Native Criminal Jurisdiction After MABO

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Summary

While the High Court decision in *Mabo* was specifically concerned with native title, some of its major pronouncements have broader application. This article extracts those pronouncements and applies them to the area of native criminal jurisdiction. This area involves the issues of whether native criminal jurisdictions survived British settlement and, if so, whether they were subsequently extinguished by legislation or executive acts. Several decided cases which have refused to recognise native criminal jurisdiction are analysed in the light of the *Mabo* decision. The final part of the article argues for legislative measures providing Aboriginal communities with their own criminal jurisdiction.

Introduction

There have been several cases since the landmark High Court decision in *Mabo v the State of Queensland*[1] which have challenged the jurisdiction of Australian courts to try an Aboriginal[2] person. Similar challenges were made prior to *Mabo* but had been rejected by the courts. The rejection was based on an enlarged notion of *terra nullius* which equated an inhabited and occupied territory (which the courts acknowledged Australia was) with a territory which was uninhabited and unoccupied at the time of British settlement. This resulted in a denial of native laws and led the courts to conclude that the only laws governing the Australian sub-continent were those introduced with British settlement.

The High Court in *Mabo* found this enlarged notion of *terra nullius* a legal nonsense. The court drew a clear distinction between genuinely unoccupied and uninhabited territory (*terra nullius*) such as Antarctica, and occupied and inhabited territory like Australia and North America. It held that, while English common law was introduced with settlement into the second type of territory, it was possible that certain prior existing native laws survived. The High Court went on to rule that native land title continued after settlement.

Flowing from this landmark decision, it could be argued that native criminal laws survived settlement so that the proper jurisdiction to try Aborigines for offences lies with native or tribal communities. The post-*Mabo* challenges in this regard have thus far failed. Regrettably, very little can be derived from the judgments which range from an outright

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1 (1992) 66 ALJR 408 (hereinafter *Mabo*).

2 The term "Aboriginal" and related expressions are intended to include Islanders from the Torres Strait.

refusal to entertain any suggestions that *Mabo* might have an impact on the issue of criminal jurisdiction, to poorly considered assertions that *Mabo* did not expressly or impliedly recognise the survival of native criminal laws.

This article provides a detailed analysis of the possible impact that *Mabo* has on the recognition of native criminal laws and criminal jurisdictions.[3] Part One will briefly present the salient aspects of the *Mabo* decision which have a direct bearing on the issue at hand. In Part Two, the question is tackled whether forms of native criminal jurisdictions have survived settlement and remained unextinguished and, consequently, should be recognised alongside the general criminal law. Part Three examines some of the leading cases, both before and after *Mabo,* which have challenged the criminal jurisdiction of Australian courts over Aborigines. In the fourth and final Part, the argument is made for legislatures to step in to recognise a restricted form of native criminal jurisdiction.

1. Mabo *Rulings on the Survival of Native Land Title*

The High Court in *Mabo* noted the three methods recognised by the international law of the 18th century by which a nation-state could extend its sovereignty to new territory. These were cession, conquest and settlement. The court held that Australia was neither ceded to nor conquered by the British but was settled. Initially, the international law regarded this method of settlement as applicable only to uninhabited and unoccupied territory (that is, *terra nullius*). However, annexation of territory by settlement later came to be recognised as applying also to territory which was newly discovered by a European State and which was inhabited by natives who were not subject to the jurisdiction of another European State.[4] British sovereignty was established in Australia by this enlarged notion of settlement.

The High Court acknowledged the prior existence of locally sovereign native peoples on the Australian sub-continent. However, as they did not constitute internationally recognised sovereign nation-states, Britain was permitted under international law to extend its sovereignty over Australia.[5] With settlement, the Crown came to hold both the local and international sovereignty of Australia.

The High Court observed that the common law was introduced to Australia with the establishment of British sovereignty. The crucial question before the court was whether prior existing native title continued to survive after the introduction of the common law. The individual judgments arrived, via two different routes, at the conclusion that native title survived. One approach was to regard the impact of settlement on native rights as being the same as that of conquest.[6] Under the international law relating to acquisition of sovereignty by conquest, it was presumed, in the absence of express confiscation or subsequent exproprietary legislation, that the rights of private owners were not disturbed.[7]

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3 The plural is used for native criminal jurisdictions so as to reflect the possible claims of various Aboriginal nations.

4 Above n1 at 438 per Deane and Gaudron JJ.

5 For a detailed discussion, see Hocking, B, "Aboriginal Law does now run in Australia" (1993) 15 *Syd LR* 187 at 192–194.

6 There is increasing historical evidence that Aborigines were conquered by the white colonists. However, the conclusions drawn in this article are the same whether Australia was conquered or settled.

7 Halsbury's Laws of England, *Commonwealth and Dependencies,* Vol 6 (1991) par 1099 of which states: "Where a conquered or ceded colony already has, at the time of its acquisition, a set of established laws, those laws will remain in force until altered by the Crown by prerogative or statutory enactment." See

Brennan J (with whom Mason CJ and McHugh J concurred) and Toohey J held that the rights and interests of natives of a settled territory should likewise be presumed to survive to their benefit.[8] The second approach was taken by Deane and Gaudron JJ. They refused to presume that native rights survived sovereignty secured by settlement. In their view, the establishment of a new British colony brought with it "only so much" of the common law "as was reasonably applicable to the circumstances of the colony".[9] This left room for the continuation of native laws and customs and even the incorporation of those laws and customs as part of the common law. Hence, native laws and customs might continue, not by virtue of a presumption of survival under international law, but by the mandate of the common law. [10]

