Indigenous Land Justice & Colonisation

Lectures for Course: Indigenous Rights: Land & Heritage
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1. Introduction

Today's lecture focuses on the colonial context of Indigenous/Koori occupation and survival. The lecture is grounded in the philosophy of history, which teaches us that the past and the present are ever-present. More important, history teaches us that in order to understand the present one needs to have a good grasp of the past as the present reveals itself to us through the past. One is also reminded of the relationship between history and the application of the law by the High Court in Mabo in which Justice Brennan declared that: 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice (especially equality before the law) which are aspirations of the contemporary (current) Australian legal system' (Mabo (No. 2) Brennan J. at 43, 59-60). The notion of history as a continuing process and the principles of equality and justice before the law will be used to:

- Interrogate the mindset of colonisation and its effect on Koori society in Victoria.
- Examine the means by which colonial policy justified the taking of Indigenous lands and the segregation and control of Indigenous people on reserves
- Highlight the background of colonial policy as a basis for understanding the ongoing Indigenous struggle for rights to land and heritage.

The lecture will also draw on some aspects of the Yorta Yorta colonial experience as a regional case study.

2. European Invasion

The ideology of racial superiority, together with Anglocentric views of land ownership drove colonisation of Victoria. This mindset played a critical role in
shaping colonial policy and in underwriting dispossession. Prevailing ideologies of land ownership, in defiance of strong criticisms from British humanitarians of the time, were used to justify the theft of Indigenous lands. Because Indigenous people had developed different land ownership systems, and land management practices including ways of gaining returns from the land to that of English modes of production, they were treated as not owning the land. The consequences of this mindset for Indigenous occupants was that those Indigenous possessory rights, that were sanctified by the Dreaming and evidence of at least 60,000 years occupation, were put on hold for the next two centuries. All of this was sanctified by the application of terra nullius. It will be argued that the construction of other barriers to Indigenous land justice in Australian law, since the removal of terra nullius by Mabo, (1992) is a retreat to the colonial mindset of racial superiority and Anglo centric views of land ownership. Will return to this next week in the analysis of the pathways to land justice through land rights legislation and the common law and in the interrogation of the Olney J. decision in the Yorta Yorta case (Broome, 1995; Christie, 1979; McRae, Nettheim and Beacroft, 1997:34, 75; Bartlett, 1993:12-14; Reynolds, 1987:31-3; Jacobs, 1972:140-1).

The deception of terra nullius was a powerful incentive at colonisation. The assumption of a vast unoccupied hinterland however was inevitably confronted when settlers came face to face with the reality of Indigenous occupation (Ah Kit, 1997:55-6; Ridgeway, 1997:65-7; Bartlett, 1993:14; Reynolds, 1987:31-3; Goodall, 1996:106; Bourke and Cox, 1994:52; Hookey, 1984:1; Pearson, 1993a; Neale, 1985:17-18).

In theory, terra nullius may have held sway at colonisation; in practice, however, it attracted substantial criticism in England and in the colony of New South Wales (Select Committee Inquiry, 1837). The obvious question of prior Indigenous occupation and land rights was raised in the establishment of the Port Phillip Protectorate and in the instructions of the Imperial government to the colonising commission of South Australia (Reynolds, 1987:99, 100, 105, 115; 1972:45-53; Bartlett, 1993:10-14; Bourke and Cox, 1994; Markus, 1994:36-49; 1987:48-53; Dredge, 1845:44).

The falsity of terra nullius was partially recognised by the Imperial Government in the
1830s and 1840s, but settler society in the colony of New South Wales were less honest. As indicated in lecture 2 on Indigenous Origins and Connections, the ideology that drove settler interests in the taking of Indigenous land reflected the 17th Century writings of John Locke. In that lecture it was argued that many of Locke’s ideas of land rights, were accommodated by Indigenous Australians (Dingle, 1988:30).

The lecture also pointed out that Indigenous interests in land were different to those of Europe, but it also recognised that they were no simpler. Rather they had developed along different paths.

While English theories of land ownership may have been influential in 18th Century notions of land ownership, it was Mabo the attempted to bring Australian law into line with contemporary notions of land justice. It abolished the concept of Australia as terra nullius, and rejected earlier assumptions that were used to justify the denial of Indigenous land rights. The recognition of prior rights in accordance with Justice Brennan’s notion of justice and equality in the hear and now however, is and remains the key issue at hand (Butt, 1996:885-886; Mabo (No.2), 1992, Brennan and Deane JJ. at 29-43; Donahue, Kauper and Martin, 1983:177-80).

