna described Reynolds’ brand of history as ‘a rolling queue of binary opposites — a succession of stark moral choices’ in *Looking for Blackfella’s Point—An Australian History of Place* (Sydney: University of New South Wales Press, 2002).

For instance, Mark Walters’ earlier work, like mine, has elements of juridical history about it, but his later ventures have shown a more acute historiographical sensitivity. He has commented on the legal interpretation of historical treaties in Canada:

…integration of superficially discordant rules, principles and facts into a coherent normative system by interpretative processes of analogising, distinguishing, classifying, inferring, and extrapolating is the key feature of common-law reasoning. . . . [D]istinctions between law and fact, past and present, and is and ought are discounted in favour of one overriding objective: a coherent normative order that produces just results for litigants today in the light of the commitments society has made in the past.

Walters’ point goes back to Maitland and Butterfield. It is the realization that legal and historical reasoning perform different functions each of which is valid within their own field. It is precisely the fudging of those functions that results in destabilization of each. It is a way by which the past because it is so highly practical also becomes highly politicized. One young scholar has described the response to his attempts to explain this distinction between legal and historical reasoning:

In presenting my analysis to various audiences, I have been struck by the tendency—in some cases almost an eagerness—to hastily conclude that my conclusions fatally undermine the reasoning of the High Court of Australia in Mabo and Wik. Such an interpretation is mistaken. It presumes, just as Reynolds appears to do, that various parts of imperial policy can be easily treated as a homogeneous single entity. It fails to distinguish between normative legal and descriptive historical analysis. Most importantly, it risks over-simplifying the relationship between historical analysis and legal analysis.

The Chippewas of Sarnia litigation further illustrates this tendency—eagerness—to collapse the distinction between law and history. The case concerned mid-nineteenth-century transactions affecting an Indian reservation, which it was alleged were irregular and invalid. This litigation sought to apply retroactively the late twentieth-century doctrine of aboriginal title and Crown fiduciary duty to impugn Crown grants over a century old. The ‘Cameron grants’ were invalid, it was argued, because the rules of legal extinguishment applicable to aboriginal title in the late twentieth century had not been punctiliously followed on this occasion in the mid-nineteenth. The difficulty with this approach was that historically the conduct of Indian affairs was regarded as a matter in the discretion of the executive and authorized officers. At the time of the Cameron grants there was no late twentieth-century notion of judicial review of official conduct such as the claimants were seeking to implant unhistorically and retrospectively into that early Victorian era. In the end the court evaded that perplexing request by pulling from the hat the bona fide purchaser rule of equity to uphold the


57 Damen Ward, Means and Measure of Civilisation, n 50 above, 16.

58 Judgment of Judge Archie Campbell 30 April 1999 (Superior Ct, Ont); [2001] 1 CNLR 56 (Ont CA).
validity of the titles derived in good faith from the Crown grant. This attempt to hold nineteenth-century actors up to the legal standards of the late twentieth is as strong an attempt to re-educate the dead as one is likely to find. The court was not being asked to apply common law aboriginal title to protect extant rights. It was being called upon to apply the doctrine as though it were an historical truth that applied as strongly in that past as this present.\(^59\)

The juridical importance of aboriginal pasts when coupled with the natural disposition of common law method has endorsed such presentism. It is a practical use of the past, but it is not history properly understood. Some judges seem to be aware that the outcome of their deliberation is not historical but legal truth. Mr Justice Gummow put it this way in \textit{Wik} (1996).\(^60\)

There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms... Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.

4. Law in history

One particular way in which presentism has affected the historiography of aboriginal societies and the common law has been in the tendency to project the modern idea of law into the past, particularly the pre-Victorian period. The (few) legal histories of aboriginal societies and the common law that have been written have tended to view law as a corpus of doctrine located in statute, royal instrumentation, and case-law. There is no doubt that law did inhabit those sources which represent important material for the legal historian to consider. However that approach also carries a positivized and presentist view of what law is and was. It supposes that the character of legal thought and practice has remained constant over time and that its sole concern has been with isolation of the sovereign ‘will’ of law contained in those sources. It is believed that law has always been based on the positive sources of statute and case precedent wherein its commands or will lies (legal positivism). Law is regarded as always having thought and applied in that positivist manner. This approach explains legal change in terms of the evolution of doctrine and institutions over time, but ignores the changes to the character of legal thought and practice itself. Positivism emphasizes human agency in producing change through its organic, cumulative reconfiguration of doctrine and institutions. It is of course possible to give a modernist\(^61\) history of the common law

\(^59\) And see the same tendency in Kent McNeil’s critique of \textit{Sarnia}: ‘Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion’ (2001–2) 33 Ottawa L Rev 301. McNeil treats the present-day law of aboriginal title as equally applicable to mid-nineteenth-century Canada. This is a valid form of legal argumentation but it is not an historical one.


\(^61\) Modernism may be regarded as the general emphasis in western thought and practice upon the role of reason and will. This orientation began in the seventeenth century (in Hobbes, to give a prominent example) and peaked in the late nineteenth and early twentieth centuries. ‘The individual is conceived as an isolated mind and will; and his vocation is to get clear about the world, to bring it under the control of reason and thus make it available for human projects... This modern orientation towards a reason aimed at enhancing human will and control has no limits. It manifests itself finally in the twentieth century as a
and aboriginal societies from the period in which the common law itself reasoned and exerted a will of its own in that form. A good deal of the history recounted in this book takes that form. However, the common law had over three centuries of encounter with aboriginal societies before it moved into its positivistic mode in the late nineteenth century. How, one may ask, can one construct a legal history of that earlier, pre-modern period?

To start, it may be observed that the few legal histories of aboriginal societies and the common law are mostly jurisdiction-specific and concentrated upon North America, most notably the work of Harring and Williams. Harring’s separate histories of the United States and Canada begin in the early nineteenth century, tracking through statute and case-law the emergence of a corpus of positive law. Essentially his historiography consists of a chronological parade of statute and case-law viewed from a late twentieth-century grandstand of distaste for nineteenth-century racism. The United States leads the way, with, first, the non-intercourse legislation of the early nineteenth-century republic followed by the judgments of Chief Justice John Marshall during the second quarter-century. Those judgments are regarded as doctrinally foundational. Canada follows in that pageant of case-law and legislation (mid-century with the Chief Justice Beverly Robinson judgments of Upper Canada, then the early Indian Acts of the Confederation (1867) era). Neither historian puts the Australasian systems into that picture, a parallelism outside their remit. However at that stage others enter, bringing into the composite historical picture other settlement colonies of the British Empire. Lawyers not writing as historians (the ever-practical historian Henry Reynolds a notable exception) then add the Australasian material to the sequence of trans-jurisdictional doctrine-formation. By the end of the century the appellate function of the Privy Council so enters the story, corresponding to what has become a considerable American jurisprudence. By this time too, most jurisdictions had erected legislative codes for the management of relations with the tribes and the conduct of their internal affairs. The broad historical picture that emerges is composite but holds a perceptible and overarching form in which the Marshall cases are regarded as navigational points suggestive of a constitutional pluralism that is eclipsed in the late nineteenth century by a less accommodating network of laws.

This usual style of writing history, related as the emergence of a case- and statute-based jurisprudence, is entirely viable and, indeed, largely the form of the later chapters in this book. These are the chapters dealing with the period from which that idea


65 For example in James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge: Cambridge University Press, 1995) the pluralistic promise of the Marshall cases disappears inside the straitening demands of the ‘Empire of Uniformity’ (a term explained more below, ch 3).
of law took hold. It is certainly true—as later chapters show—that in the late nineteenth century law became more intrusive and encompassing. The composite cross-jurisdictional historiography of the North American and Australasian jurisdictions, such as it is, accurately captures the central, often malign effect of law on tribal societies from the late Victorian period in the British Empire and after the Civil War in the American. However this historiography does not consider how law was conceived in the period before or even at the same time as the Marshall and Beverly Robinson cases of the mid-nineteenth century. The Marshall cases are elevated into a kind of early template for what could or should have been applied afterwards in other jurisdictions. By contrast the unreceptive Upper Canada cases of the mid-nineteenth century, like the New Zealand ones soon after, receive negative treatment as exemplars of judicial timidity, unrecognized racism, and over-deference to the executive. The legal history is baked largely, if not entirely, in a late twentieth-century oven.

An account of the engagement between English legalism and tribal societies in the pre-republican American era—the colonial and very early republican periods before the Marshall cases—has the potential, therefore, to reveal much about the idea of law in its pre-positivist form. How did these settler polities conceive the nature of law and how was this manifest in their dealings with their tribal neighbours? The Australasian colonies did not become significant polities until the mid-nineteenth century when the winds of change in legal method and practice were already blowing. However even there, in the period from colonial foundation through establishment of local representative institutions through to eventual Dominion status, as indeed within the Canadian, the perception of the nature of law changed through the nineteenth century. This type of inquiry explored through the colonial encounter with tribal societies has mostly been left to particularized histories of distinct colonies and periods. In these studies law is mostly seen in terms of aboriginal peoples' engagement with local legal institutions such as the governor, courts or colonial assembly. The micro legal histories of aboriginal peoples in areas of pre-Revolutionary America have been invaluable, particularly in showing how law was essentially a site of contestation. As a result there is a growing picture of aboriginal agency in their engagement with settler legalism in the colonial period. However, it is suggested that even here there has been a tendency towards largely positivist ideas of law's presence. The concentration is still upon legal institutions and their application of distinct 'rules' such as recognition of tribal title, chiefly authority, or customary law. Modernist, or at least unhistoricized, notions of sovereignty have also been used. A present-day notion of law still lurks in the shadows.

The concentration upon law as a body of rules applied by official institutions means that most legal histories of aboriginal peoples in the period before the mid-nineteenth

century invariably seize upon modernist insignia of law’s presence—cases, prerogative instrument, or statute—and overload it with more weight than its actual impact in its own time can justify. The Mohegan dispute of the early eighteenth century has become one such example. Styled the ‘greatest cause’ that ever went before the Privy Council, it has been described as an early example of the legal recognition of aboriginal sovereignty and vindication of their rights to land. The case is put into the practical light of the present day, defined by reference to its current relevance (contemporary First Nations’ claims to a residual sovereignty) rather than that of its own time (where the modernist idea of sovereignty played no part). Other examples include the emphasis given Coke’s comments on infidel status in *Calvin’s Case* (1608) and, as mentioned, the judgments of the Marshall Court. These legal moments become over-parted, imbued with significance well beyond their actual importance in their own time. They are given an inflated profile for otherwise the history would not be a ‘legal’ one in modernist eyes. It would lack ‘law’ which must be doctrine-based and with a genealogy. If ‘law’ was an all-pervasive aspect of British imperialism and colonialism, as we are frequently reminded that with liberty and Protestantism it was, then it is remarkable such legal histories rely so heavily on so few and such isolated instances. How, one might ask on such sparse, irregular and over-inflated evidence, was the common law all-pervasive?

The most important attempt at a cross-jurisdictional history has been Peter Karsten’s recently published book, *Between Law and Custom* (2002), which covers a range of British diaspora colonies in the period 1600 to 1900. He deals not only with the property rights of the aboriginal inhabitants of these colonies as part of his treatment of colonial land laws but also the development of the colonial and early national laws of contract and tort. Although the orientation is entirely legal, his approach is more sociological than historical. He contrasts the metrocentric law and modes of colonial behaviour demanded by London with the actual and usually contrary-minded law-ways of the settler communities. He describes this antithesis between the ‘high’ and ‘low’ law, seeing it as tension only resolved with each colony’s achievement of self-governance (or, for the thirteen colonies, independence). In particular he does not clarify or explain—much less historicize—the notion of law or, for that matter, public authority as it was understood in the diaspora settlement colonies. He gives a valuable compendium of settler behaviour but in vital areas his notion of ‘law’ and the role it is playing within the particular colonial society is elusive. A sense of wilful settler communities chaffing against the London line does not carry a full enough sense of how they conceived ‘law’.

