

Chapter 2 – Aborigines and Torres Strait Islanders

Aborigines and civil liberties, rights and freedoms

There has been little, if any, examination of civil liberties from the perspective of the Aborigines and Torres Strait Islanders of Australia¹. That is surprising, if “life, liberty and the pursuit of happiness” as espoused in the US Declaration of Independence, are the high level aims of society. More so, because one of the first recorded white, male observations of Aborigines indicated they lived in greater happiness than did Europeans about 250 years ago.

"These people may truly be said to be in the pure state of nature, and may appear to some to be the most wretched upon the earth; but in reality they are far happier than ... we Europeans."

– Captain James Cook writing in his journal on the *HMS Endeavour* on 23 August 1770.



*Left: Depiction of Cook landing in Botany Bay, April 1770.
– illustration from 'Australia: the first hundred years', by Andrew Garran, 1886*

Cook, though, was exceptional. Most European-born observers for the next two centuries could not see the wood for the eucalypts. The style of life, liberty and social organisation Cook glimpsed in the pacific Aborigines was beyond the ken of men used to war and pestilence for thousands of years in Europe.

In Australia, the first white arrivals found a black race occasionally belligerent but mostly helpful, living naked and uninhibited, feeding themselves and their healthy children daily with little effort, and enjoying a climate that the English would kill for...and did.

Most newcomers saw the Aborigines as “barbarous savages”, as the pirate William Dampier observed after landing on the north-west coast of Australia in 1688. In the 1810s, Judge Advocate Ellis Bent described local Sydney Aborigines as “the most ugly

¹ From here on, just ‘Aborigines’, unless the comment relates to Torres Strait Islanders specifically.

savage set” he had ever seen and the “lowest in the scale of human existence, many of them little superior to baboons, tormenting beggars and expert thieves”².

Few saw excellence and a desired lifestyle which today many whites try to emulate in terms of a ‘sea change’. South of the Ovens River (Victoria) in 1824 explorer William Hovell (photo) decided:

“Those are the people we generally call “miserable wretches”, but in my opinion the word is misapplied... Their only employment is providing their food. They are happy within themselves; they have their amusements and but little cares; and above all they have their free liberty.”

– 29 Nov 1824 Hovell WH *Journal kept on the journey from Lake George to Port Phillip, 1824-1825*, JRAHS 7, 1921, 307-78 as quoted by Bill Gammage³



It took 150 years for the outside world to appreciate how easy was the life of Aboriginal women, relative to the life of white women: anthropologist Phyllis Kaberry thought Kimberley (WA) Aboriginal women worked less hard than (white) farmers’ wives, yet got food more certainly, according to Gammage⁴.

It is not the steady strenuous labour of the German peasant woman bending from dawn to dusk over her fields, hoeing, weeding, sowing, and reaping. The aboriginal woman has greater freedom of movement and more variety...the agriculturalist may be left destitute and almost starving if the (crops) fail or are destroyed by drought, flood, fire, locusts, or grasshoppers, as sometimes happens in China and in Europe. I never saw an aboriginal woman come in empty-handed, though in 1935 there was a drought.

– Kaberry PM, *Aboriginal Women: Sacred and Profane*, London 1939 p20 as quoted by Gammage

It is hard now, more than two centuries after the first contact between English whites and Australian blacks, to try to capture in 21st century language how the core of Aboriginal life was a scheme for living and being. Recalling how much – and the ways in which – they were mistreated helps us to appreciate how much local expertise we have lost, what we now don’t know, and how much we could possibly have learned from Aborigines if we had opened our ears, eyes, and minds. It seems that Aboriginal

² CH Currey, *The Brothers Bent* 1968 as quoted by Brent Salter in the U. Tasmania Law Review Vol 27 No 2 2008

³ *The Biggest Estate on Earth: How Aborigines Made Australia*, Bill Gammage 2011 Allen & Unwin ISBN 9781742377483

⁴ Gammage, *ibid*

entities lived in relative harmony, with frequent cross-‘tribal’ group meetings for what we would call religious gatherings and parties: the Aboriginal word “corroboree” carries both elements of meaning.

Between families, within groups, across what are now suburbs and regions of Australia, there was cooperation at important times. We can surmise that spring

brought people together because food was bountiful. For major gatherings, such as the bogong moth corroborees around the mountains just south of where Australia’s Parliament stands, feasting on the plump moths went on for weeks upon weeks in early summer after wattles and wildflowers had coloured the plains all around in brilliant yellows as well as white, green and gold.



Left: depiction of a Aboriginal gathering at Newcastle NSW in 1818.

Meeting in large numbers, with different families and tribes present, speaking each other’s language, exchanging songs and stories must have been like a local ‘United Nations’ session played out around the highest mountains in Australia. There must have been a glue – what we might call protocols or guidelines or lore or ‘law’ – that governed how individuals and groups would treat each other.

If the ‘rules’ had been written down, we’d know today what the lost songs have forgotten, the niceties and nuances that allowed people to balance one Aborigine’s liberty against another’s freedom, one tribe’s cultural practices against those of another tribe only seen and interacted with once a year. By not knowing what has been forgotten, we are truly ignorant of a societal structure that apparently forged bonds between regions separated by large distances, and allowed goods to be traded from one corner of what we call a ‘continent’ to the other.

The famous anthropologist Claude Levi-Strauss called the Australian Aborigines ‘intellectual aristocrats’ among early peoples, based on outstanding features of traditional Aboriginal Society such as sophisticated religion, art, social organisation, an egalitarian system of justice and decision making, complex, far-reaching trade networks, and the demonstrated ability to adapt to, and survive in, some of the world’s harshest environments⁵.

⁵ http://austhrutime.com/intellectual_aristocrats.htm, MH Monroe quoting Levi-Strauss in Flood, 2004 Josephine Flood, *Archaeology of the Dreamtime*, JB Publications, 2004

Unfortunately, those who first had the chance to observe and record in writing the culmination of some 40,000-plus years of indigenous civilisation and unparalleled achievement were blind to what they could not see.

Even Captain Cook showed some distaste for nakedness on the beach back in 1770, when he formally claimed the Eastern coast of the continent (not the West: Cook believed the Dutch had prior claims). Here is Cook's formal claiming, from his diary⁶:



Above: Stylised painting of Cook's possession declaration.

