

Reclaiming legal history: Australian antecedents

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I began publishing Australian case law material on the web in 1996.¹ I did so because I had realised that Australian judge made law was often remarkably different from that of England, and that there were large gaps in Australian court records.

NSW was founded in 1788, yet in 1996, NSW had no formal law reports for cases decided before 1830. The reports commencing in 1830 were a spotty collection with many important omissions. They were compiled in 1890 by a barrister, Gordon Legge. He used newspaper records of case reports, backed up by some access to manuscripts. Prior to 1830, there had been nearly 50 years of litigation, and in 1996 we knew nothing about it. With only a few exceptions, NSW did not commence contemporaneous reports until 1863. These were the omissions I hoped to repair, from 1788 to 1830 when there was nothing at all, then 1830 to 1863 when the coverage was inadequate.

Law reporting was in an even worse state in other Australian colonies. For example, there was almost a complete absence of nineteenth century contemporaneous formal law reports for Tasmania and Western Australia.² The other colonies are not as badly served by law reporting, but they too had gaps. Good progress has now been made to repair these omissions, as I will show.

Why does this matter? First, as I said, colonial law was often markedly different from that of England. There were new issues to contend with for a start. In the nineteenth century, English domestic law had no indigenous people to deal with. What would colonial law do with people who had occupied Australia for at least 40,000 years, and who were divided into more than 250 language groups? How would colonial law deal with inter-se violence among Aboriginal people? Would it protect Aboriginal personal property? Would it recognise Aboriginal rights to land?

One practical legal consequence of the paucity of law reporting was that until recently it was widely believed that there was no recognition of Aboriginal legal autonomy before *Mabo v Queensland (No 2)* (1992) 175 CLR 1. That belief was largely based on a single case reported by Gordon Legge. In his *R v Murrell* (1836) 1 Legge 72 the NSW Supreme Court held that Aborigines had no legal autonomy. The project we've been working on has now uncovered an earlier decision, *R v Ballard* [1829] NSWSupC 26,³ in which the same court looked at the issue quite differently. In *Ballard*, Chief Justice Forbes recognised Aboriginal legal autonomy. *Murrell* is well known as the foundation stone of the *terra nullius* doctrine in Australia. It is well known because it was the case reported by Legge, not *Ballard*. *Ballard* remained buried in the archives and newspapers.⁴

¹ http://www.law.mq.edu.au/research/colonial_case_law/nsw/site/scnsw_home/

² See AC Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788-1890*, Law Book Co, 1994, xix-xxii.

³ http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/

⁴ http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/

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Another issue which had to be decided by colonial courts concerned land title among the colonists. How would land ownership be established in the absence of a local aristocracy? That too was a question for which English law provided no direct answer.

And would all of English law be recognised in the new colonies? The common law test of the reception of English law is that it was in force in a settled colony if it was applicable to its circumstances. That was changed for the eastern colonies to a statutory formula: English law would operate if “the same can be applied”.⁵ Were the statutory and common law tests the same? This, too, was not an issue for domestic English law. Up to the late 1830s there was flexibility in the application of these tests, a willingness to allow colonial law to leave substantial areas of English law behind. Many of the important cases are not in Legge. As Forbes said in *R v Maloney*, 1836⁶

~~to hold that Parliament intended to force the whole mass of English laws—the laws of an old and settled society, which have grown out of occasions, during a long course of years, and which are become more refined and complicated than the laws of any other country in the world—to apply all these laws at once to an infant community, without limitation or restraint, ‘is a proposition much too inconvenient in its consequences, to be perfectly just in its principle.’²~~

The departure of Chief Justice Francis Forbes in 1836 accelerated a trend towards greater strictness in the imposition of English law. That strict view reached a peak in 1879. In that year the Judicial Committee of the Privy Council declared that it was “of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same”.⁷ In judge-made law, the days of legal pluralism **seemed** to have passed. There was little left behind and little room for variation in what was received, according to the Privy Council.

These patterns of acceptance and rejection of English law were not at all clear in the brief law reports of Gordon Legge. He said that his aim in making the collection was to include law which was still relevant in the 1890s, when he was working. By then, the apparent domination of English judge made law was pretty much complete. Only by looking at the hidden cases are we able to see the pluralist pattern which I have described.