Karsten’s failure to explore the character of ‘law’ in its ‘lower’ form is highly problematic. It is insufficient for him to say that his notion of ‘law’ is not that of ‘jurists’, the breed he seems to equate with those described here as legal positivists. There is no doubt that he takes a non-statist, pluralistic conception of ‘law’, as his inclusion of aboriginal custom and settler folk-ways makes plain. Indeed his argument


is the unexceptionable one that the totalizing conception of state law, with its stifling belief in legal monoculture, eventually prevailed in the late nineteenth-century legal nationalism of each jurisdiction. Still, one is left with the problem of what Karsten means by ‘law’. One prominent legal pluralist has defined ‘law’ as ‘a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force.’ Karsten is alongside those who argue that ‘not all phenomena related to law, and not all that are law-like have their source in government.’ By his broad approach, however, all forms of social control or sustained endemic behaviour become ‘law.’ Where, one might ask, ‘do we stop speaking of law and find ourselves simply describing social life?’ It is that question which dogs Karsten’s discussion of law. Were settlers by their conduct really constructing something they perceived as their own ‘legality’ or were they simply social practices at odds with the ‘higher’ law? How is one to distinguish law-reflecting usage—colonial custom as it were—from mere social practice? Did the metropolitan agents perceive this cleavage in as strong a manner as Karsten portrays, or did they feel there was a more organic relation between English law? The royal charters and instructions establishing the colonies were well known within the white community, whose members—often prompted by a robust colonial press—were never shy of using them to their own end. These instruments may be regarded as attempts to recreate a legal Albion. They may be seen also—and this is perhaps a more historically sensitive view—as trellises for institutional practices and the growth of a local legal identity up which settler practice intertwined (though not always happily) with the ‘received’ English law. In the end, then, Karsten’s legal history goes to the other extreme. Rather than taking a narrow modernist view of what constitutes ‘law’ as historians like Harring, he is at the other extreme taking an over-inclusive, under-discriminating one that does not penetrate (or historicize) the pre-modernist view.

Those features of Karsten’s book highlight a core and early theme of this book. The histories of particular aboriginal peoples during particular stretches of the colonial and early national period, apart from being partial in their geographical and chronological coverage, like Karsten, do not consider a question that is regarded as central: it will be argued that in order to understand law’s presence in the encounter one must have at least—or strive for—a general sense of how ‘law’ was being conceived through those four centuries. That is, one must have a notion not only of the common law as the expression of rules by particular institutions. It is vital also to see the common law as a language of thought and mode of practice with its own history. In other words, whilst it is important to regard what lawyers were saying and doing in terms of generating rules, more must be grasped. It is crucial also to consider how they were expressing
themselves, the development of that manner of expression, and how this language operated and disseminated within its community, the colonial ones in particular. Indeed identification of the community of the common law is crucial, for one cannot suppose that the common law was always the language exclusively of a trained, highly professionalized elite, especially in the colonies of the seventeenth, eighteenth, and early nineteenth centuries. What or where were the sites of common law usage in the colonial and early national settler polities? Was its circulation limited to a particular cadre or ecumene or did it percolate into wider, more popular usage? If the latter was the case, as it will be suggested of colonial life in the seventeenth and eighteenth centuries and well into the nineteenth, how did that populist element occur? What consequence did that have for the view the settler community had of itself (as a polity in time and place) and its relations with its aboriginal neighbours? One must consider also how that manner of thinking, expressed through language, was changing within its own community. In short one must historicize not just doctrine and institutions but the common law as a language of thought, or, more accurately, as a mode of describing a range of possibilities and impossibilities. Without doing this, one is left with an account of the encounter between common law and aboriginal societies seen through modern-day notions of what law is, where it is located and how and by whom it is applied.

This inquiry into the nature of law in the various jurisdictions, particularly during the modernizing nineteenth century, is a huge task. What follows in the following paragraphs is by way of a thematic overture scored from the work of important scholars in the field of colonial and early national legal thought. Historians of colonial and early republican America have been engaged in this type of inquiry for some while, though mostly in contexts other than that of legal relations with the Indian tribes. Historians of nineteenth-century Canada and Australia are beginning their own national traditions of legal history and law’s engagement with the politics and wider thought of the time. In this important and growing body of scholarship less attention has been paid to the legal position of aboriginal peoples. In that particular sub-field of colonial history the present-day claims processes referred to earlier have towered over the historiography, dominating by sheer output, command of resources, and their immense political consequence. Claims processes do not require or even welcome contextualist history. Indeed, the juridical style of the history generated inside those processes is one that contextualist historiography carefully avoids. In the construction of a modern and contextualist tradition of colonial legal history (in all spheres not just aboriginal relations), New Zealand lags.

This approach is unexceptionable to modern-day historians, particularly those of political thought. However it requires an historical consciousness that escapes lawyers, at least as a species, whose disciplinary outlook is presentist and practical. Therefore, it is necessary at the outset—and in an admittedly generalized manner—to consider the nature of law in the pre-modern period. Most of the macro and micro legal histories themselves, the development of that manner of expression, and how this language operated and disseminated within its community, the colonial ones in particular. Indeed identification of the community of the common law is crucial, for one cannot suppose that the common law was always the language exclusively of a trained, highly professionalized elite, especially in the colonies of the seventeenth, eighteenth, and early nineteenth centuries. What or where were the sites of common law usage in the colonial and early national settler polities? Was its circulation limited to a particular cadre or ecumene or did it percolate into wider, more popular usage? If the latter was the case, as it will be suggested of colonial life in the seventeenth and eighteenth centuries and well into the nineteenth, how did that populist element occur? What consequence did that have for the view the settler community had of itself (as a polity in time and place) and its relations with its aboriginal neighbours? One must consider also how that manner of thinking, expressed through language, was changing within its own community. In short one must historicize not just doctrine and institutions but the common law as a language of thought, or, more accurately, as a mode of describing a range of possibilities and impossibilities. Without doing this, one is left with an account of the encounter between common law and aboriginal societies seen through modern-day notions of what law is, where it is located and how and by whom it is applied.

This inquiry into the nature of law in the various jurisdictions, particularly during the modernizing nineteenth century, is a huge task. What follows in the following paragraphs is by way of a thematic overture scored from the work of important scholars in the field of colonial and early national legal thought. Historians of colonial and early republican America have been engaged in this type of inquiry for some while, though mostly in contexts other than that of legal relations with the Indian tribes. Historians of nineteenth-century Canada and Australia are beginning their own national traditions of legal history and law’s engagement with the politics and wider thought of the time. In this important and growing body of scholarship less attention has been paid to the legal position of aboriginal peoples. In that particular sub-field of colonial history the present-day claims processes referred to earlier have towered over the historiography, dominating by sheer output, command of resources, and their immense political consequence. Claims processes do not require or even welcome contextualist history. Indeed, the juridical style of the history generated inside those processes is one that contextualist historiography carefully avoids. In the construction of a modern and contextualist tradition of colonial legal history (in all spheres not just aboriginal relations), New Zealand lags.

This approach is unexceptionable to modern-day historians, particularly those of political thought. However it requires an historical consciousness that escapes lawyers, at least as a species, whose disciplinary outlook is presentist and practical. Therefore, it is necessary at the outset—and in an admittedly generalized manner—to consider the nature of law in the pre-modern period. Most of the macro and micro legal histories

73 The notable and distinguished exceptions are Hamar Foster in Canada and Bruce Kercher in Australia.

74 With the exception of the two Oxford dissertations by Hark Hickford and Damen Ward, cited elsewhere in this book.
subscribe to a belief in the common law as simply being that which lawyers did and do. They see the common law as an autonomous and closed field inhabited by trained practitioners with exclusive linguistic access. This common law is primarily a world of elaborate pleadings and writs supplemented by equity, a very technical place inhabited by its own élite. It is seen as a field where over time, change has occurred in the procedural and substantive rules whilst the notion of law itself has remained largely fixed or anyway lying beyond even preliminary explanation. Law by this view, and in the imperial context of this book, is located in statute, legal instruments (such as royal charters, governor’s instructions, and commissions and suchlike issued under the royal prerogative), case-law, law officers’ opinions, and occasional treatises. Tied to the modernist notion of law as an instruction or command, it is not imagined that law lies elsewhere. It is, in short, another form of presentist juridical history.

There is no doubt that the common law certainly inhabited those sources, but that was far from its only location. Late in the nineteenth century legal method left its ‘pre-modern’ or classical form and became demonstrably ‘modern’. As the character of law modernized in response to the demands of the industrializing steam-driven British and American empires, so did its role in relations between the settler-state and aboriginal peoples re-orient. This change in legal method was motored by important political and economic change within the North American and Australasian jurisdictions as their early national periods were closing at the end of the nineteenth century.

The profound change in the nature of legal enterprise during the latter half of the nineteenth century is sometimes described as ‘positivization’, a term that has been used already to describe the emergence of a will-based approach in common law thought and method. However, the term should not be disconnected from the historical forces from which it emerged, lest one think the change was entirely a philosophically driven one. Rather, legal modernism75 was the outcome of late nineteenth-century imperialism and economic transformation. It was a consequence of the ‘Age of Improvement’. The precepts of Austin (1790–1859), largely unheeded in his own time, a generation later became a convenient and powerful intellectual hook on which to hang the changes which the marketplace and a responsive profession (helped by judicature reform) had made to the nature of legal enterprise. Austin’s theory of law and sovereignty seemed to show how even the most basic notions of law could be explained in terms of their logical structure and unifying authority. Law was now a distinct enterprise with clearly demarcated professional boundaries and linguistic access, one reliant upon its own explicitness rather than the previous implicitness of a bygone ordered, stable and hierarchical society. In short, the common law, like the anglophone communities around it, had industrialized.

Before this transformation of legal enterprise, the common law was woven into a general worldview that saw law, with religion, as the reflection of an integrated normative order immanent in the community itself. Through most of the pre-modern (or ‘classical’) period the common law did not claim to be a distinct manner of social order

---

75 Stephen Feldman, American Legal Thought from Premodernism to Postmodernism—An Intellectual Voyage (Oxford: Oxford University Press, 2000) uses the term ‘modernism’ to describe the concatenation of historical forces that transformed legal enterprise from its ‘classical’ or—his term—‘pre-modern’ form.
as it became in the latter modernizing part of the nineteenth century. When
Englishmen of earlier times thought about their social and political order the 'legal'
aspect was not necessarily in a compartment apart from other forms, including for a
good while the religious.76 Indeed, their sense of the nature of authority was undoubt-
edly different from ours today. The common law was integrated into a view of the
world where the religious, legal, social, cultural, and other facets were enmeshed into a
providential order. It was only at a relatively late stage in its history that the common
law—that is, the anglophone sense of legality—disengaged from that integrated
world-view into a distinct, discrete and ostensibly scientific system of its own. Until
that mid–late nineteenth-century development, the anglophone conception of law was
tied into a sense of community values that could be objectively identified. This meant,
for instance, that the jury rather than the judge played a central role in articulating that
law. Law was not an externally imposed set of rules so much as inscribed in the every-
day. The essential feature of this world-view was an abiding faith in nature and God as
a stable and foundational source of meaning and value. It was a place where individuals
and societies seemed to belong to, rather than exist separately from, nature and God.
This metaphysical unity meant that human access to meaning and value always
remained immanent in themselves and in their world.77

This was an abstract, culturally embedded idea of the nature of law that was a long
way from the writs and pleadings of the Inns of Court. In the trained professional's
hands and on his lips the pre-modern common law was highly technical and proce-
dural, but this writ-based fixation of the classical common law78 wrapped around the
broader cultural idea of law. That widespread belief about the immanence of law
supplied a consciousness about the nature of public authority that had considerable
influence upon colonial legal history in America before the Revolution and in the
white settlement colonies of the 'second' Empire. There was no hand-wringing (at least
until the penny dropped by Jeremy Bentham eventually clinked to ground) about the
'role' of natural law. Such contemplation gripped legal thinkers (though not the busy
practitioners) of a later time when 'law' and 'morality' described separate orbits. In the
modern, high-imperial conditions of the late nineteenth century a more instrumental

76 For instance JCD Clark, Revolution and Rebellion: State and society in England in the seventeenth and
eighteenth centuries (Cambridge: Cambridge University Press, 1986) 30 n18. This conservative historian
suggests that fellow historians project their secular philosophical biases (namely Marxist atheism and liberal
positivism) onto the early modern period. Also R McGowen, ‘The Changing Face of God's Justice: The
History 63; H Dickinson, Liberty and Property: Political Ideology in Eighteenth Century Britain (London:
Weidenfield and Nicolson, 1977) esp 314–315. In the American and colonial context see for example Stuart
Anthony Alexander, ‘“By the Light and Law of Nature, They Shall be Judged”: A Study of the Synchronicity
of Law and Religion in Late Eighteenth-Century Nova Scotia’ (1991) 49 University of Toronto Faculty of
Law Rev 147.