Both these approaches arrived at the same result, namely, that the Crown as the supreme legal authority acquired the radical title to land while the natives were left with a beneficial title. For Brennan and Toohey JJ, this was the result of international law presuming that native title survived the British annexation of sovereignty over Australia by settlement. For Deane and Gaudron JJ, it was because the common law left room for a beneficiary interest in their land to be held by the natives. In addition, all the judges found support for the recognition of this form of native title in a well established common law principle that private property rights survive a change in sovereignty.[11]

Having concluded that native title continued after settlement, the High Court proceeded to consider whether such title could be extinguished subsequently. It held that extinguishment could be accomplished either by legislation or by executive act. Given the seriousness of the consequences to the natives of such extinguishment, the exercise of the power to extinguish native title must reveal a clear and plain intention to do so. [12] All the judges agreed that legislation which merely regulated the enjoyment of native title did not evince a clear and plain intention to extinguish native title. Neither was legislation creating a regime of control but which was not inconsistent with the continued enjoyment of native title. The judges also agreed that executive acts disposing of or appropriating land in a manner fully or partially inconsistent with native title would, to the extent of the inconsistency, extinguish native title.

It would be useful to highlight some observations of Brennan J concerning the nature of the common law. One is that the common law is adaptable to changing factual situations and perspectives, especially in areas involving fundamental "values of justice and human rights".[13] In order to treat Aborigines justly and to accord to them the human rights which are their due, Brennan J declared that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination."[14] However, he observed that there is a limit beyond which the common law's recognition of contemporary standards of justice and human rights would not extend. The limit occurs

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also the case authorities cited by Brennan J in *Mabo* above n1 at 419.

8 Above n1 at 428–429 per Brennan J; at 484 per Toohey J.

9 Id at 439.

10 This was also the approach taken by Mason CJ in the recent case of *Coe (on behalf of the Wiradjuri Tribe) v The Commonwealth* (unreported, High Court, 23 December 1993). His Honour stated that the decision in *Mabo* was at odds with the notion "that Aborigines, as a free and independent people, are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law".

11 Above n1 at 428–429 per Brennan J; at 439 per Deane and Gaudron JJ; at 484 per Toohey J.

12 Id at 432 per Brennan J; at 452 per Deane and Gaudron JJ; at 489 per Toohey J.

13 Id at 417 per Brennan J.

14 Id at 422.

when the adoption of these standards "would fracture the skeleton of principle which gives the body of our law its shape and internal consistency".[15] Applying these observations to *Mabo*, the long held notion that Australia was *terra nullius* was rejected by Brennan J as unjust and racist towards Aborigines. This was because the doctrine deprived the Aborigines "of the religious, cultural and economic sustenance which the land provides" and made them "intruders in their own homes and mendicants for a place to live".[16] As for fracturing the skeleton of principle, Brennan J was satisfied that the restrictive form of native title which he was prepared to recognise would not unduly disturb the essential framework and functioning of the Australian legal system.

2. *The Survival of Native Criminal Jurisdiction*

Certainly, the High Court in *Mabo* was concerned specifically with native title and not with native criminal jurisdiction. Yet, there is no denying that the decision has raised the possibility that native laws governing other spheres of Aboriginal life have likewise survived settlement and remained unextinguished by subsequent legislation or executive acts. This is the result of the High Court's ruling that Australia was not *terra nullius* at the time of British settlement but was inhabited by locally sovereign peoples who possessed their own laws. Any claim of recognition of a particular form of native law can no longer be dismissed out of hand on the basis that Australia was *terra nullius*. Neither can such claims be dismissed on the basis that native laws lacked sufficient sophistication to warrant a place within the legal system.[17]

An attempt will now be made to apply the step-by-step enquiry undertaken by the High Court in *Mabo* to the issue of whether native criminal jurisdictions may have continued to this day.

A. *Whether Native Criminal Jurisdictions Survived Settlement*

If we take the approach of Brennan and Toohey JJ to equate cases of sovereignty gained by settlement with those obtained by conquest, there is a presumption that native criminal jurisdictions were not disrupted by the advent of settlement. International law of the time recognised that, where a territory was conquered, justice and expediency required the law of the conquered people to remain intact until expressly altered.[18] Brennan and Toohey JJ were prepared to presume that a form of native title survived settlement and continued until the legislature or the executive exercised a clear and plain intention to extinguish it. Likewise, it could be presumed that a form of native criminal jurisdiction survived the advent of settlement and has continued to the present day unless extinguished by legislative or executive action. The underlying basis for the presumption of continuity of native laws is the same whether the laws pertain to land or to social behaviour, that is, according justice to native peoples and recognising their fundamental human rights. In the same way as the High Court in *Mabo* acknowledged the spiritual, cultural and economic connection between Aborigines and their lands, the law should acknowledge the existence of Aboriginal systems

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15 Id at 416 per Brennan J.

16 Ibid.

17 For example, see *Coe v Commonwealth* (1979) 53 ALJR 403 at 408 per Gibbs J.

18 Blackstone, W, *Commentaries of the Laws of England* (15 edn, 1809) at 106. Blackstone's comments were approved of in *Cooper v Stuart* (1889) 14 App Cas 286 at 291; and in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 201.

of behavioural constraints with their deep underpinnings of religious and cultural values held dear to Aboriginal communities.

Should we apply the approach taken by Deane and Gaudron JJ, the survival of native criminal jurisdictions would depend on whether the common law left room for them. In this regard, it is significant to note Sir William Blackstone's observation that "colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony".[19] Without doubt, English criminal law was introduced at the time of settlement to protect the personal safety and property interests of the settlers. This would hold true wherever a settler was involved, whether as offender or victim. But it did not necessarily follow that English criminal law was intended to apply to cases where both the offender and victim were Aborigines and the criminal incident occurred within their own communities. This was certainly the factual reality as it would have been far from the minds of the early colonial administrators to want to control the social behaviour of Aborigines as between themselves. Further support for this contention is found in the instructions from the King to Governor Phillip which distinguishes settlers from natives so far as the application of English criminal law was concerned:

> You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[20]

Hence, it could be argued that with the establishment of settlement came English criminal law governing the rights and interests of settlers, but that room was left for the continued operation of native criminal laws in Aboriginal communities.