New South Wales and Van Diemen’s Land gained limited legislatures in 1824. They were able to adopt the statutory laws of England, but not to make law which was repugnant to those laws. Repugnancy, like the reception of English law tests, was first a matter for the colonial judiciary. Here too, we need to know what the courts decided. And here, too, at first there was greater flexibility than we might have expected. The Crown could refuse assent to colonial legislation, and London’s principal legal adviser on colonial matters from 1813 onwards was James Stephen junior. Showing further evidence of early nineteenth century pluralism, he advised Forbes CJ that

Whatever is tyrannical or very foolish you may safely call “repugnant” &c. But whatever is necessary for the comfort or good government of the colony you may very safely assume to be in perfect harmony with English law ... Take a new code, wherever the old one won’t suit you. Keep up the family resemblance between your

⁵ *Australian Courts Act* ((1828) 9 Geo 4 c 83, s. 24.

⁶ (1833) 1 Legge 74 at 77; www.law.mq.edu.au/scnsw.

⁷ *Trimble v Hill* (1879) 5 App Cas 342 at 345, quoted by P Finn, *Law and Government in Colonial Australia*, Oxford University Press, Melbourne, 1987, 166.

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law and ours as well as you can, and never think it worthwhile to go mad over a difficulty which an act of his Excellency in Council can grind into powder with a blow.⁸

Once again, this pluralist approach to legislation diminished as the nineteenth century progressed. However this had such radical consequences, that there was a drastic statutory change. The colonies chafed at being unable to create laws which suited their new lands. The imperial *Colonial Laws Validity Act 1865* was a charter for colonial legislative independence, though with some restrictions. Those final limits finally ended over a hundred years later.

The conclusion of all of this is that in judge-made law, we are likely to discover greater innovation in the first half of the nineteenth century than after it. That does not mean that we should report cases only before 1850. Much of this is hypothesis to be tested and the means to test it is to uncover cases from the whole colonial period.

This discovery of legal pluralism in the first half of the nineteenth century is certainly not restricted to Australia. Legal historians in New Zealand and North America have made similar discoveries.⁹ That should be seen in the context of the social and political history of the British empire.

General historians have made similar discoveries about the diversity of reaction to colonial conditions. One example of this comes from India. In his book *White Mughals*, William Dalrymple wrote about the blend of cultures among the officers of the British East India Company at the turn of the nineteenth century. They adopted much of the social customs of India, just as some Indian people accepted and resisted the incoming English and their ways.¹⁰

Colonial law shows a similar pattern. The great bulk of English law was applicable in the new colonies in theory and most of it in practice. There was not much difference between English and early Australian colonial law in such fundamental matters as procedure, criminal law, torts and commercial law. The officials of the East India Company were still English as well. But their differences were important too, just as were differences between colonial and English law. From some decades into the nineteenth century onwards, these social and legal differences began to diminish. English trained judges began to apply English law more strictly, just when the gulf between English and Indian social norms grew.

This was not a one way street towards London-centred law. Judge-made law began to converge under high Victorian values of the second half of the nineteenth century, but at the same time the legislatures took advantage of their relative freedom under the *Colonial Laws Validity Act* to make new law. Colonial divorce law came to be in advance of that of England, for example, as did the abolition of imprisonment for debt. From mid-century onwards, we need to focus more on legislation than case law if we are concerned about colonial innovations.

⁸ R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, 1863, reprint Sydney University Press, Sydney, 1974, 318.

⁹ See for example, Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51" (1999) 17 *Law and History Review* 209.

¹⁰ See similarly, Alison Gopnick, "David Hume and the Buddha" October 2015 *The Atlantic* p. 96.

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Yet even post-1850 case law showed some independence, as I suggested earlier. After 1901, the Australian High Court sometimes resisted the decisions of the Judicial Committee of the Privy Council. The final abolition of those appeals in the late 20th century returned Australian judge-made law to something like the position it had been in as a practical matter in the first part of the nineteenth century.

So that explains why we have concentrated on the recovery of hidden colonial law. I now turn to how we have been doing it.

When the Macquarie project began in 1996 we concentrated on the case law of NSW from 1824 onwards. That was the date of commencement of the first professional supreme courts of NSW and Tasmania. Immediately after commencing this project I was faced with a fundamental decision. Would I report every single case record I came across, or would I be selective as law reporters always have been? If I had been comprehensive, it would have taken many years to make only a few historical years progress. The same applied to the amount of extra material to be published as footnotes. At the beginning I was very thorough in providing supplementary material for the cases I selected to report. Look at the length of the footnotes in *R. v. the Magistrates of Sydney* [1824] NSWKR 3.¹¹ That too, had to diminish if I was not to be bogged down for many years in the 1820s and 1830s for only one colony. I decided to be selective in the choice of cases and disciplined in commentary in the hope of making faster chronological progress.