77 Stephen A Feldman, ‘From Pre-Modern to Modern American Jurisprudence: The Onset of Positivism’

78 For an account of classical common law method see Gerald Postema, Bentham and the common law
view of law, particularly of legislation, emerged as profession and professoriate became highly organized and disciplined. The economic conditions of the time required a form of law that was less personalized and more overtly transaction-based (hence Maine’s famous statement (1858) about the movement of societies from status to contract). Law commodified and industrialized, and as it did the positivism of Austin supplied the intellectual coat-hook. His public persona had been one of nervous disposition, shaky health, tendency towards melancholy, and perfectionism all of which combined to end quickly careers at the Bar, in academia, and in government service. Yet by the late nineteenth century he had become a sage posthumously offering a theory for the times that explicitly recognized the modern dominance of legislation, the active law-making of the modern imperial state and the idea of law in flux as a purposive human creation. As Gilbert and Sullivan’s witty satire *Utopia Limited* (1893) proclaimed, law was regarded as the product of an entirely human agency and a means almost by mere decree (so the musical pair lampooned it) of effecting social change. The will-based idea of law—legal positivism—had arrived. To repeat, the common law had industrialized.

By the last quarter of the nineteenth century the physical subjugation of aboriginal peoples was almost complete, prefaced as it was in most regions by brutal military suppression of last-gasp resistance. In this downtrodden condition legislative codes erected by the settler-state encircled and corralled the tribes, affecting almost every aspect of their daily lives. Aboriginal being was now a matter of law and subject to a legal will that sought to transform them into individuals standing (and, eventually, voting) on their own, non-tribal feet. This meddlesome legalism was the triumphant and spanning expression of white ascendency. That abject fate of aboriginal peoples would have occurred irrespective of the change in the method and language of legal practice and thought. The argument is not that legal modernism marginalized them: unleashed economic growth in two mighty empires, British and American, and its unquenchable thirst for their land justified laws explained by a motley, fluid and far from coherent or consistent cobble of intellectualizing. The justification for this intrusive lawmaking was straddled throughout by overarching suppositions of cultural superiority, to which were added mid-century liberal tenets giving cultural validation to competitive individualism which were later augmented by vulgarized social Darwinism. This was a highly fluid brew that bubbled, frothed, and constantly re-cooked in a wide variety of ways within each jurisdiction as events and actors generated the legalism of engagement with the aboriginal communities. The positivist format of the legalism was an expression of those interactive forces of thought, person, and event. But having become the prevalent way of organizing and expressing legal thought and practice, positivist legalism was part of the armoury—the ideological part—used by the settler-state to its own ends. Law was now undeniably the word of Leviathan. Men, not law,

caused the suffering of aboriginal peoples. Nonetheless the settler-state’s relations with aboriginal peoples was managed instrumentally through law (as well as force, religion, and the suasion of both). And, from the late nineteenth century that law began taking a particular turn and form markedly different from earlier time.

In the pre-modern period the common law represented both the language of the trained practitioners versed in its writ-based proceduralism and a wider, more popularized idea of constitutional authority. Englishmen of the pre-Victorian era thought about governance in terms of the common law as they had experienced and applied it in the shires, counties, parishes, and assizes of the old country. Both notions, one very legalistic, the other highly popularized, reached the colonies and intertwined more overtly than in England to make legalism a site of considerable contestation. In the pre-modern colonies law was both professional and popular.

This populist element in colonial legal discourse was in part an expression—at least in the Maritime and Caribbean colonies of the eighteenth century and later the Canadian and Australian through the early-mid-nineteenth—of the small colonial bars where qualified legal personnel were often the exception rather than the rule. James Monk made this scathing observation of the lower courts (1775) whilst Solicitor-General of Nova Scotia:

> These Courts become places of Entertainment and pernicious pastime to the Plebian; each suitor is pleased with his Faculty of Reasoning at the Bar—on Equity, Liberty and Constitutional Justice... Here every Rustic and Plebian who is in any degree Capable of forming his own writ and Complaint (and many there are who do it) becomes a Lawyer... 

Amateur participation in legal process was the norm in all British colonies through the eighteenth century and well into the nineteenth. Freed convicts, bumptious smallholders and tradesmen, local do-gooders, and sticky beaks were all apt to throw their penny’s worth into the conduct of public affairs and to dress their argument in a pseudo-legalism. The few, trained practitioners scorned but perforse usually had to take this high amateurism seriously, especially as it often included the bench. The extent to which colonial legal affairs relied upon the participation of untrained personnel was reported to the Imperial Parliament by the Commission of Inquiry into the administration of justice in the West Indies (1825–27). Governor, for example, exercised chancery jurisdiction in Crown colonies although most lacked legal training. Some sat by themselves, others with executive councillors (also untrained), and some, at least in the Maritimes, with judges. As the report showed, unhappiness with the quality and consistency of the application of equitable jurisdiction was a feature of colonial life in the Crown colony period before judicature reform. Equity then varied with the length of the Governor’s foot. Although the Crown colonies were becoming

---

84 Reports of the Commission of Inquiry into the Administration of Civil and Criminal Justice in the West Indies (1825–27). The three reports (1825, 1826, and 1826–27) comprising the first series are reprinted in GBPP (IUP imprint), vol tit Colonies—West Indies 3—page references are to IUP imprint.
better stocked with lawyers by the 1830s, the tuppence-worth of rustics and plebians remained a feature of colonial legal practice for much of the Victorian period.

The rise of an American bar early in the eighteenth century and the grip that colonial lawyers were taking of public affairs from that time meant that the ‘debasing’ tendency evident in the other British colonies was not so marked there. By the time of the early republic legal practice and thought (unlike the British colonies of the same period) were professionalizing in the modern sense and responding to the market-led demands of an increasingly *laissez-faire*, industrializing and westward-heading economy. In this setting American law began to disengage from the classical view, beginning to take a modernist ‘instrumental’ form, a process famously—though not uncontroversially—described by Horwitz in his book *The Transformation of American Law* (1977).

The freedom with which untrained locals and yokels participated in colonial public life and, as an aspect of it, legal affairs was more than an expression of sparse practitioner presence, critical though that was. It also reflected the broader, culturally-embedded idea of law—indeed, of the nature of authority (public and private) at large. This was shared by professional and amateur and gave the latter an untrained but self-appointed capacity to speak up and out. Shirty newspaper editors and smart aleck firebrands venturing legal comment, as well as turbulent judges, were the bane of Governors in all colonies of the pre-responsible government period. Colonial political life was a tumultuous place and the shared idea of the nature of law, itself an expression of the deeper-seated belief in the hierarchical character of authority, licensed rather than disarmed such disputation. Legal historians of the colonial period in America talk of its ‘many legalities’, a description also aptly applied to the British settlement colonies of the pre- and early Victorian period.

Colonial ideas of legality expressed the broader conception of the nature of authority—the authority of the father, snobbish colonial gentry (imitative of the English aristocracy), Governor, and the monarch. Since the colonial enterprise itself was founded legally upon the Crown’s exercise of its prerogative power—the formal erection of an *imperium*—it was this exercise of the ultimate public authority that set the parameters of legality within the colonial polity. It was no accident that the disputatious American colonists and belletrists of the mid-eighteenth century, many of them lawyers, used their seventeenth-century colonial charters in argument with the imperial authorities in London. The Crown, after all, issued charters authorizing colonial activity, incorporating merchants and others to settle overseas and these, colonists held, represented the ‘contract’ for the colony. Under those instruments the Crown appointed Governors and erected local legislative assemblies. Through that activity these bodies—Governors, companies, legislative assemblies—authorized subordinate officers who, in their turn, authorized others such as superintendents, land purchase officers, or sub-Protectors of Aborigines. British imperialism had a pyramidal structure. That architecture was accentuated once the

---


87 The term has been taken from C Tomlins, ‘The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History’ in *The Many Legalities of Early America* 1.
Crown colony became the usual form of colonial constitution from the mid-eighteenth century and in its ensuing high century. At this time and in this model the separation of powers had weak presence. Colonial legalism occurred inside a web of formal establishments and appointments setting parameters within and against which various individuals negotiated, some adeptly, some not. This, after all and to repeat, was an Empire that saw itself as founded upon law. These royal instruments, and the lesser authorities carved from them, represented the structure of authority for Empire and within colony. When judges of the pre-modern period turned their attention to the common law of Empire, it was mostly by reference to this formal conduct of the Crown. This judicial attention was sporadic, at least until the mid-nineteenth century when Indian princes and nabobs outraged by the East India Company’s rule commenced protracted (and usually fruitless) litigation. When judges considered these matters of imperial conduct their central theme was always the actual formal conduct of the Crown and its representatives. Legality, to the pre-modern, common law mind, was inscribed in regularized conduct and it was there that their attention instinctively turned for primary guidance.

Disputation within the colonies of the pre-modern period was channelled through the constituted structures of authority. This structure of authority, this organic network of imperia, should not be seen in terms of the late twentieth-century notion of judicial review according to which the courts keep officials within the vires of their constituted office. This notion of an intrusive judicial role in the management of public office did not become prominent until after World War II. In the pyramidic structure of Empire, notions of authority flowed downwards, from superior to subordinate. If a Governor acted in an excessive manner, disgruntled settler or aboriginal tribe petitioned him or went over his head to the authorities in London. For aboriginal peoples this often meant petitioning the monarch directly. A particularly or persistently miscreant Governor or senior figure would be recalled. When a colonial assembly overstepped its authority the same London authorities disallowed the offending legislation. Enforcement and determination of the scope of authority was mostly through superiors rather than laterally through the courts. Indeed the courts of the British colonies were woven into this hierarchical structure, as the example given earlier of gubernatorial equitable jurisdiction showed. The formal subscription to separation of powers was not a feature of colonial constitutions, and only started to emerge more strongly in the mid–late nineteenth century once responsible government was taking hold. A juridical sense of the Governor’s constitutional compass began to form in the late nineteenth century, by which time the onset of responsible government had rendered any jurisprudential development largely obsolete. Once the Governor was acting upon the advice of colonial Ministers, subjecting his actions via the courts to the constraint of his constituted office was much less likely, if not improbable. The Governor became less the embodiment of a distant imperial Crown than a functionary—though not always a tractable one—of the local representatives.

The American republic was an exception to that, for the obvious reason that it was an independent republic by the beginning of the nineteenth century. There the separation of powers was cauterized more rigidly than at Westminster by the Constitution’s express, textually-prescribed checks and balances. American constitutional law thus
developed concepts of full judicial review of both legislative and executive conduct over a century before British and Anglo-Commonwealth courts developed their more cautious and limited check on the latter.