It should be obvious from this discussion that the form of native criminal laws which survived settlement would not be of general application. Nevertheless, these laws are entitled to recognition within their spheres of operation in much the same way as the by-laws and regulations of statutory authorities and local councils are recognised.[21]

B. Whether Native Criminal Jurisdictions Remain Unextinguished

Even though native criminal jurisdictions may have survived the advent of British settlement, they could have been extinguished by subsequent legislation or by executive acts. According to *Mabo*, for extinguishment to occur there must be a clear and plain intention on the part of the legislature or executive to do so.

Dealing first with extinguishment by legislation, we have already noted Deane and Gaudron JJ's view that only so much of the common law as was reasonably applicable to the new colony was introduced into it in 1788. Forty years later, the *Australian Courts Act* 1828[22] was passed, section 24 of which provided that all laws and statutes in force within the realm of England at the time of its passing shall be applied in the administration of justice in the courts of New South Wales so far as those laws and statutes could reasonably[23] be applied

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19 Id and cited with approval by the Privy Council in *Cooper v Stuart* (1889) 14 App Cas 286.

20 Governor Phillip's "Instructions", dated 25 April 1787, *Historical Records of Australia*, Series 1, Vol 1, at 13–14 and quoted in *R v Wedge* (1976) 1 NSWLR 581 at 585.

21 Mulqueeny, K E, "Folk-law or Folklore: When a Law is Not a Law. Or is it?" in Stephenson, M A and Ratnapala, S (eds), *Mabo: A Judicial Revolution* (1993) at 172.

22 *Imperial Act* 9 Geo IV, c83.

23 The word "reasonably" was read into the provision by the courts: see *Quan Yick v Hinds* (1905) 2 CLR

within the colony. It may be deduced that after four decades of settlement, the British Parliament felt that the colony had grown sufficiently in numbers and complexity to justify the application of all of the English law. The following statement by the Privy Council in *Cooper v Stuart* aptly describes this legal development: "[A]s 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 ... ".[24]

The High Court has held that section 24 of the *Australian Courts Act* 1828 clearly introduced "the general provisions of the criminal law" of England to the colony of New South Wales.[25] A strong case can therefore be made for regarding this legislation as constituting a clear and plain intention to apply English criminal law to the whole of the colony, including areas inhabited solely by Aboriginal communities. As for the qualification of "reasonable application" contained in the provision, this would arguably exclude only those English laws which were entirely alien to Aborigines, for example, a law prohibiting certain activity out of respect for the observance of Sunday.[26] However, with regard to the more usual crimes such as those against the person or property, English criminal law is intended by the provision to apply even though it is shown that the Aborigines viewed these matters differently.

There is an argument against viewing the 1828 Act as having this effect. The High Court in *Mabo* referred to the Act but did not regard it as having extinguished native title; why then should it have extinguished native criminal laws? The answer lies in the difference between the nature of English land law and English criminal law. For the former, the High Court in *Mabo* held that there was nothing inconsistent with native title being held by an Aboriginal group and with the underlying radical title being vested in the Crown. By contrast, English criminal law did not accommodate a subsidiary set of native criminal laws operating alongside it.

Besides the 1828 Act, the common law criminal jurisdictions of New South Wales, Victoria and South Australia have, over the years, legislated extensively on the criminal law. Such legislation would have superseded the common law governing the particular areas covered by the legislation and, with it, any residual native criminal laws which the common law might have retained. Accordingly, a strong case can be made for regarding the criminal legislation enacted in these jurisdictions as clear and plain manifestations of legislative intention to extinguish native criminal jurisdictions which may have survived settlement.[27]

In respect of jurisdictions possessing criminal codes, the position is even more conclusively in favour of extinguishment of native criminal jurisdictions. These codes were enacted with the express objective that they would constitute the sole source of law in respect of criminal matters. Hence, their passing brought to an end any recognition which might previously have been afforded to native criminal laws. The suggestion has been made that native criminal laws may have been retained by virtue of the concept of "authorisation" found in some Code provisions.[28] The defence of lawful authority is one example of this concept.[29]

345; *Mitchell v Scales* (1907) 5 CLR 405.

24 (1889) 14 App Cas 286 at 292 per Lord Watson.

25 *Quan Yick v Hinds* above n23 at 359 per Griffith CJ.

26 See *McHugh v Robertson* (1885) 11 VLR 410.

27 Cf Professor Garth Nettheim queries whether the various Crimes Acts and Criminal Codes show a "clear and plain intention" to a greater extent than, in the context of land, the Crown Lands Acts.

28 Mulqueeny, above n21, at 177–178; *Laws of Australia. Aboriginal and Torres Strait Islanders* (1993), 1.5[9].

29 For example, *Criminal Code* (Qld), s31; *Criminal Code* (WA), s31; *Criminal Code* (NT), s26.

Another example is where criminal liability is defined in terms of conduct which is unlawful, namely, not authorised, justified or excused.[30] It is suggested that native criminal law could be one source of such authorisation. While the argument is plausible, it is more likely that the authorities contemplated by the Codes would be restricted to persons or bodies who are so empowered by legislation. This stems from the very reason why these jurisdictions enacted a criminal code, namely, to have the criminal laws laid down in clear and precise statutory form, and to have this done exhaustively. For native criminal laws to be recognised as a form of lawful authorisation would clearly run counter to this objective.[31]

Then there is legislation found in many jurisdictions which specify the powers and duties of the prosecution.[32] Invariably, prosecutors will be charged with the power and duty to institute criminal proceedings against anyone found committing a crime recognised by their jurisdiction and performed within its boundaries. This would certainly include any Aborigine who has committed a crime within that State or Territory. It could be argued that such legislation amounted to a plain and clear legislative intention to bring Aborigines under the general criminal law and, consequently, to extinguish any native criminal laws covering the same behaviour.