After a few years, I gained a new partner, Stefan Petrow of the University of Tasmania. That is when we began a similar project for Tasmanian case law.¹²

These were very expensive projects. We were given hundreds of thousands of dollars in support from the Australian Research Council and our university research departments.

There were several stages to the reporting of each case. They were finding the newspaper law reports, copying from them from microfilm records onto paper, selecting the cases to report, typing out the selected case material, editing and writing supplementary notes, and publication on the web. The main costs in research assistance were searching and copying unindexed newspaper case reports from microfilm to paper, and typing the material up.

Our paid research assistants spent hours going page by page through the newspapers on noisy, warm microfilm readers. They had to glance through every page, looking for reports of cases. That cost has now all but been removed because newspapers are now online, with automatic indexing. In Australia, this is done through the National Library's Trove project. A few simple search terms catch the first selection.

That is only half of the cost. The Trove project uses OCR for indexing, but that is nowhere near good enough to replace human typing of the text. Nineteenth century fonts and muddy printing defeat OCR, and the handwriting of nineteenth century judges and clerks is

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http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1824/supreme_court/r_v_the_magistrates_of_sydney/

12 http://www.law.mq.edu.au/research/colonial_case_law/tas/site/sctas_home/

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even worse. To meet Austlii's standards for its contemporary reports, all of this newspaper and manuscript material still had to be typed.

The only way to avoid the cost of typing is not to do it at all. In effect, law reporting can be placed online with a digital image of the newspaper or manuscript material at the National Library or archives offices. That leaves the reader to work through the sometimes difficult images which OCR cannot decipher. ~~We first did this with Justice Burton's collection of early NSW documents concerning Aborigines.¹³ The transcripts sit side by side with the originals.~~

Importantly, this is the approach that Austlii uses for its colonial legal history library. I will come back to that.

The final stage of the uncovering of hidden Australian colonial case law is the formal preparation of law reports. We have published two volumes of NSW case law, covering from 1788 to 1844. Two more volumes are in preparation, one almost ready to go. We have run out of funding for these volumes, which cannot be published without subsidy. We are hopeful that further funding might come in the next few months. The fourth volume will take us to the 1860s, when there will, at last, be formal reports for the whole of NSW history. The most important person in these formal reports is Brent Salter. He was very largely responsible for the volume containing the earliest reports. I am very grateful for his skill and enthusiasm. He's now engaged in doctoral work at Yale. The new volumes have been prepared by Brent, Lisa Ford and myself.

I now want to discuss our relationship with Austlii.

Not long after we began these projects, Graham Greenleaf offered to reproduce our NSW and Tasmanian material on Austlii.¹⁴ I had long admired Graham's attitude to Austlii. The creation of case law is publicly funded. Its publication should therefore be publicly available for free. I was pleased to cooperate. Austlii has always been my model.

And now Austlii's Australasian Colonial Legal History Library has allowed these early projects to be extended across the whole of Australia. I had long been aware of the paucity of Australian colonial case law beyond NSW and Tasmania. Through Austlii's new Library, the statute law and printed case law of all Australian colonies is now online. And now Austlii has made good progress on the unreported years of South Australia and Western Australia. These are now coming online; see for example, *R v Ann Ryan* [1840] WASupC 1.¹⁵ There are still gaps, but the method for filling them in an economical fashion has been established.

What about the rest of the British empire? The whole point of a pluralist approach to imperial case law, is that it is likely to differ from one colony to the next. Stuart Banner's brilliant book, *Possessing the Pacific* shows how common law jurisdictions across the Pacific varied from one another while also being mutually influential. The subject matter was the recognition of indigenous land titles. His conclusion is very likely to be found in other loca-

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http://www.law.mq.edu.au/research/colonial_case_law/nsw/other_features/correspondence

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<http://www5.austlii.edu.au/au/special/colonialhistory/>

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<http://www5.austlii.edu.au/au/cases/wa/WASupC/1840/1.html>

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tions and other subject matters. The best model for future online case law is the brilliant **NZ Lost Cases** project.¹⁶ They too relied on their National Library's online database of colonial newspapers. They took a different approach to me in their selection of materials and were more professional in their online reporting than my initial work in NSW.