I will now analyse the effects of the colonial mindset on Koori society and then examine the means by which Indigenous lands were appropriated (Weberriss and Frauenfelder, 1996:3-4, 11; Mabo (No. 1-2) 1988, 1992; Locke, 1983:177-80).

3. Effects of Colonisation

The original Koori population was reduced by 85% in the first generation of white contact and it did not stop there. In 1863 the Victorian Aborigines Protection Board estimated that there were only 1,920 Kooris remaining out of an estimated pre-contact population of 15,000-20,000. Introduced diseases, settlers’ guns, poison, and violence over land were the main causes of the population decline (Age, 12 July 1998, 'Koori Week Feature Articles': 13; Broome, 1995:31-2; Christie, 1979:78-9; Grimshaw, 1994:134-8; Reynolds, 1981:99; Barwick, 1972:15; Dingle, 1984:19-20).

Historians have re-examined the extent of frontier violence and depopulation. Christie argues that between 15% and 25%, or 2,000 Aborigines, died by the rifle in Victoria alone and the
figure of 20,000 has been suggested for Australia (Reynolds, 1981:99). Reynolds argues that Indigenous depopulation by the rifle in northern Australia was higher than the lives lost in all the overseas wars including Vietnam. The legacy of tragic events like these underpins our history of land struggle and remains indelibly embedded in the consciousness of Indigenous people. Reflecting on the events of colonisation, the High Court in Mabo (No 2) described it as the worst aspect of our history as a nation. It was these events that members of the court argued had created a legacy of 'unutterable shame' (Mabo (no. 2), 1992 Deane and Gaudron jj. at 104; Cannon, 1993:12-14,104,165; Reynolds, 1987:1; Christie, 1979:68-8; Cole, 1984:25). Reparation for loss of land, damage to culture, and for acts of genocide underpins the struggle for land justice.

4. Koori Resistance

The myth that Kooris passively acquiesced to the taking of their land or ceded their sovereign rights has been rejected (Cannon, 1993; Goodall, 1996; Cole, 1984; Christie, 1979; Broome, 1994; Howard, 1982; Reynolds, 1981). Violence over land was generally widespread and particularly severe in the southeastern region. Detailed accounts of Koori resistance and the strategies used to defend their territories are well documented. Kooris mounted attacks on homesteads, dispersed and killed stock, used fire to burn huts and push back intruders, and forced many pastoralists off their stations. Knowledge of bush terrain, wetlands and vegetation were utilised as tactics that were clearly aimed at defending Indigenous territorial rights (Watson, 1996:1-12; McGrath, 1995:12-13; Kickingbird 1993:32; Bourke, 1994:52-3; Cannon, 1993:1-5; Dixon and McCorquodale, 1991:226-66; Reynolds, 1981).

Earlier historians ignored the extent to which violence underwrote colonisation. The achievements of the pastoral and gold industries are praised while the Indigenous struggle to protect territorial rights is played down. Priestly, for example, in Echuca: A Centenary History (1965) claims that Aborigines 'never presented any effective barrier to white settlement of the district'. The evidence shows that these were convenient myths that were used to propagate the notion of a peaceful settlement (Reece, 1974; Reynolds, 1987; Ryan, 1981; Christie, 1979; Loos, 1982; Millis, 1992). The Select Committee Inquiry of 1836-37 and the High Court in Mabo were willing to admit that violence over land was at the heart
of Australia's history. (Mabo (No. 2)1992 Brennan J. at 69; Priestly, 1965:5; Select Committee on Aborigines in British Settlements, 183637).
Being denied land justice at colonisation is important for measuring the extent to which Indigenous rights and interests are recognised in light of *Mabo*. The rules may have changed but whether the law is capable of recognising past wrongs and applying justice in accordance with contemporary values are crucial factors (Age, 24 October 1998; McRae, Nettheim and Beacroft, 1997:36-7; Hagen, 1996; McGrath, 1995:27-8; Bourke, 1994:52-5; Chisholm and Nettheim, 1992:12-13; Neal, 1991:17-18; Aboriginal Law Reform Commission Report, 1986:19; Reynolds, 1981:72-8).

The physical struggle over land may have ended in the mid 19th Century, but the battle for land justice was just beginning. Those measures that were introduced to provide some land for Koori people and to protect them from further atrocities will now be examined (Broome, 1994: 77-86; Barwick, 1972:45-68; Goodall, 1996:46; Aborigines Advancement League, 1985:22).