This last point leads us to consider extinguishment of native criminal jurisdictions by executive acts. Traditionally, prosecutions have been brought by the Crown through the Attorney-General, a member of the executive arm of government. The office of Attorney-General was created by the *New South Wales Act* 1823 which empowered serious criminal charges to be instituted at its discretion by way of information.[33] Crown prosecutors are under the control of the Attorney-General and they receive their powers from that office. In those jurisdictions where the Crown prosecutors are under the control of a Director of Public Prosecutions as opposed to the Attorney-General, the connection with the executive arm of government remains unbroken. This is because the Director of Public Prosecutions remains accountable through the Attorney-General to Parliament for their decisions.[34] It could therefore be argued that a prosecutor's decision to charge an accused for some breach of the criminal law is an executive decision. By the same argument, the laying of charges and instituting of criminal proceedings against the accused are executive acts.[35] Consequently, the longstanding practice of the Crown to prosecute Aboriginal accused persons for the whole range of offences recognised by common law or statute constitutes executive acts which are clearly and plainly inconsistent with native criminal laws governing the same matters.[36] In this way, these native laws are extinguished to the extent of their inconsistency with the general criminal law.

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30 For example, *Criminal Code* (Qld), s291; *Criminal Code* (WA), s268.

31 Unlike Australian criminal law which is composed of prescribed rules, native criminal laws are much less formal and comprise guides for the resolution of conflict: see the Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, (1986) par 360.

32 Much of the legislation is recent and intended to create independent prosecution systems. For example, see *Director of Public Prosecutions Act* 1983 (Cth); *Director of Public Prosecutions Act* 1982 (Vic); *Director of Public Prosecutions Act* 1984 (Qld); *Crown Prosecutors Act* 1986 (NSW).

33 4 Geo IV, c96, s4. See Castles, A, *An Australian Legal History* (1982) at 45, 177–8.

34 See Tombs, J, "Independent prosecution systems" in Zdenkowski, G, Ronalds, C, and Richardson, M (eds), *The Criminal Injustice System*, Vol 2, (1987) at 90, 103–106.

35 See Willis, J, "Pre-Trial Decision Making" in Zdenkowski et al, id at 59; Kidston, R, "The Office of Crown Prosecutor" (1958) 32 *Aust LJ* 148.

36 Professor Nettheim challenges this assertion by arguing that for the jurisdiction of Aboriginal communities over their peoples to be extinguished by executive action, there has to be a "clear and plain intention" to extinguish appearing in the legislation under which the executive action occurs.

The conclusions thus far reached in our discussion may be summarised as follows: while it is likely that native criminal jurisdictions survived the establishment of British settlement, they were subsequently extinguished by either the clear and plain intention of legislators or the executive.

3. *Cases Challenging the Criminal Jurisdiction of the Courts*

In the light of the foregoing discussion, it would be useful to analyse decided cases where challenges have been made to the criminal jurisdiction of the courts over Aborigines.

Murrell (1836)

This was a decision of the Full Court of the Supreme Court of New South Wales.[37] The appellant was an Aborigine who was convicted of murdering another Aborigine. He appealed on the ground that Aborigines were not bound by English criminal law because the law gave them no protection. The court rejected this argument on the basis that "[s]erious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them".[38]

This was a policy decision showing the determination of the legal establishment to maintain law and order in a violent society. Given the extremely high rate of Aboriginal victims of crime, it may indeed be questioned whether the court in *Murrell* was merely expressing a pious hope that English criminal law would be a sanctuary for Aborigines.[39] Furthermore, by asserting that Aborigines would be killing one another with impunity if English law was inapplicable to them, the court was taking a monolegalistic stance and thereby denying the existence and efficacy of native criminal laws to control violent behaviour.

The explanation for the court's monolegalistic approach stems from its holding that Aborigines had not attained such a degree of institutional and political development as to justify any recognition of their laws and customs. The Aborigines were not "entitled to be recognised as so many sovereign states governed by laws of their own".[40] Accordingly, the court believed that British sovereignty was established in a territory without any local sovereignty at the time of settlement. This holding is now open to question in the light of *Mabo*. It is incorrect to continue maintaining that native laws are not sufficiently sophisticated to be accorded at least some recognition by the legal system. *Murrell* can therefore no longer be regarded as good authority in so far as its rejection of native criminal jurisdictions was based on the erroneous presupposition that, at the time of settlement, Aborigines lacked local sovereignty and efficient systems of laws.

Bonjon (1841)

This was a decision of a trial judge, Willis J, of the Supreme Court of New South Wales.[41] As in the case of *Murrell*, the accused was an Aborigine who was charged with the murder

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37 (1836) 1 Legge 72. For a fuller discussion of the case, see Hookey, J, "Settlement and Sovereignty" in Hanks, P, and Keon-Cohen, B, *Aborigines and the Law* (1984) at 2–4; Castles, above n33 at 526–530.

38 Id at 73 per Burton J with whom Forbes CJ and Dowling J agreed.

39 Hookey, above n37 at 3.

40 *Murrell*, cited in Hookey, above n37 at 4.