This web of formal authority and the practice that grew up and around it not only created the structure within and against which individuals and groups negotiated the public sphere. It was an organic, web-like structure, an imperial constitutional web that had its own patterns and history. Of course, one must allow for the growth of law from below, in the actual legal practices of the various colonies, but these formal instruments from the Crown were trellises up and around which variant local law climbed. Each new arena and occasion of imperial activity involved a sequence of improvisation upon and adaptation of established forms. Medieval charters of incorporation of guilds and boroughs became charters for merchants in Europe and then for merchants in the Ottoman Empires, East India and later the New World. The formal pattern of British imperialism reiterated and re-inscribed itself, usually with subtle differences from the previous occasion, but it did so habitually, almost unthinkingly. In short, the structure of the British Empire was founded not only on the exercise of authority established through the Crown's constituent instruments. It acquired momentum from the instinctive recycling of past measures and devices. This repetition was a feature of imperial and colonial practice. It was reflexive and largely unreflective. It was an instinctive expression of the common law frame of mind that was in the marrow of Englishmen.

In the conduct of imperial affairs and bustle of colonial life of the pre-modern period, legality was therefore incorporated into (and contested within) shared notions of authority and hierarchy and through a cultural valuation of inscribed, regularized behaviour. Law was the expression of an immanent order that lawyers, through their writs and proceduralism, held a particular expertise in marshalling. However, as the relish with which amateur colonists rushed in when true expertise was thin on the ground showed, legality was not an enclosed field beyond the retrieval, wit, and disputation of the layman. In pre-modern life law was part of everyday experience, the colonies no less—indeed perhaps more—than England. This made it a site of constant and intense disputation.

One issue that continually vexed colonial legalism was the enduring question of reception. Reception jurisprudence provides in itself a micro-history of the transition in legal thought during the nineteenth century. By the early eighteenth century it was established that English statute and common law, once introduced to a colony, were imported to the extent they suited local circumstances. This law applied as at the date of foundation, the rule being that to apply thereafter, imperial legislation had to name the colony specifically.

These principles of reception required colonial courts to ascertain the extent, if any, to which a particular rule had reached the colony. This in turn necessitated an exploration of how the local order of things differed from the English, an inquiry that non-legal colonists frequently regarded as leaving them prone to judicial whim and
upon which many were unafraid to comment. An anonymously written pamphlet of 1701 had protested against this rule as leaving the American colonies ‘to depend upon the Crooked Cord of a Judge’s Discretion, in Matters of the greatest Moment and Value.’89 It was an enquiry that colonial judges undertook with widely varying degrees of enthusiasm and with frequent bursts of controversy.90 In the absence of such determination colonial officials set sail by their own impression of what fitted colonial circumstances. The Solicitor-General of Jamaica commented dryly on the applicable or otherwise statute law of England (1825), specifically the penal laws (‘acts inflicting forfeitures and disabilities’). He was reported as ‘by no means, disposed to regard’ those laws passed before settlement of the island ‘as “generally” binding, here.’91 Where judges decided the reception issue their evaluation was often a masked version of their own attitude towards colonial life, attitudes that ran from homesick nostalgia for English culture to enthusiasm for the uniqueness of colonial-grown legalism.92 Since this piecemeal, impressionistic, and case-led process depended so much upon judicial perception of ‘local circumstances’ it was hardly a coherent or even within a colony much less the Empire, and it was always a process about which ever-querulous settlers were apt to complain. It recognized that a rule of common law or pre-foundation English statute could be accepted or spurned by local practice or usage. If that local usage militated against the rule, it would not be regarded as having force in the colony.

To give an example, the laws of slavery in the Caribbean colonies93 were reported (1825) as originating from usage:

The law of slavery is to be found in a sort of common law of the colonies, and in the acts of the local legislatures. The chief justice of Grenada calls it ‘a customary law, superadded to the law of England; supplemental to the common law.’ In this island [Barbados], and I believe in all the others, it was not expressly instituted or established by positive law, but obtained, insensibly, and at present depends upon certain unwritten maxims and principles, (derived chiefly from the civil law) and a usage founded thereon. This, though not strictly a legal prescription, has been a uniform practice, recognized in the earliest acts of assembly; regulated at various periods of their history; and constantly admitted as legal, in all their courts of justice; till now it is too late to question its authority.94

This passage displays the pre-modern common law values of immanence and usage. It shows how law was thought to express the inner, ingrained order of community life.

89 Anon, An Essay upon the Government of the English Plantations on the Continent of America. By an American (London: Richard Parker, 1701) 23. The writer was complaining of the uncertainty over which law prevailed in the colony and the inability of the colony (where the Circumstances of the Places are vastly different) to pass laws ‘disagreeable to the Laws of England’ (40).


91 First Report ... Administration of Civil and Criminal Justice in the West Indies 13.


93 For the approach in the Maritime colonies where judges did not regard case-law as strictly binding see B Cahill, ‘Slavery and the Judges of Loyalist Nova Scotia’ (1994) 43 University of New Brunswick LJ 73.

94 First Report ... Administration of Civil and Criminal Justice in the West Indies 73.
It was just that some judges hostile to colonial life preferred to locate this immanence in the English rather than rough-hewn colonial community. By the late nineteenth century, as legal method modernized, it was recognized that this question of the reception of particular English laws was an issue of fact proved by evidence. In that way the rule also took the scientific and forensic form typical of positivism, becoming one answered through adduced evidence rather than internal judicial logic.

However, in the pre-modern period, colonial judges played this bridgehead role determining the reception or otherwise of particular rules of English statute and common law. In *Macdonald v Levy* (1833), for example, the recently established Supreme Court of New South Wales was called upon to determine the applicability of English usury law. Under English statute law five per cent was the maximum rate; however custom in the colony, including that sanctioned by the Judge-Advocate during the penal colony regime, had allowed much higher rates. In dissent Justice Burton held that the English law was imported. To be valid a custom had to exist ‘as long as the memory of man runneth’ (that is, from 1189), a rule he invoked to deny the local custom any effect. This view reflected his privately held disgust at colonial conditions. Chief Justice Forbes may have shared similar reservations, but he had previously held a legal position in Bermuda and been Chief Justice of Newfoundland. His broader experience allowed him and Justice Dowling to hold the English laws inapplicable to the circumstances of the colony. Colonial usage was not inconsistent with English law, they held, since that law was inappropriate for local conditions.

The judgments of Chief Justice Marshall, although written at a time when Horwitz argues American law was taking an ‘instrumental’ (ie modernist) turn, were still located inside a predominantly pre-modern frame. These cases, coming in the twilight of the pre-modern era, became valuable resources for modernist legal argumentation which soon appeared and where their weight as precedents was espoused. Yet these cases were articulated through an essentially pre-modern idea of law and as such offer guidance as to how one might construct a pre-modern history of aboriginal societies and the common law.

5. The idea of law in the Marshall judgments on Indian status (1823–1832)

Chief Justice Marshall and his brethren, even if beginning to fashion law ‘instrumentally’, remained in a world where law was the outcome of common law reason rather than the product of human will:

...Marshall and his contemporaries conceived of the authority of law as external to human will in the same sense that ‘nature’, history, the will of God, and certain ‘iron laws’ of political

---

96 The first Judge-Advocate in New South Wales was ‘the tipsy legal amateur’ Richard Atkins, who had authorized local customs inconsistent with English law. After twenty-five years he was replaced by an anglophilic barrister who had the unfortunate surname of Bent. See B Kercher, ‘Resistance to Law under Autocracy’ (1997) 60 MLR 779, 788–789.
98 See also Bruce Kercher, ‘Why the History of Australian Law is not English’ (Alex Castles Lecture on Legal History, Sydney: Macquarie University, October 2000) (available online at http://www.law.mq.edu.au/HTML/staff/kercher/Castles.htm).
economy were external. Those authorities were forces in the universe which humans could not meaningfully control. Causal agency in the universe, according to the dominant epistemological presuppositions of Marshall’s time, primarily consisted of such external forces, not of purposive human conduct. Not only were such external causal agents permanent features of human experience, the nature or scope of their causal primacy could not be significantly modified by humans. Law was such a force: a timeless repository of universal principles that itself reflected the permanence of other such forces.99

The Marshall court’s judgments on Indian status all stressed the basis of the rules in the formal conduct of the British Crown, which had been, in turn, affirmed and adopted by the American states and union. These principles derived from the *jus gentium* articulated through British and, later, American practice. The clearest statement of the sources of judicial reasoning were given by Chief Justice Marshall in *Johnson v M’Intosh* (1823), a case where the court refused to recognize the validity in American law of title to land purchased directly from the Indian owners:

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely of the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles which our own government has adopted in the particular case, and given us as the rule for our decision . . .100

This passage set out the route his judgment was about to follow. To start he gave the principle of ‘discovery’, which he located, first, in the law of nature as, secondly, ‘adopted’ by the American government. His judgment then explained the rule of the *jus gentium*, demonstrating its adoption by the American government, which, in turn, made it ‘the rule for our decision.’

The law of civilized nations had developed the principle of discovery, he said, as a way of ordering their settlement of the New World. This was the principle ‘that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.’ Through it, the relations between the discoverer and natives became an exclusive matter in which no other European power could interpose:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but they were necessarily impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.101

The history of America revealed ‘the universal recognition of these principles’, Marshall added, citing Spanish, Portuguese, Dutch, and, most amply, English practice.

100 (1823) 8 Wheat, 572. 101 Ibid 574.
His judgment then set out at length the formal pattern of English practice in America, including an account of the Seven Years War and the Treaty of Paris (1763). This showed, he said, that ‘all the Nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by Indians.’

The question now became whether the United States had adopted this rule. After reviewing the conduct of Virginia (‘in whose chartered limits the land in controversy lay’) and, less elaborately, other states, he concluded that the republic had ‘unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country.’

Marshall’s judgment then took a new tack. The principle of discovery established the title of the United States to its territory under the jus gentium, but that did not explain why the Indian title was regarded in American (as it had also been previously under British colonial) law as inalienable other than to the government. That rule of ‘pre-emption’ derived from the conquest of the Indian tribes as they relinquished their land by treaty. The ‘game fled into thicker and more unbroken forests, and the Indians followed.’ So, he concluded:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned. So, too, with respect to the concommitant [sic] principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

The above passage carried the distinct ring of the classical common law. Marshall agreed that the jus gentium would normally allow conquered (and civilized) peoples to enjoy their property, and to continue the unabridged right to dispose of it. However that principle was modified by the uncivilized character of the tribes, this modification being embedded in the established pattern of British and American relations with them. That pattern, in turn, revealed the relevant legal principles which, though incompatible with the normal principles of the jus gentium, might still be regarded as consonant with reason. Law thus lay in the custom and practice that had applied in these relations and that practice was an expression of reason irrefutable by the courts.

That view of the established formal pattern of British and American relations as being expressive of legal principle was a consistent theme of the Marshall Court judgments on Indian status. This established practice was decisive. The judgments used numerous legal authorities to supplement their description and explanation of that practice. Vattel was cited on numerous occasions as an authority on the jus gentium, whilst

---

102 Ibid 584.
103 Ibid 585.
104 Ibid 588.
105 The term is used by Justice Johnson in Cherokee Nation v Georgia (1831) 5 Peters 1, 23.
106 8 Wheat, 590–591.
British and American cases were also cited freely as further illuminating the basis of actual practice for the continent. The texts of treaties, comments by superintendents, passages from Congressional journals, were all grist to the mill as illustrating that established practice. These various sources were marshalled to explain the principles of that practice with none, including the case-law, being given probative worth above the other. In his dissent in *Cherokee Nation v Georgia* (1831) Justice Thompson even insisted there was no need to consult the *jus gentium* as to the status of the independent tribes as nations. ‘We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it.’

The judgments were thus anchored squarely in the depiction of established law-reflecting American custom.