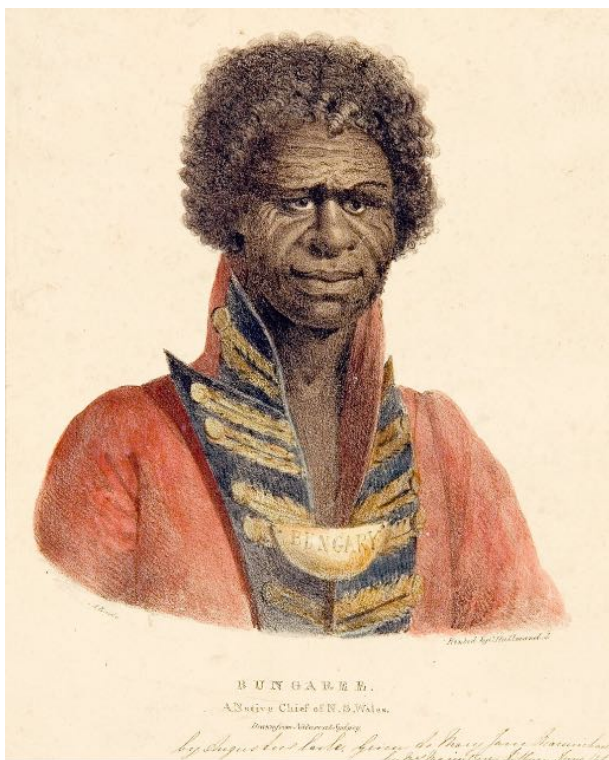
Having satisfied myself of the great Probabillity of a Passage, thro' which I intend going with the Ship and there^{for} may land no more upon this ~~Western~~ Eastern coast of New Holland and on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators ~~and as such they may lay claim to it as their property~~ but the Eastern Coast from the Latitude of 38° South down to this place I am confident was never seen or viseted by any European before ^{us and} ~~therefore by the same Rule belongs to great Brittan~~ Notwithstanding I had in the Name of his Majesty taken posession of several places upon this coast I now once more hoisted English Coulers and in the Name of His Majesty King George the Third took posession of the whole Eastern Coast from the above Latitude down to this place by the Name of New South ^{Wales} together with all the Bays, Harbours Rivers and Islands situate upon the ~~same~~ ^{said} coast after which we fired three Volleys of small Arms which were Answerd by the like number ~~by~~ ^{from} the Ship this done we set out for the Ship but were some time in geting on board on accout of a very rappid Ebb Tide which set ^{NE} out of the Passage ~~away to the NE~~ ever sence we came in among the Shoals this last time we have found a Moderate Tide the Flood seting to the NW and Ebb to the SE. at this place it is High-water at the Full and Change of the Moon about 1 or 2 o'Clock and riseth and falls upon a perpendicular about 10 or 12 feet.

⁶ <http://southseas.nla.gov.au/journals/cook/17700822.html> – excerpt from 22 August 1770 (Cook's date)

We saw on all the Adjacent Lands and Islands a great number of smooks a certain sign that they are Inhabited and we have dayly seen smooks on every part of the coast we have lately been upon —

Between 7 and 8 oClock in the Morning we saw several naked people, all or most of them women, down upon the beach picking ^{up} Shells, &C^a they had not a single rag of any kind of Cloathing upon them and both these and those we saw yesterday were in every respect the Same sort of people we have seen every where upon the Coast; two or three of the Men we saw Yesterday had on pretty large breast plates which we supposed were made of Pearl Oysters Shells this was a thing as well as the Bow and Arrows we had not seen before —

– from Cook’s journal 22 August 1770 on ‘Possession’ Island, known as Bedanug or Bedhan Lag by the Kaurareg people, who are the real possessors of the island.



From 1788, when the first fleet settled in Sydney Harbour, European settlers tried to 'civilise' Aborigines, including by making them wear clothes and attend church. There were other, more “benevolent” attempts to help, albeit by assimilation: in January 1815 Governor of New South Wales Lachlan Macquarie granted land to about 100 people in 16 families of the Broken Bay tribe, led by Bungaree (photo: Augustus Earle painting).

The “granting” of land to its true owners predates by about 160 years developments in the 20thC. The grant was to encourage Aborigines to create a European style farm, and to catch fresh fish, because producing enough fresh food was always the top priority for early colonial Governors⁷.

The Native Institute was set up in 1814, also by Governor Macquarie, to educate Aboriginal children in the European way. As Governor Phillip had tried with Bennelong and Colebee (two Aboriginal men who were taught the language and culture of white settlers) over 30 years before, Macquarie believed that if you educated some of the Indigenous population then they would take back what they had learned to their communities⁸.

⁷ <http://thestringer.com.au/bungaree-keeping-place-middle-head-nsw-6435#.VS3hvx8x1>

⁸ From Swirk, interactive schooling: www.skwirk.com.au/p-c_s-56_u-426_t-1075_c-4149/WA/10/Impact-of-European-settlement-on-Indigenous-people/_tb-v

But there was already in place an enormously strong community, or group of communities: it was just different, operating under rules and regulations, liberties and rights, that the clothed and closeted new arrivals were too ignorant to appreciate.

The word 'community' now identifies Aboriginal groups by kinship, language or belonging to a particular place or 'country'. In the richer communities along what is now the Murray River system, families lived in communities numbering probably up to a thousand or more.

In prime coastal areas – around the Sydney and Perth areas and along the Barrier Reef – smaller numbers of families comprised communities of maybe up to half that number. In remote areas, communities were smaller, with maybe only one family group numbering 20 or so, or several family groups totalling a few hundred.

Each (Aboriginal) country was

Surrounded by other countries, so that across the continent and on into the sea, there is a network of countries. No country is ruled by any other, and no country can live without others. It follows that no country is the centre towards which other countries must orient themselves, and, equally, that each is its own centre.