5. Protection

The exposure of Britain's colonising practices was at the heart of the Protection Policy. Reports from Australia of the near extinction of the Tasmanian Aborigines, the massacres of Aborigines by whites in NSW, and atrocities elsewhere, prompted the British Select Committee Inquiry of 1836. It was the Humanitarian movement in England that took up the Indigenous cause. They successfully campaigned for the abolishment of slavery in 1833. The emancipation of slavery was a great moral victory for the movement and particularly the exploited and downtrodden. On hearing reports of similar moral injustices taking place in the newly acquired colonies the movement turned its attention to the plight of Indigenous people and lobbied for the setting up of the 1836 Select Committee Inquiry (Christie, 1979:81-2; Rowley 1972b: 53-4).

I will use the main findings of the Select Committee report, of 1837 to expose some of the misconceptions of Indigenous rights discourse that has been created by contemporary historians, anthropologists and others.

Must emphasise here that these are the voices of non-Indigenous people.
This will provide the basis for analysing the state of race relations in Australia at colonisation, and to examine the origins of the infamous reserve system that was used to segregate and control Indigenous people.

Main Findings of Report


The Committee conceded that Europeans entered Indigenous lands 'uninvited' and recognised that Indigenous people had an 'incontrovertible and sacred right to their own soil'. Indeed the Committee acknowledged the importance of land to Indigenous survival, reporting that the taking of Indigenous lands had 'deprived them of the means of existence' (Report From the Select Committee, 1836-37:5-6).

The report brought home the brutality of British colonisation and the state of race relations in colonial Australia. It highlighted the nature of those injustices that are still at the heart of the Indigenous struggle (Report From the Select Committee, 1836-37:56). The outcome of the inquiry was the introduction of the policy of Protection and the establishment of the Port Phillip Protectorate (Victorian Protectorate System, 1838-49), which was aimed at providing some land and protection for Indigenous groups.

Failure of Protectorate

The first attempt at providing protection was a dismal failure however and the protectorate was abolished in 1849 just ten years after it was established. The lack of support by the government, the squattocracies opposition to the system from the outset, and the ineffectiveness of the Protectors powers to restore law and order in the colony were the main factors for its demise (1849 Select Committee of Inquiry into the Aboriginal Protectorate; Bossence 1965:43; Massola, 75:4,5).
The Goulburn Protectorate, established on the lower Goulburn River, has relevance to the Yorta Yorta (Chesterman and Galligan, 1997:15-16; Christie, 1979:43; Broome, 1994:69-86; Barwick, 1972:20; Select Committee Inquiry, 1836-37).

The Goulburn station was used intermittently by those Yorta Yorta occupying the southern part of the claim area, but due to the lack of government support and the opposition to its existence from local squatters it was closed in 1849 (Barwick, 1972:20; Bossence 1965:47; Robinson, 'Papers', 1854; Select Committee of Inquiry into the Aboriginal Protectorate, 1849; Bossence 1965:43; Massola, 1968:4, 5). Residents of the station were left to their own means of support. They continued to camp at the traditional campsites on the edges of pastoral stations and to support themselves by hunting and fishing. Other reserve lands allocated within the claim area were important for the continuity of Yorta Yorta connections. However, the reserve system as a tool of colonisation and land restitution and as a basis for Indigenous survival had its antecedents in other British colonies (Clark, 1950:90-102; Dredge, 1845:44; Bossence, 1965:44-56).

6. Origins of Reserve System

The idea of separating Indigenous people and placing them on reserves was well-established British policy. At least two centuries before Australia was colonised, reserves were used to relocate traditional Irish groups under the 'Ulster plantation scheme' in 1769. The reserve system was subsequently developed in the United States, under the Indian Removal Act, 1830. (SLIDE 14). It was national policy to remove Indigenous Americans, to reservations west of the Mississippi and to impose restrictions on their lives and movements (Christie MacLeod, 1967:26-7; Personal communication with Professor Henry Dobins, Newberry Library, Chicago, 1981).

There are major differences in the recognition of American Indian land rights and Indigenous Australians, but the main objectives of the reserves system was consistent. While the primary aim was to relocate Indigenous people from their traditional lands, the reserves became enclaves of Indigenous political resistance and survival. Indeed those reserves that were established within the traditional lands, as will be demonstrated in the Yorta Yorta case, were skillfully manipulated to provide for the

7. Reserves in the Claim Area

After the failure of the Protectorate, many attempts were made to set aside land for Kooris. The 1849 Committee of Inquiry recommended that reserves be established along the Murray so that groups could settle on the land, adapt to farming and continue their traditional hunting and fishing activities (Barwick, 1972:45-51).