Marshall’s judgment in *Johnson v M’Intosh* was highly familiar throughout the British colonies, most famously for characterizing the Crown as the sole source of title for settlers. The Chief Justice’s location of that feudal rule of common law in actual British (and adopted American) practice was never challenged. Indeed, it was elaborated on several occasions in New South Wales during the late 1830s and early 1840s. An 1836 opinion of an eminent barrister William Burge advised that a cession of land in favour of a John Batman from Australian aborigines was invalid against the Crown. The opinion cited *Johnson v M’Intosh* with added references to British practice in North America. The same controversy was re-ignited four years later by the formidable colonial lawyer William Wentworth, no lover of the feudal principle. He claimed lawful title to large blocks of New Zealand land acquired by direct purchase from nine visiting Maori chiefs whom he had entertained (and, if Governor Gipps is to be believed, plied) in the Sydney watchhouse. His antagonist the Governor disputed the legality of the purchase, the two men disagreeing in a most public manner. These rival interpretations of the law drew on Marshall’s judgment and other authorities such as Vattel, *Calvin’s Case* (1606) and *Campbell v Hall* (1774) but each, like Marshall, anchored their argument in British practice. Plainly at that time there remained an underlying consensus in the colony of New South Wales about the character of the common law, one still drawing upon the classical form.

Colonists who actually settled in New Zealand (which, mercifully, was spared Wentworth) and who had purchased land from Maori before Crown sovereignty—a
group known as the ‘old settlers’—were anxious to have the lawfulness of their land titles acknowledged. Their petitioning and disputation with the Commissioners appointed by the Crown to resolve the matter (generating claims that in the late twentieth-century remained unsettled) also drew on the Marshall cases which were used hither and thither, inconsistently, opportunistically, and ultimately, unavailingly. Marshall’s judgments were treated with ambivalence, claims as to their authority bannered across the Bay of Islands Observer and other colonial papers.

The judgments of the New Zealand Supreme Court in R v Symonds (1847), like those of Marshall, have been elevated in the late twentieth-century historiography of common law aboriginal rights into canonic status. This has been a consequence of both the character of positivist common law reasoning and its fixation with precedent (the litigation-led interest) and historians’ presentist trawling of the pre-modern period for modernist insignia of law’s presence. This case considered the Marshall cases that had been flung so thoroughly and acrimoniously across the pages of colonial newspapers, though not as precedents of persuasive value. Rather the judgments followed a pre-modern line of inquiry that concentrated, like the Marshall Court, on imperial practice.

Henry Samuel Chapman was eulogized by New Zealand’s Chief Justice Robert Stout in 1903 as having influenced the development of law in Canada, New Zealand, Tasmania and Victoria. In his lifetime he had championed settlers’ rights (against the conservative and oligarchic Family Compact) in Upper Canada, held judicial office in New Zealand and high legal office in Australia before returning for a final judicial stint in New Zealand. Chapman’s liberalism was shown in his enduring anti-elitism as he insisted upon the rights of British settlers to self-governing institutions. This did not render his view of law incompatible with that held by the likes of his contemporary Chief Justice Robinson in Upper Canada, defenders of ‘balance’ in the constitution. Chapman simply refused to implicate the common law in the preservation of such elitism. Rather—and unlike Chief Justice Robinson—he was emphasizing judicial independence from the colonial executive. He insisted that he would always adhere to what I believe to be my duty and repel the least attempt at Executive interference with my perfect independence. Chapman was one of those early-mid-Victorian colonists who were ‘indelibly and awkwardly modern’. His political beliefs were heavily liberal whilst his early legal thinking plainly retained strong elements of classical common law thinking. He was, like most people, looking forward and backward at once, combining rather than confusing classical and liberal-tinged legalism. Although we are told he was one of the few who attended John Austin’s lectures in London in the 1830s, it was not until the later stage of his legal career—his second New Zealand judgeship (1864–75)—that his legal thinking synchronized with his political. Chapman’s later judgments reveal a cast of mind that had become markedly modernist. There is a world

---

of difference between the judgments of his first and second periods of judicial office in New Zealand.

There is a strong congruence between the styles of reasoning in *R v Symonds* and the Marshall cases (*Johnson v McIntosh*, which dealt with an almost identical issue, most especially). The judgments in *Symonds* based their ruling that formal Crown grant was the only legal form of land title available to white settlers upon a feudal principle of the common law embodied in legislation, formal royal instrumentation (the charter of the colony), but, most especially, established colonial practice. Adverting to the Marshall cases and the opinions on Batman’s Treaty in New South Wales, Justice Chapman spoke of the rule being found in ‘a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments.’ These had ‘concurred to clothe with certainty and precision what otherwise would have remained vague and unsettled.’ However Chapman stressed that the courts were merely declaring principles that already existed in the nature of British colonialism:

These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the ‘vice of judicial legislation.’ They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.119

Chief Justice Martin made the same point in his separate judgment, which complemented that of Justice Chapman. The Chief Justice opened his judgment with the location of the feudal rule in ‘the general law of England, or rather of the British colonial empire, in respect of the acquisition of lands’ as it has stood ‘from very early time.’ The Lands Claims Ordinance of June 1841 had enacted the rule, but that was simply a confirmation of a deeper-seated and more pervasive common law rule of feudal title. This rule was, they emphasized, a fundamental principle of British colonialism, Justice Chapman tending to stress its function in protecting the native landowners, Chief Justice Martin explaining the need for orderly land titles. To them the feudal rule was not merely a positive one derived from statute, although they could have depicted the rule that way and left things there. Rather they characterized the rule as conformable with the requirements of reason in this particular context. That reason was demonstrated by the history of Crown practice in North America and Australasia and in the nature and function of the rule in those settings. Essentially their reasoning, like that of the Marshall Court, took classical form.

6. A history of aboriginal societies and the common law in the pre-modern era: acquiring and constituting the *imperium*

There are essentially two stages of inquiry into the common law legalism at the heart of this book. These concern, first, the legalism surrounding the means by which the

119 *R (on the prosecution of CH McIntosh)* v *Symonds* [1847–1932] NZPCC 387 (SC), 388.
Crown acquired an *imperium* in aboriginal peoples’ territory and, secondly, the circumstances of its exercise inside the introduced legal system. When an account of those stages is set in the period before the onset of legal modernism, it is necessary to review imperial and colonial practice as exercised within formally constituted structures of authority. Imperial practice, changing as it did over time, described the manner and form through which that governance (*imperium*) was constituted. A fluid combination of imperial practice expressed formally through royal instrumentation under the Great Seal (commissions, or letters patent as they became known during the nineteenth century) and royal signet and sign manual (Instructions), and less formally through despatches to colonial functionaries (the ‘epistolary constitution’ of the colonies120) and colonial practice, continually defined and redefined aboriginal status under that *imperium*. London sent informal instructions about the conduct of aboriginal relations within those structures of authority. Colonial practice—and disputation about land titles and the conduct of aboriginal affairs at large—clustered around the exercise of the prerogative powers inherent and, in the case of colonial (ie settlers’) land titles, conferred carefully but amply in the colonial authority (Governor then local assembly). Hierarchical settler societies disputed hierarchically. Regular lateral intervention through the courts was a juridical invention of the late twentieth century.

The seventeenth-century royal instruments for the American colonies did not make specific provision for the management of relations with the Indian tribes. This silence or lack of formal provision for the conduct of relations with tribes was a consistent feature of royal charters and instrumentation erecting colonies and their governing officers. It was an absence of formality that extended into the Crown colony period of the mid-eighteenth to nineteenth centuries. It lasted as long as London’s control of this sphere of colonial activity. It contrasted with the painstaking care these instruments made with regard to the granting of land titles to settlers and other internal matters such as those relating to judicature. The seventeenth-century charters for America, as the next chapter will explain, were not concerned directly with regulating Indian affairs and only made oblique references to such relations in brief hortatory moments extolling the spread of Christianity or the use of force against barbaric resistance. In supplementary, informal instructions colonial authorities were advised to conciliate the good will of the tribes, but this counsel was far from any detailed organization of those relations typical of other and usual matters of direct and formal royal attention. On the whole the management of those relations was absorbed into the inherent authority of the Crown’s commissioned officers under its undoubted prerogative as channelled through local law-making institutions.

There was an exception to that pattern (which is reviewed more fully in the next chapter), the proverbial proving the rule. In 1621, James I granted Sir William Alexander the barony of Nova Scotia or New Scotland in America, territory encompassing what today are the Canadian Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, as well as some of Quebec. Unusually, the charter set out the

---

grantee’s authority in the management of aboriginal affairs with exceptional specificity. Alexander was given: 121

...free and absolute power of arranging and securing peace, alliance, friendship, mutual conferences, assistance, and intercourse with those savage aborigines and their chiefs, and any others bearing rule and power among them; and of preserving and fostering such relations and treaties as they or their aforesaid shall form with them; provided those treaties are, on the other side, kept faithfully by these barbarians; and, unless this be done, of taking up arms against them, whereby they may be reduced to order, as shall seem fitting to the said Sir William and his aforesaid and deputies, for the honor, obedience, and service of God, and the stability, defence, and preservation of our authority among them.

Some charters, such as the Charter of the Hudson’s Bay Company (1670) recognized explicitly that war might be waged against the tribal inhabitants. The Company was authorized to make peace or war with ‘any Prince or People whatsoever that are not Christians’ in places where the Company was established. It also took authority to ‘right and recompence themselves upon the Goodes Estates or people of those partes’ from whom any loss or injury has been sustained.122 Generally, such authorization was the fullest made for management of relations with the tribes in the royal charters for America (most of which issued in the seventeenth century). Mostly this matter was left at the constitutional discretion of the grantees.

Although this created a patchwork of Indian policy and relations across the thirteen colonies, broad uniform themes soon appeared. By the time the effects of the Glorious Revolution were rippling through the American colonies, the several colonies’ management of Indian relations had common tendencies that varied only in the detail. The colonies’ laws recognized the political—that is, compact-making—capacity of the tribes, and as a consequence of that, all passed laws affecting settlers’ dealings with the tribes, for land especially. All colonies prohibited settlers trading directly with Indians and insisted on vetting and formally granting all settler land titles.123 From the very early seventeenth century officials realized that settlers free-trading with tribes for land would have been a recipe for chaos, if not disaster. Generally, colonial authorities were happy to let the tribes go about their own affairs and only sought to intervene on matters of direct interest and impact within the colony, as in disputes where a settler was involved. On the whole the underlying approach—as the next chapter will explain—was one of ‘jurisdictionalism’, by which interaction between colonies and tribe was managed through an ongoing, plastic set of protocols. This had more to with a feudal tributary system than a modernist model of sovereignty.

By the mid-eighteenth century, French influence and alliance with the powerful interior tribes had become more menacing. From the 1750s, as the two imperial

nations stumbled towards war, the unified and integrated organization of Indian relations became an increasingly pressing imperial concern. Although the French threat in the Americas diminished after British military triumph and the Treaty of Paris (1763), colonialists’ designs, buoyed by the victory, were becoming more territorial, expansionist, and less trade-oriented. The Royal Proclamation (1763) was not introduced as a ‘code’ to curb officialdom (as latter-day historians implicated in the lands-claims processes would have it). Rather it was a pan-colonial statement for the settlers’ information and benefit of a uniform basis for the exercise of the Crown’s discretionary authority relating to dealings with the Indians and land title. Governors of British North America in the period before the Quebec Act (1774) were told to take ‘effec-tual Care’ in their application of the Proclamation. They were told also ‘to cultivate and maintain a strict Friendship and good Correspondence’ with the neighbouring tribes and ‘to Use the best means You can for Conciliating their Affections and Unit[ing] them to Our Government.’ Save in reference to the conduct of the ‘peltry trade’ and ‘fair and just Dealings with the Savages, with whom it is carried on’, references to the Royal Proclamation disappeared from royal instrumentation after the Quebec Act. Indeed, after the 1775 Instructions to Governor Carleton and the peltry trade references apart, royal Instructions were mostly silent on the management of Indian relations. In this respect London’s silence reflected their continued deferral to that paradigmatic creature of British imperialism—the officer on the spot. Governors still commissioned officers and issued instructions for the Indian Department and during the first half of the nineteenth century several inquiries were conducted into Indian affairs in Canada. In the pre-Confederation Victorian period, the attitude of Upper Canada courts towards Indian matters reflected that understanding of Indian affairs as a matter for gubernatorial discretion channelled through London. Significantly and despite the outward silence of the Governor’s formal warrants, the

124 This Act undoubtedly superseded the Royal Proclamation, reference to which thereafter disappeared in royal Instructions to Governors, except in a minor respect of the ‘peltry trade.’