– Rose, DB, *Nourishing Terrains*, Canberra 1996, p38 as quoted by Gammage⁹

Aborigines had more than 50,000 years to develop their culture before Europeans arrived in Australia, as archaeological and DNA research has shown (by contrast, the English date their pre-history back about 15,000 years). While the British Isles are smallish and mostly homogeneous in ancestry and climate, in the massive southern continent which became 'Australia', Aborigines – possibly migrating across a land bridge from Asia – had to adjust to conditions ranging from rainforest to desert, from tropical heat and growth to winter ice and snow.

They were – and probably still are – very good at adapting, for example even when an ice age climate dramatically altered the landscape, and drastically reduced traditionally available food¹⁰. Seen as unchanging and ingenuous to unsophisticated outsiders, Aborigines have actually been masters of adaptation, laying claim to the longest continuous cultural history in the world, according to Flood.¹¹

Commentators in recent years have pointed to Aborigines also having a sophisticated religion, complex social organisation, art, and a knowledge of astronomy. Early

⁹ Gammage, *ibid*

¹⁰ *First Footprints*, ABC TV: <http://www.abc.net.au/tv/programs/first-footprints/>

¹¹ Flood, *op cit*

colonists commented on their agriculture, aquaculture, mining (and trading) of ochre and stone, and engineering in the form of fish traps or barriers. They built semi-permanent or permanent huts in small 'villages' where the climate and food supply were reliable enough to sustain such settlements, but early Europeans failed to notice that the clusters existed as communities.



Above right: Fish traps at Brewarrina in northern NSW are thought to be at least 40,000 years old, possibly the oldest human-made structure. on earth.

The complexity of the religion, mythology and ritual was at an even higher level than first appears, because of deeper symbolism and meaning known only to initiated men. In the most sacred rituals carried out by the fully initiated men, song, rather than narrative, is the medium used to tell the stories. Key words or references were used, instead of full descriptions. Any man not fully initiated, or women and children, would not appreciate the full meaning even if they overheard the songs, as the associations of each word must be known to fully comprehend the story being told. In north-eastern Arnhem Land a word used in everyday speech can have several sacred equivalents with slightly differing meanings. As well there is a further series of 'singing' words'.¹²

Customary law

The stories and the songs comprised customary law, which embraced both liberties and responsibilities. Today we have law libraries, journals and computers for the task; ancestral Aborigines had mental shelves and songbooks of the mind, available not through reference but recall.



Lionel Murphy (photo), when a High Court judge and after being Attorney-General of Australia, had this to say about the Aboriginal approach to a fair go:

*Two hundred years ago Europeans came to a country inhabited by peaceful people living in harmony with their environment, with an ancient system of law and a highly developed system of social justice. They had no need of the goods, the law, or the ideas of the invaders*¹³.

¹² Flood, op cit

¹³ LK Murphy, "The Responsibility of Judges", opening address for the First National Conference of Labor Lawyers, 29 June 1979, in G Evans (ed) 'Law Politics and the Labor Movement', Legal Service Bulletin, 1980 Clayton Victoria

Customary law is a set of beliefs, customs and traditions, a system of laws and practices in place for some 40,000 years before European settlement in Australia. It can vary from tribe to tribe, clan to clan, community to community, and from family groups to family groups. It is an intricate, unique system of laws that regulate Aboriginal societies in Australia. Aborigines today point out that customary law is independent of the Australian common law, and is many thousands of years in the making¹⁴.

Customary law remains the jurisdiction of the traditional owners of a particular area. You can only fully appreciate it if you understand the complexities and structures of the particular Aboriginal society. For example, issues such as the right to speak for a particular section of country, permission to cross borders, traditional blessings, entry to places of cultural significance and the like are paramount in many Aboriginal societies, but misunderstood by many non-Aboriginal Australians¹⁵.

If these rules and regulations were printed, we might name them the Bible, or the Koran...but for Aborigines, they were never printed. They are named the Dreaming, which is the collection of 'instructions', or the Dreamtime, which was the period when many of the mythical stories (parables, verses) are set. Bill Stanner describes the Dreamtime as the "everywhen"¹⁶.

Like the Koran and Sharia Law, the Dreaming binds the behaviour of Aborigines in both a religious and secular sense. Non-Muslims find it difficult to understand a Muslim's binding ties to the Koran: Europeans until relatively recent decades have made no effort to understand the rules and regulations for local life, liberty and the pursuit of happiness that are integral to the Dreaming. For example:

In South Australia, the 'wealth and variety' of Ngarrindjeri resources was affirmed by 'the fact that twenty types of food were forbidden to young men, and thirteen types were forbidden to boys...these...were considered relatively easy to obtain, so were reserved for older, less vigorous people.'

– Jenkin, G, Conquest of the Ngarrindjeri, Adelaide 1979, p14 as quoted by Gammage

Further,

"Each tribe had its own boundary, which was well known, and none went to hunt, etc., on another's property without an invitation, unless they knew they would be welcome, and sent special messengers to announce their arrival. The Turrbal or Brisbane tribe owned the country as far north as the North Pine River, south to the Logan River, and inland to Moggill Creek. This tribe all spoke the same language, but, of course, was divided up into different lots,

¹⁴ Australian Law Reform Commission Report 31: <http://www.alrc.gov.au/inquiries/aboriginal-customary-laws>

¹⁵ <http://dakibudtcha.com.au/Turrbal/index.php/culture/>

¹⁶ See 1968 Boyer lecture

who belonged some to North Pine, some to Brisbane, and so on. These lots had their own little boundaries. Though the land belonged to the whole tribe, the headmen often spoke of it as theirs. The tribe in general owned the animals and birds on the ground, also roots and nests, but certain men and women owned different fruit or flower-trees and shrubs.”¹⁷.

The Dreaming has different meanings for different Aboriginal people. It is a complex network of knowledge, faith and practices that derive from stories of creation, and it dominates all spiritual and physical aspects of Aboriginal life.

The Dreaming sets out the structures of society, the rules for social behaviour and the ceremonies performed to maintain the life of the land. It governed the way people lived



and how they should behave. Those who did not follow the rules were punished. In essence, the Dreaming revolves around the land, the sky and the mystery of life forces that interact between the two and affect the people in between. In Aboriginal society, people did not own the land: it was part of them and it was part of their duty to respect and look after mother earth¹⁸. Selling or leasing the land was not only not possible, it was literally unthinkable.

