International Law in general

Settlement of English colonies in Australia. Inheritance of English law in New South Wales 1788 and 1828

A prisoner, Dugan, was serving a life sentence for the capital felony of wounding with intent to murder. While serving his sentence, he commenced an action in the Supreme Court of New South Wales alleging that he had been defamed by Mirror Newspapers Ltd. The Supreme Court dismissed the action and held that a prisoner serving a life sentence for a capital felony (an "attained felon") could not sue for a wrong done to him whilst under that sentence. He applied to the High Court of Australia for special leave to appeal. The application was refused. In its decision (*Dugan* v. *Mirror Newspapers Ltd* 53 ALJR 166) handed down on 19 December 1978, the High Court (Barwick CJ, Gibbs, Stephen, Mason, Jacobs and Aickin JJ, Murphy J dissenting) held that according to the law of England as it stood in 1788 and 1828, a prisoner serving a life sentence for a capital felony was a prisoner from suing in the courts until he had served his sentence or received a pardon, and that such law became applicable in New South Wales as a settled colony in those years, 1788 and 1828, as being suitable or reasonably applicable or appropriate to the conditions of the colony, and had not been abolished or otherwise affected by the operation of subsequent legislation enacted in New South Wales. In the course of his judgment, Gibbs J discussed the principles applicable to the inheritance and application of English laws in the colony of New South Wales (53 ALJR at 168):

> In considering whether the law with respect to attainder became part of the law of New South Wales, it is necessary to decide what that law would be in its application to the colony . . .
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> In a famous passage Blackstone stated the principles governing the adoption of English law in a settled colony. He said (1 *Comm* 107): "It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force . . . But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force." The same test has been adopted under s 24 of 9 Geo IV c 83 which applied to New South Wales the laws and statutes in force in 1828. The question has been said to be, was the law "suitable or unsuitable in its nature to the needs of the Colony", or could it "be reasonably applied in the existing circumstances

of the Colony": see *Quan Yick* v *Hinds* (1905) 2 CLR, 345 at pp 356, 367, 378. In applying these tests it would not be right, in my opinion, to ask whether the law in question was applicable to the conditions existing in a penal settlement. The ordinary rules relating to the adoption of English Law in a settled colony have been held to be applicable in relation to New South Wales: *Cooper* v *Stuart* (1889), 14 App Cas 286, at p 291. It would indeed be a poor birthright if the common law inherited by the settlers of New South Wales was only that applicable to the condition of persons living in an open penitentiary. In any case, "as the population, wealth and commerce of the Colony increase, many rules and principles of English law which were unsuitable to its infancy, will gradually be attracted to it": per Lord Watson in *Cooper* v *Stuart*, at p 292.

Sovereignty. Legal foundation of the Commonwealth of Australia. Status of the Aboriginal people. Whether Australia was terra nullius in 1770.

A claim by an Aboriginal, Coe, against the Commonwealth of Australia and the United Kingdom of Great Britain and Northern Ireland was brought before the High Court of Australia on an application to amend the statement of claim. The main facts and circumstances asserted in the statement were summarised by Gibbs J (with whom Aickin J agreed) in his judgment handed down with the decision of the Full Court on 5 April 1979 (*Coe* v *Commonwealth* 24 ALR 118), which resulted in the refusal of the application, as follows (24 ALR at 128–131):

(a) There is an aboriginal nation which, before European settlement, enjoyed exclusive sovereignty over the whole of Australia, and which still has sovereignty...

(b) Captain Cook wrongly proclaimed sovereignty and dominion over the east coast of Australia, and Captain Phillip wrongly claimed possession and occupation thereof, on behalf of His Majesty King George III, and the defendants are the successors in title, in Australia and the United Kingdom respectively, of that monarch; the Commonwealth now claims, and "has purported to exercise" sovereignty over Australia...

(c) Before European settlement, individual members, and tribes of the aboriginal people had proprietary and possessory rights in land, subject to usufructuary rights in others, but the whole of Australia was held by the aboriginal nation for the benefit of all its members...

(d) Australia was acquired by the British Crown by conquest, after which the aboriginal people and nation retained their rights in respect of their lands...

(e) The Commonwealth has enacted legislation which interfered with the free exercise of the religion of the plaintiff and of the aboriginal community and nation, *inter alia,* by allowing parts of lands of religious significance to be mined and by permitting the mining and export of uranium...