125 Instructions to James Murray, Captain-General and Governor in Chief of Quebec, 28 November 1763 in A Shottt and A G Doughty (eds), Documents Relating to the Constitutional History of Canada 1759–1791 (Ottawa: Printer to the King, 1918) 181, 199, and 200; Instructions to Governor Carleton, 1768, ibid, 319 and 320.

126 Instructions to Lord Dorchester, 23 August 1786, Shortt and Doughty, above, 816, 827; Instructions to Lord Dorchester as Governor of Upper Canada, 16 September 1791, AG Doughty and DA McArthur (eds), Documents Relating to the Constitutional History of Canada 1791–1818 (Ottawa: Printer to the King, 1914) 33, 42; Instructions to Governor Dalhousie, 15 April 1820, NAC MFM Reel H959, RG 7, G18, Vol 4, folium 35-174 at 139–9.

127 Instructions to Governor Carleton, 1 March 1775, in Shortt and Doughty (eds), above, 594–621 appending the ‘Plan of 1764’ for the management of Indian Affairs (at 614–620). The plan substantially replicated the Royal Proclamation 1763. This was the last detailed scheme emanating from London on such matters.

128 Additional royal Instructions of 15 December 1796, for example, gave authority over Indian affairs to the Lieutenant-Governor of Upper Canada subject to the Governor’s overriding authority but made no actual provision for the exercise of the authority; text in Doughty and McArthur, above 189.

colonial assembly was not given authority to legislate for aboriginal affairs until 1860.130 Late twentieth-century legal historians slating those courts for failure to adopt the Marshall approach have misapprehended the notions of public authority and prerogative within loyalist colonial societies.

That pattern also occurred in Australia. The Instructions under the sign manual to Captain Arthur Phillip (1787) were an almost identical replication of the Canadian. He was 'to open an intercourse with the natives, and to conciliate their affections' and to spare them 'unnecessary interruption in the exercise of their several occupations.'131 Formal instructions to Australian Governors after Darling (1825) required them to take measures for the civilization of aborigines and to 'protect them in their persons, and in the free enjoyment of their possessions.'132 Other than that, and in keeping with long-standing formal practice, no attempt was made to spell out a framework for the conduct of those relations.

After the abolition of slavery (1833) the influential humanitarians of Exeter Hall turned their attention towards the plight of indigenous peoples. In July 1834 the leading anti-slave crusader TF Buxton, seconded by the Secretary of State for the Colonies, moved in the Commons:133

...that a humble Address be presented to His Majesty, humbly to represent to His Majesty that His Majesty's faithful Commons in Parliament assembled, deeply impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this Country with the native inhabitants of its Colonial Settlements, of affording them protection in the enjoyment of their civil rights, and of imparting to them that degree of civilisation and that religion with which Providence has blessed this nation...

The Address urged the Crown to use its authority to manage aboriginal policy in a beneficent manner but did not seek to bridle the prerogative with a set of legislative rules (in a period when codification was a matter of intense intellectual debate). This Address was sent to all colonial governors.134

When the colony of South Australia was established (1836) the Governor was given all the usual powers of his office including the authority to make grants of land. As usual that particular power was spelt out in great detail. This time, however, nothing was 'to affect the rights of the aboriginal natives of the said colony to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands ... then actually occupied or enjoyed by said natives.'135 A similar clause appeared in the charter for the colony of New Zealand (1840).136

This careful provision was a

---

130 23 Vict cap 15 (UK).
131 Instructions to Captain Arthur Phillip, 23 April 1787, in GB Barton (ed), History of New South Wales from the Records (Sydney: C Potter, Government Printer, 1889) 485.
132 Full references to the Instructions to Darling (1825), Gipps (1837), Fitzroy (1850) and Denison (1850) in Reynolds and Dalziel, 'Aborigines and Pastoral Leases' (1996) 19 University of New South Wales LJ, 323.
133 Text ibid 323.
134 TS Rice, Secretary of State, to Bourke, 1 August 1834, Historical Records of Australia, Ser I, vol 16, 80–83. Henry Reynolds gives this example in his essay 'Native title and historical tradition: past and present' in Bain Artwood (ed), In the Age of Mabo: History, Aborigines and Australia (Sydney: Allen & Unwin, 1996) 17, 26.
136 Instructions under the royal signet and sign manual, 5 December 1840, enclosure in Lord John Russell to Governor Hobson, 9 December 1840, CO 209/8/460.
sign of the greater care that British practice, prodded by Exeter Hall, was taking over the status and property rights of aboriginal peoples, but it also continued to assume that the management of those relations was part of the prerogative available to the Governor. His authority to make land grants received even more closer attention and careful specification than usual but it was expected that, as always, aboriginal affairs were matters for his own management.

The British Empire of the late eighteenth century may have recently lost the thirteen colonies and clung precariously to its Canadian and Maritime possessions, but in other parts the East India Company was consolidating its hold and the southern Pacific was opening. As this happened attention turned more consciously to the consequences of imperial presence and assertion of authority over non-Christian peoples. The jurisdictionalism of previous times gradually gave way to a more deliberative approach towards the acquisition and assertion of *imperium* over the widening range of non-Christian people crossing the spreading path of British imperialism. This change is described in chapter 4. It did not happen overnight; however by the early 1840s British practice, pressed (not bullied) by the humanitarians, had drawn a much clearer focus and the modern territorialized and absolutist position on sovereignty was coming into place. British practice regarding the acquisition of an *imperium* in non-Christian territory moved subtly but distinctly into a modernist trajectory concerned with the capacity of tribes to enter into treaty-relations. Although *Calvin’s Case* (1606) had denied the status of infidels, this un-Christian outburst went mostly unheeded.137 Indeed it was vigorously disowned as the sad vestige of Crusading zeal.138 British practice in the seventeenth and eighteenth centuries made treaty after treaty, never pausing, at least in the deliberative manner of the mid-nineteenth-century imperialists, to consider the capacity of infidel rulers. When that began to happen it was not only because the British were being more actively exposed to a wider range of non-Christian society. The long-encountered Ottoman, Mughal, and American Indian polities possessed an outward and (mostly) stable form of political organization and leadership that British eyes could apprehend, but the Australian Aborigine, the cattle-herding Nuer of Africa, and war-torn Pacific islanders strained that perception. However, though this variegating experience undoubtedly fuelled it, the question of capacity itself had also come to the front of the British imperialist’s mind for other reasons. Officials pondered in a manner that had never previously detained them the non-Christian polity’s capacity to confer an *imperium* and the Crown’s capacity to govern their society. In the post-Vienna

---

137 Callis reported it in 'The Reading of That Famous and Learned Gentleman... Upon the Statute of 23 H 8 Cap. 5 of Sewers' (1622) 23 and it appeared in Wingfield’s *Maxims* (1658) (see Julius Goebel Jr, *The Struggle for the Falkland Islands—A Study in Legal and Diplomatic History* (New Haven: Yale University Press, 1957) 104); the rhetoric of Bacon’s *Rebellion in Virginia* (1675) (see W Washburn, *Red Man’s Land/White Man’s Law* (New York: Scribner and Sons, 1971) 43; opinion of Fitzhugh, an eminent Virginia lawyer (1683) (epitomized in Joseph Smith, ‘The English Criminal Law in Early America,’ in Smith, Joseph, and Thomas Barnes (eds), *The English Legal System: Carryover to the Colonies* (Los Angeles, CA: Clark Memorial Library of University of California at Los Angeles, 1975) 9–11) and submissions of counsel in *East India Company v Sandys* (1683–5) 10 St Tr 371 (KB) where Jeffries CJ agreed but inferred the Crown could remove that status by entering into relations.

138 Anonymous (1640) 1 Salk 46 (CP); *Privy Council Memorandum* (1722) 2 Peere Wins 75; *Omichund v Barker* (1744) Willes 538 (CA), 542; *Campbell v Hall* (1744) Lo Ft 655 (KB) at 744.
world, there was a growing sense amongst European nations that title to govern colonial possessions had to be shown. This became a fixation of British imperialism in its late Victorian crescendo. In America also the Marshall Court explained the legal status of the American tribes but (it will be seen) in a manner that was consistent with the republic’s fresh constitutional tradition and a departure from the British.

From the second quarter of the nineteenth century British officials engaged in a similar exercise as that of the Marshall Court in America, albeit in a completely different manner. They too became concerned with the juridical status and capacity of tribal peoples. It was not just white settlements that were enclosing the indigenous peoples of these jurisdictions, although that was a crucial factor pressurizing deliberation in London over native policy and the legal basis of Crown jurisdiction. A less tangible change was occurring, an entirely intellectual one inside Anglo thought and practice of which the tribes could have scant idea. Modernist notions of sovereignty were also forming. Previously an essentially feudal and personalized idea of sovereignty provided a means through which the tribes’ apart-ness was negotiated. Increasingly through the last three-quarters of the nineteenth century a new, modernist incarnation of sovereignty was re-positioning tribal societies and intellectualizing their subordination. A relationship with the settler polity that had been conceived by the latter in jurisdictional terms changed in its own mind into one where its Crown proclaimed its own paramountcy and regarded the aboriginal as a ‘subject’ rather than an ‘ally’. It should not be forgotten that this change occurred in the context of the spreading Second British Empire and growing economic might of the American republic. Imperial design and ideology dovetailed.

The following two chapters consider the history of the means by which the Crown acquired an imperium in non-Christian territory. This history moved from an early notion of jurisdiction that was still located in residual feudalism, towards a modernist conception of sovereignty. This transformation affected not only the way in which an imperium was acquired, but the status of the aboriginal polities afterwards. Jurisdictionalism supposed the integrity of the non-Christian polities. That approach began to wilt in late eighteenth-century North America and the East Indies as the sun rose on the Second Empire (particularly after the defeat of the French). The incorporation of the non-Christian polities of those parts into the imperial reach not only endorsed the stronger confidence in its sovereign authority held by the British and American empires as their might grew during the nineteenth century (however episodically dented that might have been by such as the Mutiny, Little Big Horn, and Khartoum). It also validated the modernizing manner in which simultaneously that authority was becoming conceived. Ideology and imperialism fed one another. Sovereignty positivized. The modernist doctrine, territorialized and absolute, became a standard-bearer to the virility of the spreading British and American empires.

7. Aboriginal status under settler-state sovereignty—from the twilight century into the era of self-determination

Later chapters look at the consequence of anglophone sovereignty for the indigenous peoples in the settler-state jurisdictions of North America and Australasia. These chapters
describe the several ‘Empires of Uniformity’\(^{139}\) in place by the end of the nineteenth century. The term describes the enclosure of aboriginal culture by laws of overweening state paternalism that sought to transform aboriginal society through de-tribalization and reconstruction of aboriginal being into a version of the white, enfranchised, and self-regarding individual. The ‘Empire of Uniformity’ demanded a constitutionally homogenized population, one that reflected Anglo-settler values, rather than a pluralistic one with sources of political authority apart from the state. In pursuit of that goal, settler-states passed legislation applying policies for the assimilation of tribal peoples into the constitutional norm. This goal mixed with what was intended as an interim policy of protection, although that element acquired unhappy legal permanence as the other policy—assimilation—faltered and failed. Nonetheless the protective element of these laws ensured aboriginal society retained more coherence than might have been the case with unadulterated assimilationism. Later chapters outline the movement by aboriginal societies during the last quarter of the twentieth century out of those stifling paternalistic regimes into new legal frameworks founded upon a recognition of aboriginal status. These new frameworks sought clumsily, incompletely, and often maladroitly (though, for the most part, not insincerely) to accommodate aboriginality through an overarching principle of ‘self-determination’. The pace of legal change in this final quarter-century was fast and highly uneven. It is a history that is still happening.