Above: Artist's impression of the signing by John Batman of a "Treaty with the Native Chiefs, 6 June 1835" purporting to secure legal rights over what is now Melbourne and surrounds by giving local Aborigines blankets, knives, scissors and flour. The "treaty" was quickly repudiated by the colonial government in Sydney.

Aborigines were also organised in a highly-sophisticated way to avoid inbreeding. Anthropologists use 'moiety' to describe the practice, in nearly all tribes in Australia, of dividing each tribe into two groups for social and ceremonial purposes. It was usual for people to marry someone from outside their own moiety. The children may belong either to the moiety of the father or the mother, depending on whether the local group recognise descent through the mother (matrilineal) or the father (patrilineal).

This system is at least partly totemic in nature, as it is often extended to include other animate and inanimate things, as well as the people. In some areas the moieties can be further divided into sections and sub-sections, where special marriage rules apply, as well as grouping various relatives in different ways.

¹⁷ Constance Petrie, Tom Petrie's *Reminiscences of early Queensland* 1904, p117)

¹⁸ <http://australianmuseum.net.au/indigenous-australia-spirituality#sthash.T6AsKR9R.dpuf>

To the Aborigines, the system of social organisation was known to every member of every tribe, but to outsiders it is often extremely complicated and riddled with hidden twists and contradictions, making it difficult to master. The system provides yet another indication that these were not simple primitive savages¹⁹.

*Balance and continuity were reciprocal: no species should threaten or overrun another, and totem guardians were bound to prevent it...*²⁰

Whenever people trade, there must be 'rules' that both sides abide by, even if they are unwritten. And Aborigines were great traders, swapping ochre and the narcotic pituri plant, for example, throughout the length and breadth of Australia: Indigenous people also traded extensively with visitors from the islands to the north.

*Aboriginal people were in contact with other cultures, sharing ideas and skills long before permanent European occupation in 1788. Many Indigenous communities have been influenced by contact with Macassans, Melanesians, Dutch, English, Portugese navigators and traders, as well as other Aboriginal communities and Torres Strait Islanders. For over 300 years, Macassan traders from Sulawesi (now part of Indonesia) visited the coast of northern Australia to fish for 'trepang' (sea slug), a delicacy in cooking. The cultural exchange can be seen in rock and bark paintings, emblems and objects used in ceremonies, the introduction of dug-out canoes and some Macassan words in Aboriginal languages. Images of Macassans were painted in rock and bark. Tobacco was introduced to northern Australia. There are pipes from this area made after the Macassan style but with local designs.*²¹



Above: Wonggo (from Caledon Bay, Gulf of Carpentaria), drawing of a Makassan prahu.
Photograph by DF Thomson, courtesy of Mrs DM Thomson and Museum Victoria .
Note: Macassan and prau or prahu are other spellings of the two terms.

¹⁹ MH Munro: http://austhrutime.com/australian_aboriginal_tribes.htm, sourced 1015 130315

²⁰ Gammage, *The Biggest Estate on Earth*, p285, 2011, Sydney

²¹ <http://australianmuseum.net.au/indigenous-australia-cultural-heritage>

Indigenous ‘multiculturalism’

It’s easy to forget how big Australia is, and the distances across which the first peoples ranged, traded, communicated and disseminated their ideas of different approaches to liberties and rights, rules and responsibilities.

"The population of Australia's Aboriginal and Torres Strait Islander communities is extremely diverse in its culture with many different languages spoken. Think of the Kimberley region of Western Australia...if you travel through the Kimberley with its large Aboriginal population and the diversity of people within this region, it's just like travelling through Europe with its changing cultures and languages."

– Dot West, Chairperson, National Indigenous Media Association of Australia, Boyer Lectures, 1993²².

The Kimberley is about one-quarter of the size of Western Australia, which is about one-third the size of Australia. One of the indicators of trade across these distances was the speed at which diseases travelled and killed people without any natural immunity, because they had been isolated for tens of thousands of years.

Epidemic diseases like measles, smallpox and tuberculosis raged across Australia soon after the First Fleet arrived. Smallpox killed most of the Aborigines who died over the next century, accounting for about 90% of an estimated population across the continent of some 750,000 people²³. Aborigines also had no resistance to venereal disease, which ravaged communities living near white settlements.

What the white man’s law did to Aborigines

Detailed analysis of English law brought to Australia, and the Aboriginal interaction with it in the first 100 years or so, belongs to another book. But there are milestones worth recording to illustrate how Aborigines were always outside the justice pendulum’s swing, with few or no ‘European’ rights and liberties as we know them.

Traditional Aboriginal society had councils of elders and what we would today call a corporate decision-making process. English law came in on the coat tails of the colonists, so that the rights and processes established by the 1215 Magna Carta and the Bill of Rights 1689 were brought from Britain by the colonists²⁴. In theory.

In reality, from the beginning of white settlement, the colonists treated Aborigines as inferior beings (see Judge Advocate Ellis Bent’s quote, earlier in this chapter). They were frequently shot and killed, without anyone facing formal charges. A settler

²² <http://australianmuseum.net.au/indigenous-australia-cultural-heritage#sthash.NbYFTfHP.dpuf>

²³ Glynn, Ian; Glynn, Jenifer (2004). *The life and death of smallpox*. Cambridge University Press. pp145–146. ISBN 0-521-84542-4

²⁴ https://en.wikipedia.org/wiki/Human_rights_in_Australia

merely had to claim self defence or provocation to be believed, and therefore either not be charged with a crime, or be acquitted. In July 1805 Judge Advocate Richard Atkins gave a legal 'Opinion on the Treatment to be Adopted towards the Natives'. Finding that Aboriginal people could not present evidence in a criminal court, he suggested the only course was to 'pursue them and inflict such punishment as they merit'²⁵.

On this basis Governor Philip Gidley King used his power to exile resistance leaders like Bulldog and Musquito, who were sent to Norfolk Island in 1805 and again transported, in 1813, to Van Diemen's Land (Tasmania). Governor Lachlan Macquarie sent Dual, who was captured at Appin in 1816, to Van Diemen's Land, but reprieved him two years later. Tristan Maamby, on the other hand, chose self-imposed exile when he jumped ship and ran away in Rio de Janeiro in 1807 to avoid being taken to London by his guardian, Samuel Marsden, the Anglican cleric and notorious horse-riding magistrate. Tristan returned to Sydney seven years later with Captain John Piper, but died soon after landing²⁶.