41 "Papers Relative to the Aborigines, Australian Colonies" (1844) *British Parliamentary Papers*, Vol 8, at 146ff, discussed by Hookey, above n37 at 4–8. See also Castles, above n33 at 530–532.

of another Aborigine. But contrary to the ruling in *Murrell*, Willis J agreed with the accused's contention that the courts of New South Wales lacked the jurisdiction to try Aborigines. This difference in outcome is to a large measure due to the fact that Willis J approached the problem by examining which, if any, of the legally recognised methods of establishing sovereignty had been exercised by Britain when establishing the Colony of New South Wales. The court in *Murrell* did not conduct this exercise. Willis J held that Australia was neither conquered, ceded nor settled (in the sense of occupying an uninhabited territory) by Britain. He ruled further that the Aborigines of New South Wales were a domestic dependant nation having their own self-government, as were the North American Indians. Specifically, there existed a system of Aboriginal customary laws governing criminal behaviour at the time of British settlement.

Nevertheless, Willis J acknowledged the historical fact that the Colony of New South Wales was established in 1788 and with it came the common law, but he believed that the mere introduction of the common law and courts on the English pattern was insufficient to extinguish native laws and jurisdictions. This could, however, be achieved by express statutory provision.

These findings by Willis J are strikingly similar to many of the propositions held by the High Court in *Mabo*. Only two points of clarification appear to be necessary. First, *Mabo* has now clearly declared that settlement can take the enlarged form of establishing sovereignty over a territory inhabited by natives who were not already subject to the jurisdiction of another European nation-state. British sovereignty was established in New South Wales through this method. Secondly, it is likely that any native criminal laws which had survived settlement have since been extinguished by legislation and/or executive acts.

Cooper v Stuart (1889)

This was a decision of the Judicial Committee of the Privy Council.[42] The case did not involve a legal challenge to the criminal jurisdiction of the courts to try Aborigines. Rather, it was concerned with the validity of a reservation in a Crown grant of land. Its significance to our discussion lies in certain *obiter* remarks contained in Lord Watson's opinion which have been relied on by cases such as *Wedge* and *Walker*, discussed below. Lord Watson, delivering the advice of the court, had asserted that Australia was "a tract of territory practically unoccupied, without settled inhabitants or settled law" in 1788.[43] It was therefore susceptible to being "discovered and planted by English subjects".[44] As a statement of law, this assertion correctly declares the method of establishing sovereignty by the discovery and occupation of uninhabited territory. However, as a statement of fact, it failed to appreciate that Australia was already inhabited by "settled inhabitants" with "settled law". It is conceivable that Lord Watson would have given the same advice as the High Court in *Mabo* has done had he been fully cognisant of the true facts concerning Aboriginal societies existing at the time of British settlement.

Another aspect of Lord Watson's opinion worth noting is the "great difference" which his Lordship sees between a colony acquired by conquest and one acquired by settlement through occupation of an uninhabited territory. For the former, his Lordship held that

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42 (1889) 14 App Cas 286.

43 Id at 291.

44 Ibid, citing with approval Sir William Blackstone, above n18.

there is "an established system of law" which is presumed to continue unless expressly overturned by the new sovereign. For the latter, English law is introduced absolutely to fill the legal vacuum. This again is a correct statement of 18th century international law. It should be observed, however, that Lord Watson was not comparing a conquered territory with one which was "settled" in the enlarged sense described by the High Court in *Mabo*, and which is relevant to Australia. Taking the approach of Brennan and Toohey JJ, any established system of laws belonging to the native inhabitants should be recognised in the same way as international law recognises the laws of conquered inhabitants.

It is important that any future judicial reliance on *Cooper v Stuart* should have the above observations in mind.

Wedge (1976)

This was a decision of Rath J, of the Supreme Court of New South Wales, trying an Aborigine charged with the murder of another Aborigine.[45] The accused tendered two arguments in support of his submission that the court had no jurisdiction to try him. The first was that Aborigines were and still are a sovereign people and accordingly not subject to English law. Secondly, even if Aborigines are not a sovereign people, the English colonists brought with them only so much of English law as was applicable to their circumstances, and this law only affected British settlers. Rath J opined that both these arguments depended on the premise that the Colony of New South Wales was not established by settlement. He relied on Lord Watson's obiter remarks in Cooper v Stuart, as previously discussed, to hold that New South Wales was indeed settled by the British in 1788. The effect of this was that

> the law of England ... becomes from the outset the law of the Colony, and is administered by its tribunals. That law of England is the only law which those tribunals then recognize and apply. Thus it seems evident that, as New South Wales, in legal theory, was founded by settlement, there was only one sovereign, namely the King of England, and only one law, namely English law.[46]

Doubtless, this correctly describes the legal consequence of Britain having founded a colony on uninhabited territory. But, as *Mabo* has clearly decided, Australia was not so uninhabited, that is, it was not *terra nullius*. Accordingly, *Wedge* can no longer be regarded as good authority for denying the recognition of native criminal jurisdictions since the decision was based on a factual falsehood. Henceforth, nothing that was said in *Wedge* on the issue of sovereignty can be relied on when discussing the legal effect of the enlarged form of settlement which occurred in New South Wales.

One other notable feature of this decision was Rath J's reference to Governor Phillip's Instructions, mentioned in Part Two.[47] Having cited the relevant passage of the instructions, Rath J conceded that it did contrast the King's subjects with the natives. He dismissed this by asserting that "in law the 'natives' were in the King's territory, and under his sovereignty". The said contrast cannot be dismissed so easily. As *Mabo* has declared, the mere fact that Aborigines are physically within the Crown's territory and under its sovereignty does not automatically lead to the conclusion that Aborigines cannot rely on their own laws. A

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45 (1976) 1 NSWLR 581.

46 Id at 584.

47 See main text accompanying note 20.

thorough legal examination in a given area reveals, as *Mabo* did, that certain limited forms of native law and jurisdiction exist alongside the general laws of Australia.

