COLONIAL JURISDICTION, INDIGENOUS SOVEREIGNTY & LEGAL HYBRIDITY

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https://www.ecologyandsociety.org/vol18/iss3/art19/
(Figure 2)
JURIDIFICATION OF COLONIAL AUTHORITY

*R v Murrell (NSW SC, 1836)* per Burton J

- Aboriginal people are not law-bearing people: they have superstitions not laws
- Thus legally, Australia was unoccupied when the Crown claimed first title: *terra nullius*
- The Supreme Court does not recognise Aboriginal jurisdiction; only recognises the British rule of law
- Aboriginal people are subject to the universal Anglo-Australian law: they are ‘equal’ to settlers under the law, with the same rights & obligations
EMBERS OF RECOGNITION

Milirrpum v Nabalco & Cth (1971) FLR 141

- Yolŋu people have an “elaborate system of laws” constituting a “government of laws and not of men”

Mabo v Qld (No 2) (1992) 107 ALR 1

- British Crown did not acquire exclusive legal possession of all Australian land in 1788
- Aboriginal & Torres Strait Islander peoples continue to have rights to land consistent with their laws
- *Terra nullius* is a fiction.
POST-MABO CHALLENGE TO CRIMINAL JURISDICTION

Walker v NSW (1994) 16 ALR 321

- NSW legislature has power to make laws NSW, including over Aboriginal people.
- Criminal statutes apply to Aboriginal people due to principle of equality before the law.
- No analogy between Indigenous criminal sanctions and native title; no coexistence.
- Even if recognition of “customary law”, Crown has extinguished it.
NO RIGHT TO BE TRIED BY INDIGENOUS JURORS

- *Binge v Bennett* (1988) 13 NSWLR 578


No special rights to trial by Indigenous peers > Indigenous people are equal before the law thus subject to the same jury selection and criminal laws
BAIL AND SENTENCING

- *Re Application by Anthony [2004] NTSC 5*: “It is not permissible for a court to structure orders with a view to facilitating the unlawful infliction of traditional punishment.”

- *Bugmy (2013) HCA 37*: “An Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.”
AUSTRALIA’S INDIGENOUS PEOPLE ARE MOST INCARCERATED IN THE WORLD

Indigenous to non-Indigenous Imprisonment per 100,000: 2018

Rate of African American imprisonment per 100,000

https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528
INCREASED IMPRisonMENT OF INDIGENOUS WOMEN CF NON-INDIGENOUS WOMEN PER 100,000

Source: Australian Bureau of Statistics
DETAINING INDIGENOUS PEOPLE IS NOT NEW: COLONIAL CARCERALISM

1. **Palliative carceralism** – smoothing “dying pillow” on missions & government settlements (18th C onwards), coalescing with enforced displacement & sedentation around ration depots

2. **Protective carceralism** – controlling lives on Aboriginal protectorates (missions, settlements, homesteads, cattle stations) (from late 19th C)

3. **Welfare carceralism** – assimilation through welfare institutions and homes (from mid-20th C)

4. **Penal carceralism** – prisons, youth detention and police lock-up (late 20th C)
CONTEMPORARY CRIMINALISATION

- High levels of policing Indigenous people on streets, especially in regional and remote towns

- Indigenous people face greater levels of criminalisation at each stage: police contact, arrest, prosecution, bail refusal, sentencing to prison, parole refusal

- Notable over-representation for public order offences, traffic offences, justice breaches & property offences
INDIGENOUS YOUTH

Increasing Indigenous youth in detention at younger ages

- Greater profiling & policing, remand & custodial sentences since 1990s
- Torture in Northern Territory detention
  - Hooding
  - Shackling
  - Forced stripping
  - Freezing and sleep deprivation
  - Chemical gassing
DEATHS IN CUSTODY

Royal Commission into Aboriginal Deaths in Custody 1991 > deaths have increased following commission

No successful criminal prosecutions for an Aboriginal death in custody in Australian history.
Prisons and Corrections
Police
Anglo-Australian Courts
Youth Justice System
Child Services and Care Sector
Diversionary facilities and programs

The Hybrid Domain

Inter-cultural/law examples:

• Night Patrols
• Community Courts and circle sentencing
• Aboriginal Community Justice Reports
• Aboriginal legal services
• Law and Justice Groups and Plans (e.g. Kurdiji)
• Aboriginal Justice Agreements

Aboriginal Domain

On-place, place-centred and holistic
Law
Country
Elders
Ceremony
Land
Language

• Caring for Country
• Cultural Authority & Governance
• Cultural Health, Security and Wellbeing
Healing & Decolonisation

- Healing includes repairing the harms created by prisons for inmates & families and decolonising social structures

- Decolonisation replaces cycles of incarceration, dispossession & discrimination with cycles of wellbeing, self-determination and healing

- No prisons in Indigenous societies > arguments for prison abolition (Māori scholar Moana Jackson)
INDIGENOUS-OWNED JUSTICE & WELLBEING INITIATIVES

- **Aboriginal women’s centres**: e.g. Waminda, (south coast NSW) & Mudgin-gal (Redfern, Sydney)

- **Youth programs**: Aboriginal Girls Circle project (Dubbo); Clean Slate Without Prejudice (Redfern)

- **Yuendumu Women’s Night Patrols**

- **Community Justice Groups** (Qld) and **Law & Justice Groups** (NT) > place-centred interventions, strength-based & law-claiming