The approach of these later chapters is to describe the manner in which Anglo legalism sought to dominate and transform aboriginal life from the late nineteenth century. There was, of course, a considerable shortfall between the goal and its actual result: in the face of this heavy-handed legalism aboriginal communities improvised, resisted (actively and passively), and adapted. The ends sought by the legislative regimes (once sufficient land had been gained) were never cherished enough by the settler state to invest the resources to make their achievement more plausible. Anglo and American leaders protested the goal of turning the aboriginal individual into a fully-fledged citizen, but in all jurisdictions the pursuit of that end was half-hearted and unsustained and it had to deal with the continuing though highly dynamic reality of the aboriginal polities themselves. Nonetheless the laws imposed did have a huge impact upon the direction tribal nations took from the late nineteenth century even as they resisted the policies those laws embodied. The history given here is a topography of how law tried to control, how it imagined the re-constituted aboriginal citizen inside its own common law constitutional space. That history is essentially a top-down one, describing what it was that was going through Anglo legalism’s head as it managed aboriginal affairs. Below the sight-line of that history, and as I have commented already, there lie myriad aboriginal histories of how its ham-fist failed, yet at the same time still influenced the path of those at whom it was directed.

One aspect of this history not covered in this book concerns the interaction of tribal societies with anglophone criminal law. For many this was (and remains) their closest scrape with the law-ways of the settler-state, a sorry fact reflected in the statistical histories of the several criminal justice systems through the twentieth century.

---

\(^{139}\) The term was coined by James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) 58–98.
Historically, aboriginal peoples in all jurisdictions have long been disproportionately represented in prisons, the ‘deaths in custody’ controversy in Australia during the early 1990s a particularly grim reminder. The intensified use of the criminal law against aboriginal peoples has been itself symptomatic of the deepening reach of the settler-state. This exposure became more prominent from the late nineteenth century as the anglophone settler-state sought to stamp its authority over the tribal. That resort to the criminal law occurred at a time when white settlement was hemming in and whittling down the aboriginal land base and in response the threatened tribal peoples were becoming less quiescent. Major aboriginal uprisings in the 1860s and 1870s in the American West, the Canadian prairies, and central North Island of New Zealand, told the settler-state that it should regard tribal ‘lawlessness’ with a heavy hand. From the late nineteenth century the criminal law became an important tool in the settler-state’s ongoing assertion of its supremacy and a continuing sign of the dislocation suffered by the downtrodden aboriginal societies. Racked by alcoholism and the fraying of the tribal fibre, aboriginal individuals slipped into socially maladjusted behaviour that brought them to the severe attention of the white criminal justice system. However that aspect of the encounter between tribal societies and anglophone legalism is not addressed directly in this book, except in the context of the jurisdictional questions relating to settler-state sovereignty in the mid-nineteenth century. Although it challenged tribal authority, the criminal law’s aim was at individuals, and instilling in them western notions of individual responsibility and culpability.

For aboriginal peoples subjection to the political authority of the settler-state—such as its criminal law—became a particularly intense experience from the late nineteenth century. This was a brunt that many had long since felt, such as the Atlantic seaboard tribes and removed Cherokee of the American republic; however by the late nineteenth century it was the fate of virtually all. By then aboriginal resources were substantially depleted, crippled by land dispossession, most of it performed under colour of law. Their once-powerful political presence was diminishing, for some groups entirely gone, as increasingly the settler-state framed laws for their ‘assimilation’ into white civilization. The overwhelming legalism smothering aboriginal peoples in this period reflected their beleaguered position de facto. Legal engulfment also was an expression of the dominant positivized notion of state sovereignty, especially in the legislative sphere. Law was the means by which the settler-state imposed its sovereign will upon aboriginal peoples. It designated and pronounced their destiny to assimilate into versions of the industrious settler. That consciousness was fuelled by the prevalent nationalism of the late nineteenth century: the American republic commenced Reconstruction after the Civil War with a renewed sense of Manifest Destiny, its God-given entitlement to the continent. The British settlement colonies of Canada and Australasia also had a growing awareness of their own constitutional identity as they passed from responsible government to self-governing Dominion. As the imperial apron string was loosened these former colonies exercised their new legislative muscle vigorously whilst courts maintained deference to the executive's management of native affairs. Aboriginal relations was a sphere over which a local legislative jurisdiction was late-coming as the imperial Crown struggled to maintain its centralized protective control. But in the end—through the 1860s—even that authority was passed over to
local institutions. By the time the nineteenth century entered its final quarter, these legislatures, like Congress, were passing comprehensive laws for the management of tribal affairs and their land. Absolutist (and triumphalist) notions of sovereignty were applied to tribal peoples and reflected the mounting confidence of the settler-state in itself as a law-making polity in time and place. Law became a conscious tool of social and cultural engineering as well as a ringing validation of the state itself. Ideology and imperialism continued to nourish one another.

The century that followed, the one commencing in the late nineteenth century and ending with the political resurgence of aboriginal peoples in the 1970s, has been called the ‘twilight of tribalism’. In this period aboriginal peoples were at their weakest, their political and cultural forms barely tolerated, if at all, by the settler-state and its laws. The policy of assimilation that drove law-making from the late nineteenth century consciously strove to weaken the tribalism seen as impeding the Indian’s progress towards civilization. Individualization of the communal land title was a device introduced to smash the tribal bond. Although applied with devastating effectiveness in the United States and New Zealand, it failed to take in Canada in quite the same ruinous manner. From this time government officials became the pharaohs of aboriginal society. Their broad discretionary powers reached into the minutiae of everyday life. This was a level of interference never attempted previously in Canada and Australasia, when aboriginal affairs were managed gubernatorially through London under the royal prerogative and protectors (or superintendents) liaised with rather than micro-managed aboriginal communities. It was also a new turn in American Indian policy as settlement closed in on Indian land and rendered infeasible the earlier policy of westward removal. Those closest to aboriginal peoples—and by the late nineteenth century settlers were getting nearer all the time—wanted both their land and to change them into versions, poorer and servile, of themselves. Tribalism obstructed that goal.

Occasional attempts were made to revivify tribal structures, as with the Indian Reorganization Act 1934 in the United States and incorporations and Development Schemes for Maori land, also of the same inter-war period. But those were brief moments that for aboriginal peoples were compromised by the essentially Anglo vision of corporate endeavour they carried and which anyway went headwind into the prevailing anti-tribalism of the white settler-state.

These regimes did not achieve the goal of assimilation. The legal declaration of desirable outcome was not matched by the actual. Aboriginal peoples’ resistance was strong despite the damaging impact of the policy. In addition the statutory regimes tended to be administered in a careless and indifferent manner and with the under-resourcing that has always characterized Anglo-American governments’ management of aboriginal affairs. This fate reflected the government’s lack of concern and motivation in the field. For all the aggression of its outward form, the legalism was adrift, virtually paralysed by the combination of official neglect and aboriginal resistance. Since that legalism did not at that stage recognize any ‘aboriginal rights’ it was not one that aboriginal leaders could kick-start and use to their own ends. Hence the general condition of legal drift in all jurisdictions through the first half of the twentieth century.

The anti-tribalism of those laws was renewed after World War II. Western liberal democratic states, seeing the horrors of Hitler and Stalin, were rightly aghast at the harmful effects that ‘special treatment’ could have on minorities. As the Universal Declaration (1948) showed, a much sharper consciousness of rights entered western legalism after the war.\textsuperscript{141} The liberal notion of a culturally-undifferentiated population, all its members equipped with equal rights and without special status, became a stronger central plank of government policy in common law jurisdictions. Until then, the various legal regimes had paternalistically given aboriginal groups some protection, whilst also binding them to stifling rules that suppressed significant autonomy. During the 1960s—although the process of ‘termination’ had begun the decade before in the United States—all jurisdictions proposed removing the remaining special rights and status of aboriginal groups and individuals. Non-discrimination and equality became the new norm applied to aboriginal peoples. This had some positive overtones, as in recognizing aboriginal peoples’ entitlement to equal treatment in the workplace, social welfare, and electorate. But it had more ominous undertones, especially where their land-ownership—the basis of their cultural identity—was concerned. In that regard formal ‘equality’ was essentially a more aggressive form of assimilation and aboriginal peoples viewed it that way.

As each jurisdiction moved in that direction, aboriginal peoples, backed truly against the wall, were required to articulate a counter-vision of their place within the anglophone constitutional system where, like it or not, they were placed. Aboriginal communities, although weather-beaten and necessarily affected—indeed fundamentally changed—by the experience of colonialism, had still retained their own identities despite the severe effects upon particular groups. Land and genealogy remained at its core, but other new forms of identity also emerged. As stressed in opening this book, aboriginal histories of colonialism are tales of resistance, innovation, and adjustment. Aboriginal people responded to this rights-talk by formulating their own versions. Increasingly during the last quarter of the twentieth century they prefaced their claim to distinct rights with the adjective ‘aboriginal’. This indicated a special set of rights based upon their political coherence and status as original occupants of the colonized territory. From the early 1970s, the acceptance and articulation by governments of the tribes’ right to ‘self-determination’ (for all that term’s pliability and argument over its implications) simply expressed publicly and gave official benediction to identity-practices that had never left aboriginal culture. Thus aboriginal peoples spoke of their ‘inherent’ and ‘aboriginal’ right to self-determination.

Another post-war trend helped them articulate that goal, this being the de-colonization movement where the principle of self-determination applied unreservedly. As applied after the war, the norm of self-determination was essentially concerned with ‘saltwater’ colonization, the continued presence of colonial powers in foreign territory. It carried with it the right of these self-determining peoples to secede. This notion had its own thorniness but, anyway, it did not fit completely the position of aboriginal peoples in territory inundated by white settlement and where secession was implausible.

Nonetheless the international norm mingled with other norms of international law (chapter 5) and fed tribal peoples’ claim inside the municipal legal system to an ‘aboriginal right’ to self-determination. The right was located within the framework of settler-state sovereignty and articulated as one ensuring the continued integrity of aboriginal culture and its special constitutional status. In Canada the notion of ‘citizens plus’ captured the aboriginal claim to both the basic rights of citizenship and entitlement as aboriginal inhabitants to special legal status. Gradually through the 1970s all jurisdictions shed the policy of assimilation and accepted instead the principle of aboriginal self-determination inside the national constitutional system, although Australia dramatically renounced in the late 1990s.

Governmental acceptance in principle of aboriginal self-determination did not change the legal system in each jurisdiction. These carried a century-weight of paternalism that could not disappear overnight. Moreover that past also harboured injustices that aboriginal peoples wanted the state to resolve, those of North America and New Zealand particularly. In Canada and Australasia, unlike the United States where a unique common law doctrine of residual sovereignty applied, facilitation of aboriginal self-determination required legislation. No movement could be made towards that goal unless the festering historical and contemporary land claims were also being addressed. These claims, particularly those to continued rights over traditional lands and fisheries, were also boosted in Canada142 (1972), New Zealand143 (1986), and Australia144 (1992) by the judicial recognition of common law aboriginal title. In the United States that recognition was long-standing, although executive and Congressional extinguishment of that title was denied Constitutional protection by the Supreme Court (1955).145 However the Burger Supreme Court injected new life into the doctrine of residual tribal sovereignty (1978).146 This reversed a century-old haemorrhage and set that sovereignty out as the doctrinal starting point—in short, the battleground—for federal Indian law over the rest of the century.