Walker (1988)

This was a decision of the Court of Criminal Appeal of Queensland.[48] The accused, an Aborigine, was convicted of wilful destruction of property on Stradbroke Island. He challenged the jurisdiction of the Queensland courts to try him on the ground that the Aborigines, as the original occupants of the island, had not consented to their own legal system being displaced by the English and, subsequently, Queensland legal systems. McPherson J, with whom Andrews CJ and Demack J concurred, interpreted the challenge in the following way:

> The question raised by the appellant is, I suspect, essentially not a matter of international law. It raises the issue of how it is that judges and others in Queensland apply, and regard themselves as bound to apply, these laws to Stradbroke Island; and, conversely, why the Nunukel people, who in times long past once exercised sovereignty over Stradbroke Island are, without any formal displacement of their own legal system, now expected and obliged to submit [to] laws not of their own making.[49]

McPherson J believed that this question was one which the law does not attempt to answer. He ventured to suggest that at some unspecified time after 1788, the native legal order was "overthrown by a revolution"[50] which introduced a new legal order for Stradbroke Island.

Based on *Mabo*, it can be said that McPherson J was correct in regarding the issue of displacement of native legal systems as not a matter of international law but of municipal law. He was also right in acknowledging that native laws and jurisdictions survived the advent of British settlement. However, contrary to McPherson J's view, municipal law does provide an answer to how a native legal system might later have been displaced by the English and, subsequently, Australian Federal, State and Territory legal systems. This was done, not by a revolution occurring at some unspecified time, but by legislation or executive acts which clearly and plainly indicated an intention to extinguish the native legal systems.

McPherson J was also wrong in thinking that the question raised by the appellant was "one for which the courts do not and in law are not required to respond".[51] He opined that the reason why courts obey the enacted law is that "they recognise the law-making authority of the legislature which enacts it".[52] Consequently, the courts can "acknowledge no other legal system and are not at liberty to do so".[53] According to *Mabo,* the courts should and the law does require them to respond to the question at hand. They have a duty to answer such questions as whether a particular native law has survived settlement and, if so, whether it continues to this day or has been extinguished by identifiable legislation or executive acts. Implicit in all of this is that the Australian legal system does have the capacity to accommodate another legal system or, at least, aspects of such a system within its ambit. The only restriction to

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48 (1988) A Crim R 150.

49 Id at 154.

50 Id at 155, applying to a view expressed by Professor HWR Wade in "The Basis of Legal Sovereignty" (1955) *Cambridge LJ* 177.

51 Id at 154.

52 Ibid.

53 Above n48 at 155.

doing so is that such accommodation must not, in the words of Brennan J, "fracture the skeleton of principle which gives the body of our law its shape and internal consistency". [54]

Archie Glass (1993)

This appears to have been the first case after *Mabo* was decided where a challenge was again made to the court's criminal jurisdiction over Aborigines.[55] The accused was an Aborigine who was charged with assault and robbery on certain non-Aborigines. He had applied for bail to Sully J sitting as the Supreme Court of New South Wales. The accused submitted that since *Mabo* had rejected the application of *terra nullius* to Australia, the courts no longer had jurisdiction over him. Sully J rejected the submission outright and issued a strong warning against politicians, judges, academics and the media misinforming the public about what *Mabo* actually decided. As Sully J saw it, the misinformation takes the form of regarding the *Mabo* decision as having "introduced into this country a different system of law which creates classes of citizen to some of whom the law applies and to some of whom it does not apply".[56] A little further on in his judgment, he makes the same point, speaking of the *Mabo* decision having "somehow created classes of citizen". Sully J is certainly correct in saying that *Mabo* did not "introduce" or "create" a separate legal system for Aborigines. This is because any native legal system which has survived till this day owes its existence, not to the *Mabo* decision, but to its continuation after the establishment of the Colony of New South Wales and to the fact that it has not been extinguished by subsequent legislation or executive acts. The High Court in *Mabo* did not create or introduce any new law but merely clarified and confirmed the legal position.

However, this does not appear to be the misinformation which Sully J has warned against. He was concerned rather with the claim that *Mabo* recognises separate classes of citizen to some of whom the ordinary laws of the land do not apply. He emphatically rejected this claim on the basis that "all are equal before the law and that the law applies equally to all".[57]

That everyone is equal before the law is a well established legal principle and one which is commonly invoked by the courts and other lawmakers. But it is important to appreciate what exactly this principle entails and to acknowledge any exceptions to it. With regard to its nature, the main concern does not lie in people being treated equally as in *the type of law before which* they are treated equally. Professor Detmold has put this issue cogently and forcefully:

> It is no more justifiable to make Aborigines equal before European law than it is to make Europeans equal before Aboriginal law. Where is equality before Australian law? It cannot at this point of the argument simply be assumed that the law in question is Australian law (fudging its Europeanness). That would brush away the actual issue of law in the European settlement, and would be a return to a form of terra nullius ... But Australian law and Australian community is not European law and European community. Because of the nature of community it can only lie in the difference between European and Aborigine ... Equality is important as the equality of difference: the fundamental recognition of difference is that your difference is of equal status to my own. And your difference (the difference of any other) goes right through to your very existence.[58]

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54 Above n1 at 416.

55 Unreported, Supreme Court of NSW Sully J, 22 January 1993. See casenote in (1993) 63 *Abor L Bull* 18.

56 Transcript at 3.

57 Transcript at 4.

58 Detmold, M J, "Law and Difference: Reflections on *Mabo's* Case" (1993) 15 *Syd LR* 159 at 163.

It follows from this point of view that everyone can only be said to be treated equally before Australian law provided it is a law which accommodates both European and Aboriginal laws.[59] This view was endorsed by the High Court in *Mabo* to the extent that it was prepared to recognise native title (derived from native legal systems) co-existing with other forms of legal interests to land. With respect, Sully J was therefore wrong if he meant to confine "the law" to European-based law alone. The true nature of Australian law is that it is capable of accommodating separate legal systems within its ambit.