I'll now turn to Peter Bullock's paper on consular courts

Since my retirement in 2007, I no longer concentrate on Australia. Through Brent Salter, I was introduced to Peter Bullock who was to speak next. Unfortunately he is ill, so can't be with us. His paper is online with the conference materials. Much of what follows was taken from him. I can present his ideas, but without his energy.

The great bulk of this recent work on consular courts is Peter's rather than mine - he has chosen the cases and typed them, while I have edited them and placed them online.

The interest Peter and I share is not in colonial law, strictly speaking. Instead, we are uncovering the British and other western court decisions in places such as Constantinople, Japan and China.¹⁷ Under the extraterritorial court system, western governments had jurisdiction to try their own subjects and citizens who were located within a foreign country.¹⁸ Pluralism is the strong connection between these and colonial cases. Everywhere we look we see adoption, adaptation and resistance to the application of western law across the world.

This extraterritorial approach was developed most fully in Shanghai. After the British imposed the treaty ports on China and Japan during the 19th century, they also forced the concession of allowing British subjects in those ports to be tried before British courts. The consuls acted as judges, and were later aided by a British Supreme Court for China and Japan. These extraterritorial courts lasted until the end of the treaty ports system in the mid-20th century. This was not restricted to Britain. Shanghai also had active courts for the citizens and subjects of numerous western nations, including the United States, Russia, Scandinavian countries, Austro-Hungary and Germany. They heard all cases concerning their own citizens, even if the other party was Chinese. We have put a lot of non-British cases online too.

The cases we have uncovered showed that the British consul in Shanghai occasionally tried cases which were supposedly those of another country. In *Municipal Council v. Stibolt*, 1865,¹⁹ for instance, a case against a Danish subject was heard by the British consul acting as the consul of Denmark. This raises an obvious question of whether Danish law was applied in practice or English.

Most of our work has concerned Shanghai, partly because of the quality of the law reporting in the *North China Herald*. So far, we have reported about 600 consular cases heard in Shanghai, beginning in 1852. Britain provided the greatest number of these cases, followed by the United States. Eventually there was a combined consular court, which heard

¹⁶ <http://www.victoria.ac.nz/law/nzlostcases/default.aspx>

¹⁷ http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/site/cc_home/

¹⁸ P. Cassal, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*, Oxford University Press, Oxford, 2013.

¹⁹

http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1865_decisions/municipal_council_v_stibolt_1865/

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its last case in 1941. The consular cases mainly concerned commercial law, shipping, land law, taxation and crime. ~~Through these cases, we can see the growth of the Shanghai Municipal Councils and their work on water supply, sewers, hygiene, roads and the police. Legal history can often find the details of social and political history which are otherwise absent. Matters of procedure and jurisdiction²⁰ were also important. While non-monotheistic oaths were still suspect in England and its colonies, the Shanghai courts accepted an oath sworn on the God of Evil. The potential witness explained that if he breached it the God of Evil would surely come for him.~~

We have also reported many cases heard by the Mixed Court in Shanghai, from 1865 onwards. This court had Chinese and western judges sitting together, hearing criminal matters against Chinese who committed offences within the western ports areas.²¹

The consular court system was also important in the Ottoman empire. Peter has listed over 130 places across that vast empire in which British consular courts operated. We have barely begun work on these, though we have found cases from Constantinople, parts of present-day Morocco, Egypt and the eastern Mediterranean both north and south of the sea. There is plenty more work to be done. Nor have we done much on very large parts of the British empire. India, Africa and the West Indies will all pay rich rewards, let alone North America.

Some of these extraterritorial cases seem impossibly exotic. In ***Stanley v Tippoo Tib, 1889***²² a consular court in Zanzibar heard a contract action for £10,000 brought by the famous explorer Stanley against a person described as an Arab slave trader. The defendant had agreed to supply several hundred retainers to support one of Stanley's expeditions. Tippoo Tib is still well known; he has a significant wikipedia entry, the mark of fame these days.