The process of combining farming with traditional practices was supported by the Chief Protector George Robinson who recommended that 'Aborigines be allowed free access to Lakes, Rivers, Swamps, Lagoons, etc. and their favorite hunting grounds at the season for hunting' (Select Committee Report 1849:12-14; Goodall, 1996:Chapter 5 'Dual Occupation'). The recommendation was never adopted and other attempts to set up reserves faced similar problems.

The impact of European settlement saw the further deterioration of Aboriginal/European relations which prompted another Government Inquiry into Indigenous affairs. A Select Committee Inquiry was set up in 1859 to 'enquire into and report upon the best means of alleviating what they regarded as the Aboriginal condition' (1859 Select Committee Inquiry into the Aboriginal Condition).

8. Government Reserves

The Committee recommended that reserved areas of land, be allocated in places where Aborigines could be gathered to and issued with blankets, rations and clothing. It was much the same as the Protectorate but a broader scheme which was run by a European administered Aborigines Protection Board. This was the beginning of the era of the reserve system in Australia which had its antecedes in the failed protectorate but which, had its origins in other British colonial practices.
By the time it reached Australia it was a well oiled tool of colonial oppression and control. I will now examine the system of reserves that were introduced into Victoria as a forerunner for other states and then look at their application to the Yorta Yorta (MacLeod, 1967:26-27; Rowley, 1970: 183-184; Chesterman and Galligan, 1998:16-30; Jacobs, 1972:140-141; Costo and Henry, 1977:219; Cohen 1977).

9. Victorian Protection Board:

The Victorian Board for the Protection of Aborigines was established in 1860 to administer the funds granted by the Government and to set up and run the reserve system. The New South Wales protection Board was established in 1883, and largely mirrored the existing Victorian model which by 1911 had been duplicated and adapted by all other States. (Chesterman and Galligan, 1998"131: Broome, 1994:161-162).

10. Policy of Segregation and Control

The Victorian Protection Board was the first to introduce special restrictive laws to control Indigenous people. Statutory authority for the Victorian Board was provided under the Aborigines Protection Act 1869 (Vie). The Act gave the Board wide discretionary powers: to control the lives and movements of Kooris; to relocate them to reserves and to remove children to reformatory schools. The origins of the Stolen Children Inquiry a century later can be traced to the Victorian Legislation (Edwards and Read, 1989:20; Barwick, 1972:14; Broome, 1994:174; Jackomos and Fowell, 1991:16,180-3; HREOC, 1997).

Further restrictive laws were enacted under the Aborigines Protection Act 1886 (Vie) and the Aborigines Act 1910 (Vie) which gave the Board powers to define who was an Aboriginal person according to biological and physical characteristics, and to exclude Kooris from those benefits that were available to other citizens. These exclusory laws were further complemented by Commonwealth laws that denied Aborigines citizenship

The 1869 Victorian legislation was duplicated by New South Wales in 1909, giving it equivalent powers to relocate Aborigines to government-controlled reserves. From the end of the resistance to the establishment of the State Protection authorities, the Yorta Yorta continued to utilise introduced structures. They integrated the ration depots into the traditional economy, utilised the pastoral stations as a means of coexistence and supplemented pastoral activities with subsistence practices.

13. Maloga Mission 1874-88

The Maloga Mission was established in 1874 on land selected by Daniel and William Matthews. The site was an important meeting place for Indigenous groups and the place where the river cut its most recent course, 8,000-10,000 years ago (see Chapter 2; Cato, 1976:28; Barwick, 1972:45-7).

On setting up Maloga, the Matthews brothers were quick to understand the nature of the political boundary presented by the Murray. For the Aboriginal residents of Maloga, however, the river was not a political boundary. The majority were from the local Yorta Yorta who occupied both sides of the river, and some came from neighboring tribes from the upper and lower reaches of the Murray. Maloga was intermittently occupied by the Yorta Yorta between 1874 and 1888, many of whom continued to camp at traditional places in the bush, along the rivers and at pastoral stations. With the creation of the NSW Protection Board in 1883, a new site of 1800 acres upstream from Maloga was reserved. This was 'Cummeragunja' ('Cummera' as it is affectionately known), a word derived from the local Yorta Yorta language meaning 'our home'. Residents of Maloga were moved to Cummera by the NSW Protection Board in 1888-89 (Hagen, 1996:112; Barwick, 1972:45-6).