Those relying on the principle should also acknowledge the exceptions to it. In respect of Aborigines, an obvious exception is section 8(1) of the *Racial Discrimination Act* 1975 (Cth) which enables special measures to be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups requiring protection to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.[60] Hence, the possibility that certain forms of criminal behaviour amongst Aborigines are solely governed by their own native laws cannot be dismissed out of hand. A close scrutiny of the social reality occurring in Aboriginal communities may well reveal that in respect of some criminal matters, these communities are better equipped than the ordinary courts to ensure the proper maintenance of human rights and fundamental freedoms.[61]

Leeton James Jacky (1993)

This was another post-*Mabo* case before the Supreme Court of New South Wales in which an Aborigine charged with the murder of a non-Aborigine challenged the jurisdiction of the court to try him. [62] Campbell J held that he was bound to follow the decision of the Full Court of the Supreme Court of New South Wales in *Murrell* unless the High Court in *Mabo* had expressly or impliedly overruled that decision. He also noted that *Wedge* was directly in point on the matter of jurisdiction as it similarly involved a charge against an Aborigine for the murder of another Aborigine. He was of the opinion that he should follow *Wedge* unless it was clearly inconsistent with *Mabo.*

Our earlier analysis of *Murrell* and *Wedge* both led to the conclusion that these cases can no longer be regarded as representing good law after *Mabo.* This is because their refusal to recognise a claim of native criminal jurisdiction was premised on the falsehoods that Aborigines lacked a sufficiently sophisticated system of laws (*Murrell*) and that Australia was uninhabited (or *terra nullius*) at the time of settlement (*Wedge*).

But apart from questioning the premises underlying the decisions in *Murrell* and *Wedge*, could *Mabo* have impliedly agreed with the holding in these cases that the courts have criminal jurisdiction over Aborigines? Campbell J felt that it did, citing a passage from the joint judgment of Deane and Gaudron JJ in which they held that once the Colony of New South Wales was established, the English common law automatically applied throughout the whole of the Colony.[63] That passage concluded with the following sentence

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59 Detmold makes the point that Australian law should accommodate all other differences which obtain between people in Australia. For example, a law which only accommodates men's interests would not be treating women equally.

60 For an example of the application of this provision to Aborigines, see the High Court case of *Gerhardy v Brown* (1985) 159 CLR 70.

61 This issue is taken up in greater detail in Part Four.

62 Unreported, Supreme Court of NSW Campbell J, 10 June 1993. See casenote in (1993) 63 *Abor L Bull* 19.

63 Above n1 at 439.

which Campbell J emphasised in his judgment: "Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by that common law."

A careful examination of this passage and those immediately preceding it shows that Deane and Gaudron JJ did not so regard the whole of the common law as having been introduced with the advent of settlement.[64] As we have observed in Part Two, their Dean and Gaudron JJ noted that only so much of the common law as was reasonably applicable to the Colony was introduced at the time of settlement, and there was room left by the common law for the continuation of some native laws.

Ultimately, *Mabo* may have impliedly supported the holding in *Murrell* and *Wedge* that the courts do have criminal jurisdiction over Aborigines. However, the basis for this conclusion is not contained in the passage relied on by Campbell J. Rather, it is found in those passages where the High Court has held that native laws which had survived settlement could be subsequently extinguished by legislation or executive acts.

Walker (1993)

This was a decision of the New South Wales Local Court.[65] The accused was the same person who had appeared before the Queensland Court of Criminal Appeal five years earlier. He was charged with assault and with discharging a firearm with intent to evade arrest. The defence counsel argued that *Murrell* was no longer sound authority after the decision in *Mabo*. This was because *Murrell* was based on the false premise that Australia was *terra nullius* and that the Aborigines lacked sufficiently sophisticated systems of laws to warrant any recognition by Australian law. *Mabo* had changed this by rejecting the application of *terra nullius* to Australia and recognising that Aborigines had systems of native land laws which could be recognised by Australian law. It followed from this, defence counsel submitted, that there could exist a separate system of native criminal laws.

The magistrate rejected the argument, citing Sully J's comments in *Archie Glass* on why the decision in *Mabo* should not be regarded as establishing two classes of people under two separate systems of law. The magistrate found further support for this holding by noting that the recognition of a separate system of native criminal laws would run counter to the *Racial Discrimination Act* 1975 (Cth).

With respect, Sully J's views in *Archie Glass* need to be heavily qualified in the ways indicated previously. As for the *Racial Discrimination Act*, consideration should have been given to section 8(1) of the Act which allows special measures to be taken to secure adequate advancement of Aboriginal communities requiring protection to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.

The magistrate in *Walker* had also based his judgment on the same passage by Deane and Gaudron JJ in *Mabo* which was relied on in *Leeton James Jacky*. He regarded the passage as saying that, with the advent of settlement, the whole of the common law automatically applied as the domestic law of the Colony of New South Wales. As we have already noted, Deane and Gaudron JJ were not suggesting that all of the common law was introduced into the Colony and were prepared for some room to be left for the continuation of

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64 A similar misreading of this passage appears to have been made by the commentator in *Laws of Australia. Aborigines and Torres Strait Islanders*, above n28 at 1.5[4].

65 Unreported, Local Court, Lismore, before the magistrate, Mr P Molan, 16 November 1993.

native laws. Overall then, *Walker* did not advance any further the judicial views expressed in the other post-Mabo decisions of *Glass* and *Jacky*.

From the foregoing case discussion, it may be said that the decision in *Bonjon* comes closest to what was held in *Mabo*. Apart from this decision, none of the cases discussed the issue of extinguishment of native criminal jurisdictions, despite the fact that the existence of these jurisdictions stands or falls depending on this issue. It is therefore imperative that, at the next available opportunity, a court should undertake an intensive and comprehensive examination of the matter of extinguishment of native criminal jurisdiction. So as not to cloud the examination with other extraneous considerations, it would be preferable for such a case to involve an Aborigine charged with committing a crime against another Aborigine and which occurred within their own community. The ideal situation would be, say, where an Aboriginal elder inflicts traditional punishment on a member of her or his own tribe in response to some wrongdoing under native laws.