(f) The plaintiff and the aboriginal people are entitled at common law to the proprietary and possessory rights which they had prior to 1770,

unless those rights were taken away by "bilateral treaty, lawful compensation and/or lawful international intervention"...
(g) Since 1788 certain of the aboriginal people have been unlawfully dispossessed of their lands by Captain Phillip and other persons including servants and agents of the defendants...
It is clear that the allegations whose effect I have briefly stated in paras (a) and (b) above could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see *New South Wales v Commonwealth* (1975) 135 CLR 377 at 388; 8 ALR 1 at 28, and cases there cited. If the amended statement of claim intends to suggest either that the legal foundation of The Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: *Cherokee Nation v State of Georgia* (1831) 5 Pet 1 at 17. However, the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ (at p 16) of the Cherokee Nation, that the aboriginal people of Australia are organized as a "distinct political society separated from others", or that they have been uniformly treated as a state. The judgements in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.
The allegations summarized in para (d), *supra,* also do not raise an issue fit for consideration. It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European

> standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class: see *Cooper v Stuart* (1889) 14 App Cas 286 at 291 . . .
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> I must, however, add that nothing that I have just said is intended to suggest that the present action is properly constituted as to parties. In the first place, there is the question whether the appellant has any standing to sue for the relief which he seeks. That involves the questions whether there is a body of persons properly described as "the aboriginal community and nation of Australia" and if so whether rights and interests in lands in particular parts of Australia vest in or enure for the benefit of that "community and nation" and whether the appellant is entitled to sue on its behalf. I have already indicated that there is no aboriginal nation, if by that expression is meant a people organized as a separate state or exercising any degree of sovereignty. Secondly it is gravely doubtful whether the second defendant is a legal person capable of being sued, and if so whether it could be impleaded in an action such as this. In any case it is difficult to see how the second defendant could be regarded as a proper party.

The Court being thus divided, the decision of Mason J at first instance therefore stood. He had said in dismissing the application (18 ALR 592 at 595, 596):

> There is, in all this, no justification for the view advanced by the plaintiff's counsel that the plaintiff's case is that the aboriginal people constitute a community within the Australian nation and that this community is not itself a sovereign nation. No doubt this submission is designed to take advantage of the concept of a "domestic dependent nation" mentioned by Marshall CJ in *Cherokee Nation v State of Georgia* (1831) 5 Pet 1 at 17; 30 US 178 at 181; 8 L Ed 25 at 31. It is, however, a submission which is quite at odds with the case that is sought to be pleaded . . .
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> In so far as the plaintiff's case as pleaded rests on a claim of continuing sovereignty in the aboriginal people it is plainly unarguable. It is inconsistent with the accepted legal foundations of Australia deriving from British occupation and settlement and the exercise of legislative authority over Australia by the Parliament of the United Kingdom, involving the establishment by statutes of that Parliament of the colonial legislatures and subsequently the establishment of the Commonwealth of Australia and the States as constituent elements in the Federation. The plaintiff's counsel sought to derive support for the proposition that Australia was not *terra nullius* at the date of British occupation and settlement from the decision of the International Court in the *Western Sahara* case [1975] ICJ 12. Whatever that decision may say it has no relevance to the domestic or municipal law of Australia based on the Constitution which this Court is bound to apply.

On the appeal Jacobs J dissenting said (24 ALR at 132–3, 136):

> The proposed amended statement of claim seeks to raise a number of issues which can be regarded separately. The first part is apparently

intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia in the face of a sovereignty alleged to be possessed by the aboriginal nation . . . These are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged . . . Paragraph 8A appears also to be directed to the question whether under the law of nations Australia was *terra nullius* in 1770 and 1788. Further, it seeks to impugn the proclamations taking possession of New South Wales on behalf of the British Crown. This is not permissible in a municipal court . . .

I go now to the third part of the proposed statement of claim. This is in parallel with the second part. Whereas the second part is based upon the assumption that New South Wales was a settled colony of the Crown, the third part is based upon the allegation that the colony was conquered territory. I do not think that paragraphs in this alternative form ought to be struck out. The view has generally been taken that the Australian colonies were settled colonies; but, although that view was expressed in *Cooper v Stuart* (1889) 14 App Cas 286 and in *Randwick Municipal Council v Routledge* (1959) 102 CLR 54, there is no actual decision of this court or of the Privy Council to that effect. The plaintiff should be entitled to rely on the alternative arguments when it comes to be determined whether the aboriginal inhabitants of Australia had and have any rights in land .