The theory was that all people were treated equally – and signs were posted prominently to try to get the message across to people who did not speak English – but the reality was quite different. Aborigines received summary justice, usually by gunshot; every reason possible was explored to absolve white men who killed Aborigines.

Right: Equality before the law was the message of this proclamation, but the reality for Aborigines was different.

*Massacres of Aborigines were still occurring more than a century later.
– State Library of Victoria illustration.*



²⁵ R. Atkins, 'Opinion on Treatment to be Adopted Towards the Natives', 20 July 1805, Historical Records of Australia, series 1, vol 5 at 502-504.

²⁶ http://www.sl.nsw.gov.au/events/exhibitions/2010/mari_nawi/04_exiles/index.html 1540 15041

Brent Salter has reported on research by Bruce Kercher which shows that, in the years following settlement in Sydney “criminal courts were comprised mostly of amateur judges and military members, governed by military rules and functioned without legal assistance”²⁷. The first settler charged with killing an Aborigine was Edward Lutrell in 1810, who was charged with shooting and wounding Tedbury. Lutrell was acquitted.

The first Aborigine charged, Daniel Mow-watty, was tried and executed in 1816 for raping the daughter of a convict Hannah Russel, near John Macarthur’s Parramatta farm. But trials, rather than summary ‘justice’ immediately dispensed, were the exceptions for Aborigines for decades to come. In 1820, the first European was convicted for murdering an Aborigine, Burragong, a native chief from the Newcastle area who was known as King Jack. John Kirby, an escaped prisoner, was sentenced to death for the killing (John Thompson, another escaped prisoner, was acquitted)²⁸.

It was the early 1820s before judgements emerged with legal reasoning attached, as now. In 1823, in the case of *R v Hatherly and Jackie* (1822) NSW Sel Cas (Kercher) 734, the first Indigenous person was tried for murdering a settler (both the white Hatherly and the Aboriginal Jackie were acquitted): presumably, until then, “rough justice” was dispensed by killing any Aboriginal thought to have killed a white man.

Individual Aborigines were murdered, while massacres – nowadays well recorded – occurred intermittently. As the 19th century progressed, the deathly interactions between settlers and Aborigines pressed inexorably outwards from the major settlements, causing confrontations often little reported in places where the writ of law was only finely traced, judicial personages were rare visitors, there were no reporters or newspapers, and the advancing settlers were literally “frontiers-men”.

The discovery of gold, which rippled around the continent from about mid-century, exacerbated the over-running of Aboriginal land, and rights.

To the Aboriginal tribal person, the land they were born in is part of them, their spirits were believed to reside in places like sacred waterholes or other places when a person died until it entered the body of a pregnant woman and was reborn as a baby. So the lack of the possibility of acquisition of a neighbour's territory by any tribe removed an excuse for war that was present in other parts of the so-called civilised world. Even when the tribes did have wars, there were often stylised substitutes for outright war that minimised death or injury. Another case in which they had customs, that would seem to be more civilised than those of the rest of the

²⁷ ‘For Want of Evidence’: Initial Impressions of Indigenous Exchanges with the First Colonial Superior Courts of Australia: Law School, University of Tasmania Law Review Vol 27 No2 2008

²⁸ *R v Kirby and Thompson* (1820) NSW Sel Cas (Kercher) 661

*world, where wars have always been fought over anything that a powerful leader considered a good excuse to gain extra territory*²⁹.

In Victoria, regulating Aborigines began formally in 1860 with a Board of Protection being set up. Two years later, it was responsible for seven reserves and 23 small camping places. The Governor of Victoria could order the removal of any child to a reformatory or industrial school. The Protection Board could remove children from station families to be housed in dormitories. By 1869 about 50% of the Victorian Aboriginal population was living on missions or reserves. The first Aborigines Protection Act – a euphemistic legal concept mirrored around Australia – was introduced in 1869 in Victoria, as an *Act to Provide for the Protection and Management of the Aboriginal Natives of Victoria*, which was later transformed into the *Aborigines Protection Law Amendment Act 1886*. This was “the first statute to legislate for the differential treatment of ‘full-blood’ and ‘half-caste’” reflecting the then-current thinking about ‘race’ and skin colour.³⁰

Aborigines, even after a century of settlement, were more accustomed to talking than fighting as they traced a retreat into the far-flung corners of Australia and, particularly, away from the coasts towards the dry interior. They had no weapons comparable to those of the settlers, and the Aboriginal sense of land stewardship and responsibility was alien to the settler concept of ownership and exploitation. The English law and individual rights and liberties were of no use to Aborigines for another century...and perhaps little use, even until today, in many respects.

Federation of the states in 1901 was a decidedly mixed blessing for Aborigines, who were not part of the conferences and debates leading up Australia becoming one entity...again, as it had been in 1788.

It is unsettling to imagine how the Australian nation today might be different if the wisdom of Aboriginal stewardship of the land mass, and the gentler, more harmonious approach to life, had been woven into the foundation document, the Constitution.

As British citizens before federation, Aborigines had notionally been entitled to vote, but few actually did. Some Aborigines even lost the right to vote under the Commonwealth Franchise Act in 1902. It gave women a vote in federal elections, but excluded Aborigines, unless they had a right to vote previously (except in South Australia, where they were still entitled to register for the state and therefore also receive federal voting rights).

The *Commonwealth Electoral Act 1962* gave Aborigines the right to register and vote, but voting was not compulsory. Full voting rights came when Aboriginal and Torres

²⁹ MH Munro http://austhrutime.com/australian_aboriginal_tribes.htm

³⁰ https://wikieducator.org/IND/Protection_Acts

Strait Islander people were required to register on the electoral roll in 1984...so that, officially, the first peoples only received a prime right two centuries after English settlement.



It was not until 1934, about 150 years after settlement by Europeans, that an Aboriginal Australian made the first appeal to the High Court and succeeded. Dhakiyarr (photo) was found to have been wrongly convicted of the murder of a white policeman, for which he had been sentenced to death; the case focused national attention on Aboriginal rights issues. Dhakiyarr disappeared upon release: some people think he was murdered³¹.