14. Cummeragunja 1888—present

Both Maloga and Cummeragunja were important places for the Yorta Yorta to regroup and to rebuild as a community. They allowed the Yorta Yorta to re-assert their
inherent rights and Cummeragunja played an important role in the struggle that culminated in the YYNTC (*Shepparton News*, 22 September 1999; Broome, 1994; Homer, 1974; Aborigines Advancement League, 1985; Barwick, *1972*:45, 65-8).

From *1860 to 1999*, the Yorta Yorta have made at least 18 attempts to claim land and compensation. The chronology of claims in Appendix I illustrates the historic nature of the struggle. Some of these were made on behalf of the Yorta Yorta; others were made by the Aborigines Advancement League established by William Cooper in the *1930s*, and some by the Yorta Yorta Clans Group *1983-99*. The more favorable political climate of the *1970s* provided the Yorta Yorta with the opportunity to reassert their claims with a greater prospect of success. Formal approaches for greater control over Cummeragunja and for the return of the Barmah Forest and other areas were subsequently developed. *Mabo* ushered in a new era of law that increased Indigenous hopes of land justice.

15. Ongoing Struggle

It is more than a hundred and fifty years since the Yorta Yorta fought against the invasion of their sovereign rights. Since then Yorta Yorta society has continued to adapt to social, technical, environmental and economic changes.

While the majority of these changes were forced ones, the Yorta Yorta responded in their own courageous way by utilising the limited options available. Today the Yorta Yorta remain a coherent and distinct community, emphasising their ties of kinship and regional affiliation in their dealings both with white society and with other Aboriginal groups (Barwick, *1972*:16; Broome, *1994*:80-4; Aboriginal and Torres Strait Islander Social Justice Commissioner Report, *1995*:94-105).

16. Yorta Yorta Today

The people who identify as Yorta Yorta/Bangerang are the descendants of the Indigenous occupants of the land and waters. The Yorta Yorta asserts that
they have never relinquished their sovereign rights to territories occupied by their ancestors. The 1996 ABS survey found that a significant proportion of the Yorta Yorta population continue to regard the area as their traditional homelands. (Hagen, 1996:1; Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:94-6; Yorta Yorta Statement of Claim and Contentions 1994-95).

The majority of Yorta Yorta live in the townships of Echuca, Moama, Shepparton, Moorooopna, Cummeragunja, Barmah, Nathalia, Finley, Cobram, Kyabram, Wangaratta and Mathoura, and other smaller centres within the lands. Some live nearby at Albury, Wodonga, Deniliquin, Kerang, Barham and Swan Hill. Others have moved to the cities to pursue educational and economic interests, most of whom still visit the area regularly to maintain social and cultural links (ABS, 1996; Hagen, 1996:6-8; Yorta Yorta Land Management Report, 1999: 10; and see Chapters 8-9).

The existence of narrower sub-groupings has evolved into broader interests within the area. This is reflected in the name of the organisation set up to represent Yorta Yorta people in land and heritage matters - Yorta Yorta Nations Inc. The events of the last one hundred and fifty years have resulted in the Yorta Yorta placing greater emphasis on their broad unity and inter-relationships and less on narrower interests. For most practical, political and administrative purposes the Yorta Yorta are one group.

The Yorta Yorta have set up organisations to service the needs of their people in housing, health, education, employment, land and heritage matters. These organisations have provided mechanisms through which the Yorta Yorta have been able to deal with governments on both sides of the Murray.

Many of the Yorta Yorta were instrumental in the fight for civil and political rights leading up to the 1967 Referendum. They established the first Aboriginal organisations in Melbourne and Sydney in the early 1930s. Some of the early leaders were active in highlighting similar injustices in other parts of Australia in the 1950s and in assisting those Victorian communities that gained some land justice in the 1970s and 1980s (Aboriginal Land Act 1970 (Vic); Aborigines Advancement League, 1985: 55-84; Homer, 1974:68-80; Barwick, 1972:16; Broome, 1994:80-4; Goodall, 1996:230-58).
Yorta Yorta people predominantly run the intricate network of community-based organisations in the claim area. The Yorta Yorta Nations Inc, acts as the head organisation for land, water and cultural matters. It is modelled on traditional structures in which representatives are democratically chosen from family groups to form a Council of Elders and Governing Committee.

Conclusion

The history demonstrates that Yorta Yorta connections have never been washed away by so-called tides of history, and there has been a continuing process of political struggle. Finally it is against this background that Yorta Yorta and Koori history come together to question the values of justice and racial equality before the law, and to challenge the principles of a fair and just society for all Australians.

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