Murphy J, also dissenting, said (24 ALR at 137–8):

Several obstacles to success were mentioned during argument: one was Mr Justice Blackburn's judgment in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; [1972–73] ALR 65, which is not binding on this court. It has been subjected to reasoned criticism (see John Hookey: "The Gove Land Rights Case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia?" (1972) 5 Fed L Rev 85). Another was *Cooper v Stuart* (1883) 14 App Cas 286. In that case, the Privy Council stated that the colony of New South Wales was not acquired by conquest, but was "practically unoccupied, without settled inhabitants or settled law at the time it was peacefully annexed to the British dominions" (at p 291). That view is not binding on us (see *Viro v R* (1978) 18 ALR 257; 52 ALJR 418). "Occupation" was originally a legal means of peaceably acquiring sovereignty over territory otherwise than by secession or conquest. It was a cardinal condition of a valid "occupation" that the territory should be *terra nullius* — a territory belonging to no one — at the time of the act alleged to constitute the occupation. "Territory inhabited by tribes or peoples having a social and political organization cannot be of the nature *terra nullius*" (see *Professor J G Starke: International Law,* 8th ed, p 185, and generally). The extent to which the international law of occupation is incorporated in Australian municipal law is a question which would arise for determination in the proceedings.

The plaintiff claims that the fact is that Australia was at (or during) the time of its acquisition inhabited by the aboriginal people who had a

complex social, religious, cultural and legal system and that their lands were acquired by the British Crown by conquest. There is a wealth of historical material to support the claim that the aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time to time in an established pattern; that they had a complex social and political organization; that their laws were settled and of great antiquity (for example, see *D C Biernoff: Land and Law in Eastern Arnhem Land: Traditional Models for Social and Political Organization,* 1975).

Independent tribes, travelling over a territory or stopping in certain places, may exercise a *de facto* authority which prevents the territory being *"terra nullius"* (see "Western Sahara" 1975 ICJ 39, in particular the Declaration of Judge Gros at p 75). There have been various estimates of the population of Australia in 1788, the most consistently mentioned number of aboriginal people at that date being 300,000 (see vol 1, *Encyclopaedia Britannica* 1969, p 795; vol 1, *A History of Australia,* C M H Clark, 1962, p 4; *The Modern Encyclopaedia of Australia and New Zealand* 1964, p 75; and *The Official Year Book of the Commonwealth of Australia,* No 23, 1930, p 696).

Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.

The plaintiff is entitled to endeavour to prove that the concept of *terra nullius* had no application to Australia, that the lands were acquired by conquest, and to rely upon the legal consequences which follow. It may rely, in the alternative, on common law rights which would arise if there were peaceful settlement. Whether the territory is treated as having been acquired by conquest or peaceful settlement, the plaintiff is entitled to argue that the sovereignty acquired by the British Crown did not extinguish "ownership rights" in the aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.

Aborigines. Proposed "treaty, covenant or convention of peace" with Australian Aboriginal people

In the Senate on 19 November 1979, the Minister for Aboriginal Affairs, Senator Chaney, said in answer to a question concerning advertisements proposing the negotiation of a Treaty, covenant or convention of peace with Australia's Aboriginal people which would protect their culture and land rights and detail conditions for the mining of Aboriginal lands, compensation for the loss of traditional lands and damage to traditional life (Sen Deb 1979, Vol 83, 2427):

> There is something of very great value in the proposition that there should be agreement between Aboriginals and the governments that concern them so much about what are appropriate measures which are to be taken on their behalf. Some concern has been expressed about the concept of a treaty because of the implication that one is in some way talking about more than one Australia or more than one nation within Australia. I would share that concern if the proposal meant that. The honourable senator may not know that last week the executive of the National Aboriginal Conference, which is the elected body representing Aboriginal opinion around Australia, dealt with the proposal for a treaty. It preferred to deal with it on the basis of an Aboriginal word 'makarrata'. The word suggests an agreement between people after a dispute.

On 20 November 1979 the Prime Minister, in answer to a question, wrote (HR Deb 1979, Vol 116, 3254):

> The concept of a Treaty of Peace and Friendship has been advanced by a group of non-Aboriginals called the Aboriginal Treaty Committee. A proposal for a treaty of commitment had been advanced earlier by the National Aboriginal Conference. However, that proposal is still very much in its embryonic stages . . . I have indicated my willingness to meet with the National Aboriginal Conference at an appropriate time to discuss the proposals should it wish to do so.