National Archives of Australia photo

Who is an Aborigine or Torres Strait Islander?

Australia has used lineage, blood quantum, birth and self-determination to determine ethnicity. Until the 1970s, Aboriginal children under 12 who had less than 25% Aboriginal blood were considered "white" and were often removed from their families. The difficulty of classifying people is summed up in this tale:

In 1935, an Australian of part Indigenous descent left his home on a reserve to visit a nearby hotel where he was ejected for being Aboriginal. He returned home but was refused entry to the reserve because he was not Aboriginal. He attempted to remove his children from the reserve but was told he could not because they were Aboriginal. He then walked to the next town where he was arrested for being an Aboriginal vagrant and sent to the reserve there. During World War II he tried to enlist but was rejected because he was an Aborigine so he moved to another state where he enlisted as a non-Aborigine. After the end of the war he applied for a passport but was rejected as he was an Aborigine; he obtained an exemption under the Aborigines Protection Act but was now told he could no longer visit his relatives as he was not an Aborigine. He was later told he could not join the Returned Servicemens Club because he was an Aborigine³².

In 1983 the High Court defined an Aboriginal or Torres Strait Islander as "a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives". Judge Merkel in 1998 defined Aboriginal descent as technical rather than real –

³¹ <http://web.archive.org/web/20100505045130/http://uncommonlives.naa.gov.au/life.asp?IID=2>

³² Spencer, Stephen (2006). *Race And Ethnicity: Culture, identity and representation*. pp33–34: Routledge. ISBN 1-134-26639-1.

thereby eliminating a genetic requirement. This decision established that anyone can classify him or herself legally as an Aboriginal, provided he or she is accepted as such by his or her community³³.

Until 1967, official Australian population statistics excluded "full-blood aboriginal natives". "Half-caste aboriginal natives" were shown separately up to the 1966 census, but since 1971 there has been no provision on the forms to differentiate 'full' from 'part' Indigenous or to identify non-Indigenous persons who are accepted by Indigenous communities but have no genetic descent³⁴.

In 1967 a referendum changed the Australian Constitution so as to be able to legislate for Aboriginal and Torres Strait Islander people, and 90.77% of eligible Australians voted 'yes' to count Aboriginal and Torres Strait Islander Australians in the national census of the population and to give the Commonwealth Government power to make specific laws for Indigenous people³⁵.

For Aborigines, it took 150 years for the penny to drop that they would have to fight for rights to land that was already theirs, always had been. In fact, a quest for land rights followed quite some time after Aborigines started to ask for a fair go, in general.

A movement for Indigenous rights in Australia began in the 1920s when the first Aboriginal political organisations formed: Fred Maynard founded the Australian Aboriginal Progressive Association (AAPA), but it lasted only a few years, to 1927.

*The group demanded children no longer be separated from their families or indentured as domestics and menial labourers, and should have access to public schools. It protested the revocation of north-coast farming reserves; advocated that all Aboriginal families should receive inalienable grants of farming land within their traditional country and that Aborigines should control any administrative body affecting their lives.*³⁶

In 1932, Aboriginal activist William Cooper, who had been expelled from Cummerooonga for opposing poor conditions, established the Aborigines League in Melbourne. The aims of these associations initially were full-citizenship and equality. Their radical demands were made at a time when the accepted belief in the general community held that Aborigines were inferior and a dying race. In 1937 Cooper proposed that the 150-year anniversary of the 1788 "British invasion" be recognised by Aboriginal people as a "Day of Mourning".

³³ <http://www.alrc.gov.au/publications/36-kinship-and-identity/legal-definitions-aboriginality>

³⁴ <http://web.archive.org/web/20120207071332/http://www.aph.gov.au/LIBRARY/pubs/rn/2000-01/01RN18.htm>

³⁵ <http://lryb.aiatsis.gov.au/activism.html>

³⁶ <https://www.findandconnect.gov.au/ref/nsw/biogs/NE00032b.htm> Naomi Parry 25 Sept 2013

An all-Indigenous body, the Aborigines Progressive Association (APA), formed in 1937 in NSW with Jack Patten as president and William (Bill) Ferguson as secretary.³⁷ They took up the idea of the 'Day of Mourning' (photo shows 1938 version) and produced a manifesto, entitled 'Aborigines Claim Citizenship Rights', which was published. The opening words of the manifesto were:



“This festival of 150 years so called ‘progress’ in Australia, commemorates also 150 years of misery and degradation imposed upon the original native inhabitants by the white invaders of this country...you came here only recently and you took our land away from us by force. You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim as white Australians, to be a civilised, progressive, kindly and humane nation”

At a time when it was very difficult for Aborigines to be political activists, this was a dramatic statement. Patten and Ferguson subsequently met with Prime Minister J.A.Lyons and presented him with a 10-point program for Aboriginal equality. Their program dealt with the areas of education, housing, employment, land purchases and social welfare.

But rigid controls on the Aboriginal reserves were not relaxed and inculcating white values and norms prevailed. This training for assimilation, which Indigenous people considered a form of cultural genocide, became official policy, leading to increasing protest by Aboriginal people during the 1960s.

By that decade, sporadic activism and resistance had solidified into a wider movement. In 1965, Charles Perkins, one of the first Aboriginal university graduates and later the first Aboriginal head of a federal government department, led a group of Aborigines and supporters on a 'Freedom Ride', a bus tour of outback NSW³⁸.

³⁷ http://indigenoustrights.net.au/organisations/pagination/aborigines_progressive_association

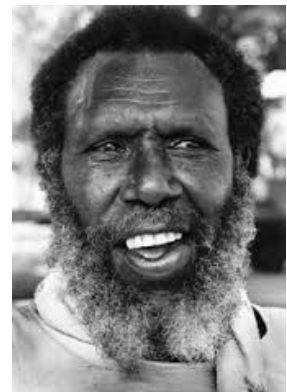
³⁸ <http://lryb.aiatsis.gov.au/activism.html>

In 1966, the NSW government set up a Parliamentary Committee to investigate Aboriginal welfare. The APA was asked to make a submission. Prominent active members of the again-reformed APA were Joyce Clague (photo, with her husband, Colin), Dulcie Flower, Harriet Ellis, Ray Peckham, Chicka Dixon and Ken Brindle.³⁹



Meanwhile in the top of Australia, the Yolgnu people of Yirrkala in north-east Arnhem Land in 1963 presented a bark petition combining traditional bark painting with text typed on paper to the Commonwealth Parliament. The petition was a response to the threat to their country posed by bauxite mining. When the petitions failed to stop the mine, the Yolngu turned to the Northern Territory Supreme Court where hearings of the Gove Land Rights Case began in 1968. Although the case failed in court, the Yirrkala community helped pave the way for the recognition of Indigenous rights in Australian law.