By and large the 1970s and 1980s were a time of adjustment as the national legal systems acclimatized to the new direction of engagement with its aboriginal inhabitants. Although, indeed because, this adjustment was largely self-imposed (through court and statute), it was an uneven and bumpy one. The settler-state’s institutions of governance were committing to a new accommodation of aboriginal peoples, but this process was far from easy. The state’s institutionalized psychology of domination and aboriginal peoples’ hard-learnt scepticism of white ways were not easily shed. Still through that period, as aboriginal elements entered the domestic legal system and public institutional practice in a more thoroughgoing (though far from pervasive) manner, a simplistic model of relations largely sufficed. This was the binary one of the ‘state’ and ‘aboriginal peoples’. The legal system was largely concerned at this time with recognizing rights of aboriginal peoples and the configuration of the jurisprudence mirrored that orientation. The ‘jurisprudence of recognition’ set out broad principles for the

---

142 Calder v Attorney-General for British Columbia 134 DLR (3rd) 145 (SCC).
143 Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 (HC).
144 Mabo v Queensland No 2 (1992) 175 CLR 1 (HCA).
state’s relations with aboriginal peoples (chapter 7). The courts became especially instrumental in validating many of their claims, and by so doing (such as through the dramatic recognition of common law aboriginal title in Canada and Australasia) prod-
ded the state into acceptance. The 1970s and 1980s were, then, a crucial period of recognition when the legal systems identified foundational rights held by aboriginal peoples.

During the final decade of the twentieth century that model moved into more com-
plex terrain. By then, national governments were settling the land-related claims and reaching agreements with aboriginal peoples as the courts had hoped (chapter 9). In America also the federal government was applying a more permissive approach towards formal recognition of tribes. Under these settlements and in America through federal recognition, aboriginal groups began receiving and managing considerable resources. This rehabilitation of the aboriginal asset-base became a regular feature of the 1990s and altered the legal framework for aboriginal life. The binary model still sufficed in aboriginal relations with the state, although a new qualifying notion of ‘reconciliation’ emerged by which those recognized rights were reconciled with the state’s obligation to govern in the whole nation’s interest. Reconciliation aimed at being a consensual process in which the antagonisms of the courtroom were discarded in favour of negotiation and agreement as well as incorporation of aboriginal voice into public decision-making.

However the spectre of settlement activated dramatic debate and processes within aboriginal culture itself. Conferring concrete rights and assets through institutionalized processes of settlement or federal recognition (as opposed to the intellectually earlier step of recognizing their juridical basis) inevitably raised the knotty question of who would hold those rights and the basis upon which they would do so. The question had moved downstream from the foundational one of the existence of aboriginal rights (recognition) to their practical articulation by and management within the legal system. As aboriginal groups invested with inherent rights became stronger economic and political forces, the host legal system required them to assume a more definite shape than that supplied by the old, still-in-force paternalistic regimes of earlier times. Those regimes were relics of a bygone era. They reflected neither the present ambition of the aboriginal group nor the demands of a modern legal system. Questions of aboriginal status now took a new, sometimes unwelcome turn. Some aboriginal groups had to labour inside outmoded legal vehicles, such as the Indian Act (Canada), ‘boiler-plate’ Indian Reorganization Act constitutions (United States), or ‘section 438’ trusts (New Zealand). Claimant groups seeking life outside those confines were required to establish mechanisms for determination of membership, to show clear mandates for leaders, and to operate according to principles of transparent governance. Issues of aboriginal leadership, mandate, and representation appeared and multiplied as claims settlement became a regular phenomenon. These issues of governance quickly populated the national legal system which found itself institutionally ill-equipped—the courts in particular—to deal with what were regarded as internal matters for aboriginal peoples. Fluid identity-practices became encased in the rigidifying criteria demanded by the spectre of settlement. The very measure designed to abate the consequences of
colonialism—settlement of claims—seemed destined to continue it in another form. In that sense some believed that settlement was simply rearranging the furniture of colonialism.

Moreover the fuller admission of aboriginal groups into the legal system and their investment with certain rights put those rights into the more general rights-place of the legal system. Recognition led to downstream questions of integration, and these occupied considerable legal attention in the post-recognition world of the 1990s. Aboriginal rights rubbed against the rights of other players, such as the non-central federal institutions of settler-state governance like States or Provinces as well as municipal bodies. These public bodies claimed a competing authority, particularly over resources. These jurisdictional issues had to be resolved by litigation—the old stand-by—or by reconciliation processes of dialogue and protocol (a growing though irregular phenomenon of the 1990s). Aboriginal rights, being held by a group organized under customary law, also rubbed against individual rights valued by Anglo-American constitutional practice, such as those of due process, accountability, and non-discrimination. As part of the cost of recognized and legally-validated autonomy inside the settler-state legal system, all aboriginal societies were required to incorporate those western elements into their practices of governance. Aboriginal governance would be tolerated, supported even, so long as it comported with the constitutional values of the settler-state.

Aboriginal rights also rubbed against wider community rights in a range of matters like conservation, resource management, access to recreational land, and zoning. In all of those competitive contexts aboriginal rights did not automatically out-trump the other set of rights, nor were they discounted or given low priority. Mechanisms were, however, needed to resolve the tension and to achieve balance. These operated on all three fronts of law-making: in statute, court judgment, and contract. The multi-faceted processes of post-recognition integration are described in chapter 8. They occupied considerable legal attention in the 1990s and, doing so, benefited the legal profession enormously though for aboriginal peoples the experience was less enriching.

By the beginning of the new century there had been enough experience of aboriginal enterprise in the era of self-determination for jurisprudential patterns to be observed and lessons to be drawn. The two new themes were those of governance and reconciliation. As a concept governance, with its emphasis upon capacity-building, drew on the experience of development aid in the Third World as well as influential surveys of North American tribes’ experience. It entailed the construction of sympathetic legal regimes that both accommodated the cultural disposition of the group and met the demands of the wider legal system itself. That was the legal side of governance, but it also required other elements of capacity-building incorporating human and financial resources. Reconciliation involved the removal of rights-integration from a contestative adversarial setting with its zero-sum outcomes—essentially the courtroom—into a dialogue- and agreement-led zone. Steps in that direction were more perceptible in governmental and business sector dealings with aboriginal groups in the 1990s, but it was a patchy and fragile trend. As part of this new, more positive
dynamic of reconciliation, settlements and statute put in place innovative processes that
drew the aboriginal voice into decision-making through structures of co-management and
formal representation (chapter 9).

The movement in the legal culture of the municipal systems from the 1970s–1980s jurisprudence of
recognition into the 1990s’ jostling and bustling intricacies of integration was a pattern shared with
international law in that period (chapter 5). In the recognition period aboriginal peoples moved from
neglect to objects to subjects of international law. As subjects their status was undoubtedly secondary
to that of sovereign states and highly context-specific. By the beginning of the 1990s indigenous
peoples, having secured international law’s attention as a distinct juridical category (recognition),
were pressing for the development of substantive norms. A Working Group was established in the
United Nations (1982). It generated considerable institutional awareness within the complex institutional
structures of international organizations. This was particularly noticeable after it drafted a
prospective United Nations Declaration on the Rights of Indigenous Peoples (1993) which was being
considered with a view to completion by the close of the UN Decade for Indigenous Peoples

Whilst claims settlement and the movement from recognition to reconciliation might have eased
the conscience of the settler-state, the blessings for aboriginal peoples were more mixed. This was the
enduring paradox that aboriginal peoples faced as they confronted the constitutional system of the
settler-state after the war: the more they rejected the outcome of colonialism (its victimhood especially),
the more they co-opted (and adapted) key elements of it, such as (most notably) its legalism. For some
groups and individuals it was not necessarily a negative so much as energizing series of choices in
keeping with their history of adaptation and innovation. However the demand for recognition of
their rights and its sequel—the bustling thicket of a competitive post-recognition world—required
aboriginal people collectively and individually to make hard and controversial strategic choices
about inhabiting the colonialist constitutional system surrounding them.

This enforced co-habitation was the enduring and, for some, a bitter legacy of colonialism. Even to talk
the language of rights was, in the eyes of many, the antithesis of their aboriginal identity. One put it this
way:

Ideologically, ‘rights’ talk is part of the larger, greatly obscured historical reality of American
colonialism . . . by entering legalistic discussions wholly internal to the American system, Natives participate
in their own mental colonisation. Once indigenous peoples begin to use terms like language ‘rights’ and
burial ‘rights’, they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These indigenous Native practices are not ‘rights’ which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel . . . When Hawaiians begin to think otherwise, that is, to think in terms of ‘rights’, the identification as ‘Americans’ is not far off.147

147 H Trask, From a Native Daughter: Colonialism and Sovereignty in Hawaii (1993) 23. I am grateful
to Kerensa Johnston for this reference and reiterating this point in ‘International Law, Indigenous Peoples
and the Struggle for Human Rights’ (paper for the LLM Course 732, University of Auckland, 20 June 2003).
Entering the rights-arena as they did after the war thus put aboriginal histories into that new public place where they had to match its demands or suffer. Small wonder that they took the juridical form that this inhabitation required.

But what, one might ask, was the alternative to life inside the Anglo settler rights-place with specially protected status? Some contemporary jurists take the Darwinian position, arguing that social engineering through law designed to insulate cultural communities will ultimately fail, because moral agency on a personal (and, by extension, communal) level is an inherently comparative and organic exercise:

To preserve a culture—to insist that it must be secure, come what may—is to insulate it from the very forces and tendencies that allow it to operate in a context of genuine choice. How does one tell, for example, whether the gender roles defined in a given culture structure have value? One way is to see whether the culture erodes and collapses as a way of life in a world once different ways of doing things are perceived. The possibility of the erosion of allegiance, or of the need to compromise a culture beyond all recognition in order to retain allegiance and prevent mass exodus, is the key to cultural evaluation. It is what cultures do, under pressure, as contexts of genuine choice. [148]

Entry into a western rights discourse and history may have been the inevitable fate of aboriginal peoples after the war. Faced with the policies of legal termination, they had no option but to counter-demand in the same rights-based language that threatened their viability. Doubtless in the inter-cultural dynamics of the Darwinian world they would have survived somehow had those policies progressed further, in the same determined way they had eked out the stifling regimes of the previous ‘twilight century’. However, they entered the rights-place insisting that the processes of colonialism that had so weakened them were not the outcome of genuine choice but of overwhelming, involuntary dominance by an arriviiste polity whose laws, policies, and institutions had viciously narrowed the spectrum for any choice. Historically and at virtually every turn aboriginal agency had been curtailed and suppressed. Indeed, their history of survival inside the colonial condition where their cultural choices were brutally limited (to the bleak point where their youth, unable to contemplate any future, committed group suicide or turned to substance-fuelled violence against one another), demonstrated considerable grasp of the grim Darwinian reality of cultural survival. Aboriginal people did not talk of their culture as a relic, or museum piece that had to be secured ‘come what may’. There were always judges and jurists who characterized aboriginal peoples’ rights that way, washing them away in the tide of history in order to restrict their scope and ambition (inside the competitive rights-place). For that reason indigenous peoples prefaced their rights with the term ‘aboriginal’ to signify a special and organic cluster of rights, as talk of rights they now must, that belonged to them ab origine (from the beginning). In bowing to the acceptance that retention of full cultural choice required adoption of rights-talk, aboriginal people not only demonstrated grasp of the Darwinian reality but confirmed the ongoing inescapable experience of the

colonialism that had pitched them into it: that the onus of adjustment and adaptation would always fall on them, that the terms of cultural survival would never be wholly their own, that ultimately the dictates of the *arriviste* anglophone world-view, its legalism especially, would prevail. But fight they must to preserve their own presence in that public space. What follows here is a history of the legal dimension of that world-view and aboriginal peoples’ presence in that constitutional space.