International law in municipal courts. Legislation giving effect to international conventions. Construction of statutes by reference to conventions

In the case of *R v Sillery* (30 ALR 653), decided on 17 June 1980, the Court of Criminal Appeal in Queensland was referred to the Convention for the Suppression of Unlawful Seizure of Aircraft for the purpose of determining whether a person convicted of hijacking an aircraft in Queensland should have been sentenced to a mandatory term of life imprisonment, and said (30 ALR 658 at 656):

> Finally, under this head of argument it was said that it was permissible to have regard to the Convention which is scheduled to the Act. In *Yager v R* (1977) 51 ALJR 367 at 372; 13 ALR 247 at 257, Mason J said that it was legitimate to resort to the terms of a Convention in the construction of a statute passed to give effect to it, in order to resolve an ambiguity. We were referred to Art 2 of the Convention, which I have set out above. It is impossible to say that a mandatory sentence of life imprisonment is other than a "severe penalty". The applicant, in my opinion, derives no assistance from the terms of the Convention.

Mason J had said in *Yager v R* (1977) 13 ALR 247, at 257:

> There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute (*Salomon v Commissioners of Customs*

> *and Excise* [1967] 2 QB 116 at 143–4; *The Banco* [1971] P 137 at 151, 157, 161). Still less is there any foundation for resorting to the provisions of such a convention for the purpose of qualifying or modifying an express definition contained in a statute.

The High Court of Australia considered the *Sea-Carriage of Goods Act* 1924 (Cth) in its decision in *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (32 ALR 609) handed down on 12 December 1980. An extract from the joint judgment of Mason and Wilson JJ (with whom Gibbs and Aickin JJ agreed) is as follows (32 ALR 609 at 618–9):

> It has been recognized that a national court, in the interests of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as the carriage of goods by sea, "in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation", to repeat the words of Lord Wilberforce in *Buchanan (James) & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152: see also *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 at 350.
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> It is important that we should adhere to this approach when we are interpreting rules which have been formulated for the purpose of regulating the rights and liabilities of parties to international mercantile transactions where great store is set upon certainty and uniformity of application.
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> To say this is not to assert that we should exclude from our consideration of the rules settled by an international convention the meaning which has been consistently assigned by a national court to words and expressions commonly used in the documentation by which international trade is transacted, when the convention, in seeking to regulate the rights and liabilities of parties to international trading transactions, uses those words and expressions. There is a high probability that when such words and expressions have been incorporated in a convention, they have been incorporated with knowledge of the meaning which has been given to them by national courts. Nor do the principles of interpretation of an international convention exclude recourse to the antecedent municipal law of nations for the purpose of elucidating the meaning and effect of the convention and the new rules which it introduces. It would be extremely difficult to interpret the new rules as if they existed in a vacuum without taking into account antecedent municipal law and the problems which its application generated. However, in resorting to antecedent municipal law we need to recollect that it is the language of the Hague Rules that we are expounding, the antecedent law providing a background for that exposition by enabling us more readily to gauge the sense and direction of the new rules which the convention introduces.

Constitutional law. Australian Constitution section 51 (xxix). Use of "external affairs" power by Commonwealth Parliament to give legislative effect to international agreements

On 21 March 1979, the Prime Minister, Mr Fraser, was asked whether the Government would be prepared to use the external affairs power of the Australian Constitution to introduce a Bill of Rights, and said (HR Deb 1979, Vol 113, 944):

> The present Government has set its face against using the external affairs power to expand the Commonwealth's power and influence at the expense of the States. The Government believes that this is a correct course to take because the founders of the Constitution certainly did not mean the external affairs power to be used in that way. We know that during the previous Administration the external affairs power was used for a number of purposes designed to expand Commonwealth power. We reject that approach. In addition, we have introduced a number of changes in the negotiation of treaties and accession to treaties and international conventions in terms of co-operation with the States, in terms of consulting the States and in terms of having their observers present during negotiations and consultations, at the same time seeking where possible to have federal clauses built in which are designed to protect the position of the States. I believe that that is the correct course to take in a federation.

(Note: for lists of international conventions, treaties, agreements or other arrangements which have been implemented in whole or part in Australian law through Federal legislation in the years 1970–1979, see the written answers of the Attorney-General in Sen Deb 1977, Vol 73, 2062–2063, and 1979, Vol 80, 1196–1197; on the use of section 51 (xxix) see also the dissenting judgment of Murphy J in *Dowal* v *Murray* (1979) 53 ALJR 134, at 140–141.)