The landmark decision of the High Court of Australia in *Mabo v The State of Queensland* (1992) 175 CLR 1 brought the issue of Aboriginal customary law to top of mind for all Australians, black and white. Before then, customary law was only relevant in Aboriginal communities in the outback and remote areas.⁴⁰



Eddie Mabo

On Australia Day 1972, activists erected a tent – the ‘Aboriginal Embassy’ – on the grass opposite the entrance to what is now Old Parliament House in Canberra. They vowed to remain until the government granted Aboriginal land rights. In 2012 the tent embassy celebrated its 40th anniversary...and there it remains (2018).

The Hawke government set up the Aboriginal and Torres Strait Islander Commission (ATSIC), a representative body of Aboriginal and Torres Strait Islanders, in 1990. In 2004, the Howard government disbanded ATSIC, leaving Aborigines without any elected representatives directly deliberating on Aboriginal issues.

³⁹ http://indigenoustrights.net.au/organisations/pagination/aborigines_progressive_association

⁴⁰ <http://lryb.aiatsis.gov.au/activism.html>

In 1999 the Australian Parliament passed a motion of reconciliation drafted by Prime Minister John Howard in consultation with Aboriginal Senator Aden Ridgeway. It described the mistreatment of Indigenous Australians as the most "blemished chapter in our national history"⁴¹.

On 13 February 2008, Prime Minister Kevin Rudd issued a public apology to members of the Stolen Generations – Aboriginal children who had been forcibly separated from their parents – on behalf of the Australian government. The symbolic gesture, supported by all of the federal parliament, was well received by Aboriginal Australia.

The numbers of Aboriginal people who are Members of Parliaments has grown in recent years, but the influence that Aboriginal Australians have over their own lives and liberties is not on an upward curve, apart from those who have completely assimilated into lifestyles of suburban suit-wearing indistinguishable from those of any white Australian.

Probably the clearest exposition of how Europeans have limited, removed, ridden over or ignored the civil liberties, rights and freedoms of Aboriginal Australians came in the Redfern Park speech by Prime Minister Paul Keating (photo) in 1993:

*"[I]t might help if we non-Aboriginal Australians imagined ourselves dispossessed of the land we lived on for 50,000 years, and then imagined ourselves told that it had never been ours. Imagine if ours was the oldest culture in the world and we were told that it was worthless. Imagine if we had resisted this settlement, suffered and died in the defence of our land, and then were told in history books that we had given it up without a fight. Imagine if non-Aboriginal Australians had served their country in peace and war and were then ignored in history books. Imagine if our feats on the sporting field had inspired admiration and patriotism and yet did nothing to diminish prejudice. Imagine if our spiritual life was denied and ridiculed. Imagine if we had suffered the injustice and then were blamed for it."*⁴²



– See more at: <http://australianmuseum.net.au/indigenous-australia-social-justice#sthash.VLwjvxXB.dpuf>

⁴¹ Brennan, Frank (21 February 2008). "The History of Apologies Down Under". *Thinking Faith – the online journal of the British Jesuits*.

⁴² Extract from the speech by Paul Keating, Prime Minister of Australia, Redfern Park, 10 December 1993 at the launch of Australia's celebration of the International Year of the World's Indigenous People.

A quarter of a century after Keating's speech, the Australian government would be hard pressed to list a major achievement in bettering the lives of Aborigines generally. Many people could illustrate where change has been for the worse.

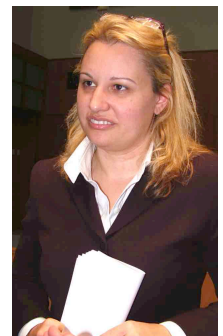
Life expectancy for Aborigines has extended since the 18th century, as it has for non-Aboriginal Australians. However, Aboriginal life measured now in terms of "life, liberty and happiness" is a darker, more shadowy imitation of how simple, fair and easy life was for Aborigines in 1770 when Captain Cook first set eyes on Australia.

By any measure, the decline in the happiness and liberties, broadly defined, of Aborigines has been the most "blemished chapter" in Australian history. There is no sense that, 250 years on, things are likely to improve significantly to restore them to anywhere near the rights and freedoms they enjoyed on first contact with the English, or for the majority of Australians to benefit by learning from intrinsic qualities and knowledge probably still retained, despite 200 years of "assimilation".

What could Aborigines teach us now if they had been encouraged to retain their unique understanding of art, 'culture-religion', environment, care for the land, music, games and athleticism? How much has world knowledge suffered because of the ignorance of the "educated" English invaders and the ever-expanding early settlers?

Aboriginal, and law professor, Larissa Behrendt (photo) summed it up:

*"The problem was, Europeans often didn't know what they were looking at when observing Indigenous people in their culture. Often blinded by their confident belief in their own racial superiority and their arrogant perception of the inferiority of all other races, it seemed impossible that other cultures could have any insights to offer."*⁴³



The rights and freedoms Aborigines enjoyed in the later 1700s came with cultural responsibilities which had to be discharged. The only way to restore Aboriginal and Torres Strait Islanders to a rightful place in Australian society is to give them more land, not less, as well as more power, more resources and more responsibility to lead other Australians, to be givers of wisdom rather than takers of handouts, to teach about their traditional and unique insights into the (good) life, liberty and the pursuit of happiness that most Australians seek.