The work we have been doing is becoming easier technically, due to the growth of online newspapers and the ease of indexing which it allows. Newspapers were not always reliable, of course. Some of them were biased in the selections of cases and the ways in which they were reported. But the quality of reporting in many of them, such as the *North*

²⁰ On this, see Mack v. Municipal Council, 1885, http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1885_decisions/mack_v_municipal_council_1885/
Fu Chin-yue v. Shanghai Municipal Council, 1882, http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1882_decisions/fu_chin-yue_v_shanghai_municipal_council_1882/

Fangtan Land Case, 1941, http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1930-1941_decisions/fangtan_land_case_1941/

²¹ http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/mixed_court_establishment/
http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/mixed_court_operation_and_abolition/

²² http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/zanzibar_and_east_africa/stanley_v_tippoo_tib_1889/ See H Brode, *Tippoo Tib: the Story of his Career in Central Africa*, Edward Arnold, London, 1907.

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China Herald and the *Sydney Morning Herald*, was remarkably good. As Peter points out, there are problems of missing pages, cases only half reported, sometimes unreadable text and so on. These gaps can sometimes be filled through manuscript records. Language is another issue: one case Peter has transcribed included a cross-examination of a witness in Chinese pidgin English.²³ The case involved Norway, Sweden, Germany and the Shanghai Mixed Court before ending up in the British Supreme Court for China and Japan.

Peter points out that the greatest weakness of all is our reliance on English newspaper reports. This is necessarily one-dimensional. We do not yet know what the Chinese, Hebrew or Arab press had to say. That was particularly important for Palestine, where the Press Censorship Regulations restricted what the Arab and Hebrew press might have said. Peter is currently working on a case from Smyrna where the report was in Italian. Other relevant languages are French, Russian, German, Danish, Portuguese and Ethiopian. The most striking example so far is that of Sergius Sultan, a supposed clergyman of confused status and origins, who ended up in the Shanghai Mixed Court. The newspaper report noted: "The proceedings were conducted in English, French, German, Latin and Chinese."²⁴

After the digitisation of newspapers, the next step requires the digitisation of archival manuscript records, a process which is coming along more slowly than that of newspapers. National libraries seem to have more money than archives offices, or perhaps, there is greater interest in newspapers. Peter Bullock has, however, found a good online collection of middle east manuscripts, which he is working through.

Finally Peter points out that it is important to go beyond superior court records. As he says in his paper, the Macquarie site also contains material on subjects which might be considered peripheral, such as inquests, courts-martial, police courts and even some Chinese law cases. Inquests and courts-martial were often the first evidence of English law that people in newly occupied areas saw. ~~The event was transmitted, and explained, by various people, mainly camp-followers or army servants, and although we cannot know what was said, or what their understanding was, the events must have attracted curiosity and to some extent created an understanding of the 'new ways.'~~ On one occasion, in China, an elderly and very infirm woman found refuge in a missionary hospital. She died, and her death caused considerable local unrest. An inquest was held, and the inhabitants went away nodding approval. It may not have been so on all occasions, but there can be no doubt that in this case an English inquest exerted a satisfying and calming influence on a disturbed local Chinese population.²⁵

~~A new arrival on our website is obituaries. Peter points out that we need to know much more about people: not only the judges but the Court officials, such as ushers, the local police force, and others. These men were an osmotic membrane through which questions and answers, information and ideas, passed and re-passed. The material so far is scanty and not very informative, but a flag has been planted. Further work on other sources, such as the Royal Gazettes, Consular~~

²³ Asgaard v. Hong Kong Fire Insurance Co., 1885.
http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1885_decisions/asgaard_v_hong_kong_fire_insurance_co_1885/

²⁴ Sultan, 1882,
http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1882_decisions/sultan_1882/

²⁵ [http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/colonial_inquests/china/newspaper_reports_china/The_Chinese_Repository, 1 February 1839](http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/colonial_inquests/china/newspaper_reports_china/The_Chinese_Repository,_1_February_1839)

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~~Records, and other newspapers, will bring more useful details. The constant question is always, can we afford the time needed for this.~~

We are losing the romance of archival work. Online law reporting, based on the digitisation of manuscripts and newspapers, means that the reason for researchers to travel to exotic foreign cities is diminishing. With that, we lose the physical benefits of imagination and atmosphere. Until very recently historians wore old clothes when they went to archives to spend time with documents which smelt and felt of the past. Now they are as likely to sit at computers linked to libraries or websites on the other side of the world, not needing to leave home. But that loss of flavour is outweighed by the very great advantage to digitisation, that much more work can be done on the grandest historical scales, across the world and across the centuries. The potential now is to create a world legal history. That is the scale of general world histories being written by people such as David Christian at Macquarie University. Through growing digitisation we now have the potential to do the same in legal history. When that happens, general historians should be able to see how important a role law plays and has always played across the world.