Some ways of creating a sea change of the status quo might be:

- compulsory education in primary and secondary schools, for "white" Australians, run by Aboriginal Australians (both teachers and fellow students);

⁴³ <https://www.theguardian.com/commentisfree/2016/sep/22/indigenous-australians-know-were-the-oldest-living-culture-its-in-our-dreamtime>

- requiring all Australian children to give a three-minute speech in an Aboriginal language before graduating from primary to secondary education;
- traditional land owners having the formal power, above parliaments, to decide land and environmental issues locally (and to lead the debate and consultative processes on national land and environmental issues);
- creating an Aboriginal university, where core subjects are what they might have been had Aborigines been equal partners since 1788, rather than subjugated;
- establishing a specialist Aboriginal health service, to focus on Aboriginal health issues until life expectancies in the Australian Aboriginal community match those of white Australians; and
- an annual Aboriginal Parliament for, say, two months of the year when the “white” parliament is not sitting, to debate and decide Aboriginal issues (a “winter Parliament” in Alice Springs could be a useful national building project).

Aboriginal ‘justice’

Regardless of whether fresh ideas are tried, in terms of liberties and rights there is an overwhelming inequity in how today’s Aborigines are treated by the Australian law and “justice” system. The inequities of today probably stem in part from historical mistreatment, like “stolen children” and “stolen wages”.

However, there are continuing problems that appear to be a product of the states’ and territories’ failures to provide suitable ways to engage Aboriginal young people, who come from a vastly different tradition, in learning. Inadequate health systems and home circumstances mean that the sight and hearing of Indigenous children can be affected from an early age by trachoma and otitis media: if you can’t see properly and your hearing is poor, your chances of doing well in school are minimal.⁴⁴

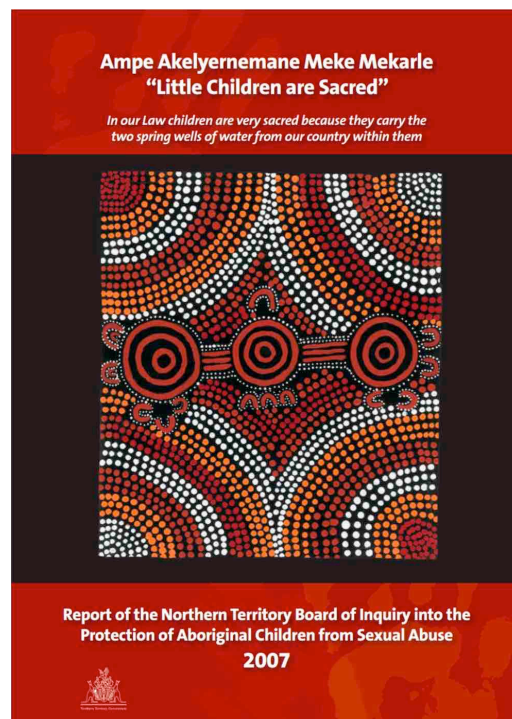
The imprisonment rate for Aboriginal Australians is about 15 times higher than for non-Aboriginal Australians; more than a fifth of prisoners in Australia are Aborigines; in some states, juvenile Aborigines comprise the vast majority in detention...and evidence occasionally sees the light of day outside “the system” that they are abused while mostly hidden from public view⁴⁵.

⁴⁴ <https://theconversation.com/why-is-trachoma-blinding-aboriginal-children-when-mainstream-australia-eliminated-it-100-years-ago-63526>

⁴⁵ Australia’s shame: the brutalisation of children behind bars (Darwin NT) <http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm> . See also Cleveland Youth Centre Detention Report (Townsville Qld) <http://www.abc.net.au/news/2016-08-18/images-of-alleged-mistreatment-cleveland-youth-detention-centre/7758204> and Ashley Youth Detention Centre (Deloraine Tas) <http://www.abc.net.au/news/2016-09-01/ashley-report-flags-concerns-about-staff-behaviors/7803964>. For a summary of the situation in Australia: Chris Cunneen, The Conversation <https://theconversation.com/abuse-in-youth-detention-is-not-restricted-to-the-northern-territory-63101>

Aboriginal Australians must be encouraged and empowered to design their own solutions to these affronts to liberties and rights against juveniles... and against Indigenous people in adult jails.

Unfortunately though, “solutions” to Aboriginal issues are mostly crafted from afar and delivered patronisingly. For example, in 2007, a Northern Territory Government study into sexual abuse crimes in Aboriginal communities – Ampe Akelyernemane Meke Mekarle, “Little Children are Sacred”, resulted in an Australian government “intervention”, welcomed and hated equally by 50% equally of the population.



Regardless of the merits of extra federal concern, the intervention was visited on Aborigines in the NT because the federal government has the power to legislate for territories (NT and ACT) but not for states. This is just one of the anomalies in an Australian Constitution originally drafted to ignore equal rights for Aborigines, and later amended so that something like the intervention became legally possible.

While there is talk about creating a “preamble” – a set of nice-sounding words that pay lip service to white Australians’ debt to Indigenous Australians – it would be far more meaningful to rewrite Australia’s core legal document to give everyone a fair go, equally, including Aborigines. Only when every Australian law treats our people equally fairly will we have a just legal system.

Australian society has a responsibility to ‘level the playing field’. A detailed report⁴⁶, by Aboriginal and Torres Strait Islanders themselves with an enabling and supportive steering committee drawn from government, spelled out the simple aims Indigenous Australians, ethnic Australians, just plain Australians, have for their future:

‘We want for our children the same opportunities and choices other Australians expect for their children. We want them to succeed in mainstream Australia, achieving educational success, prospering in the economy and living long, healthy lives. We want them to retain their distinct cultures, languages and identities as peoples and to be recognised as Indigenous Australians.’

⁴⁶ Empowered Communities: Empowered Peoples Design Report, Wunan Foundation Inc. 2015. ISBN 978-0-9942155-1-2 (print) 978-0-9942155-2-9 (online PDF) <http://empoweredcommunities.org.au/about/report.aspx>
Civil Liberties in Australia: Ch 2 – Aborigines/Islanders

To reach that halcyon state, white Australians might have to look inside themselves – it was our forebears who brought racism to Australia:

Almost all Australians (that is, original Aboriginal inhabitants of Australia) could have no concept of race until there was more than one, after invasion.⁴⁷

v170205 v 180608 8573 words

⁴⁷ Gammage, op cit p312