4. *A Limited Form of Native Criminal Jurisdiction*

Although we must await a case which decides whether native criminal jurisdictions have been extinguished by legislation or executive acts, the likely conclusion is that they have been so extinguished. Should this be correct, any possibility of a judicial development recognising some form of native criminal jurisdiction will be quashed. However, the possibility remains for the legislature to revive forms of native criminal jurisdiction which it had itself extinguished.

Before examining the arguments for legislative recognition of native criminal jurisdiction, it is worthwhile recollecting two features of the *Mabo* decision which have paved the way for such recognition to occur. The first is the High Court's acknowledgment that the Aboriginal communities had and continue to possess sophisticated native laws. As such, legislation which revives native criminal jurisdiction would be placing Aborigines, not under the governance of some outmoded, primitive and inoperable legal sub-system, but under a living, functional and workable law. Secondly, the High Court was prepared to recognise the co-existence of native laws with the general laws of the nation. This was a welcome breakaway from the view that there could be only one set of laws and one legal system operating within Australia. Accordingly, legislation which recognises a form of native criminal jurisdiction co-existing with the general criminal jurisdiction would be in step with this *Mabo* ruling.

Legislative reinstatement of native criminal jurisdiction would be a significant step towards rectifying a gross injustice perpetrated on Aboriginal communities. The injustice is that of denying these communities their desire and need to control the behaviour of their members in accordance with a system of laws shaped by the history and values of their culture. Extinguishment and replacement of native laws with an European-based legal system stemmed from the imperialistic notions of monoculturalism and racism of a past era. The effect on Aboriginal communities was devastating: the demise of their spiritual and legal restraints tore at the basic fabric of these communities and drastically eroded the security, cultural integrity and self-esteem of their members. This sense of loss is comparable to that experienced by Aborigines by the annexation of their lands. It is a loss which has carried through to the present day, manifesting itself in the vast over-representation of Aboriginal offenders in the criminal justice system and in Aboriginal disenchantment with the system. Present day legislators can help to heal these wounds inflicted by their predecessors by returning some form of native criminal jurisdiction back to Aboriginal communities.

Such a reinstatement would also be in line with an emerging international trend towards providing indigenous peoples with the right to self-determination or self-manage-

ment.[66] This right is not based on whether indigenous peoples were once sovereign but on the need to provide them with a free choice today of deciding what form of political association they would like to have with the current successor of their past colonisers. This right to self-determination finds expression in two international law instruments which have been ratified by Australia, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article One of both Covenants commences as follows: "All peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development". These international obligations of the Commonwealth government would be met to a considerable extent by the enactment of legislation empowering Aborigines to exercise social control over their own communities. This type of legislation would replace the European model of social ordering with traditional methods, without challenging the overall sovereignty of the Australian state. [67]

The need for self-management of social behaviour by Aboriginal communities may be justified on several fronts. One is that the general criminal law and criminal justice processes have failed dismally to maintain social cohesion and order within these communities. The result has been extremely high rates of violent crimes committed by one Aborigine against another. Conventional methods of providing effective protection to crime victims have backfired and compounded the rift between Aborigines and the criminal justice agencies. This is most clearly exemplified in the over-policing of Aboriginal communities.[68] Legislation which returns native criminal jurisdiction to these communities would have the effect of replacing a legal system which is ineffective and despised by the Aborigines with one which they respect, will voluntarily adhere to, and claim as their own.

Several objections to such a legislative move are envisaged. One is that native criminal laws might not adequately protect Aboriginal victims. For example, a defence recognised by native law might absolve an accused from liability entirely and this would affect the level of legal protection afforded to the victim.[69] In reply, we should beware of the danger in this field of simply assuming that one set of values and perceptions is somehow superior to another. The normal developmental process of native laws would have ensured that the particular native law defence emerged only after a fine balancing had been done of the various competing interests, including those of the victim. Another objection may be that to recognise Aboriginal native laws but not those of migrant communities would be discriminatory against the latter communities. The following response of the Australian Law Reform Commission to just such a concern is apposite:

> Migrants came to the Australian community [founded after 1788] ... not as communities but as individuals (or families). They came to a community with its own laws and legal culture. But the position of the members of Aboriginal communities is different. This is their country of origin. In relation to the general community, they exist not merely as individuals but as a prior

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66 See Barsh, R, "Indigenous Peoples and the Right to Self-Determination in International Law" in Hocking, B, *International Law and Aboriginal Human Rights* (1988) at 68.

67 For the suggestion that the Mabo decision lends itself to the promotion of self-determination of this kind, see Nettheim, G, "'The Consent of the Natives': Mabo and Indigenous Political Rights" (1993) 15 *Syd LR* 223 at 230–231.

68 Cunneen, C, "Policing Aboriginal Communities: Is the Concept of Over-Policing Useful?" in Cunneen, C (ed), *Aboriginal Perspectives on Criminal Justice* (1992) at 76.

69 Australian Law Reform Commission on the Recognition of Aboriginal Customary Laws, above n31 at par 449.

> community (or series of communities) inhabiting territory to which the general community itself migrated (without their agreement and without their having any control over that process).[70]

The Commission also noted that the adverse impact of non-recognition of their native laws on Aborigines was demonstrably greater than was the case for immigrant minorities. For these reasons, the Commission concluded that special measures for the recognition of Aboriginal native laws would not be racially discriminatory and will not involve a denial of the principle of equality before the law.[71] In this connection, section 8(1) of the *Racial Discrimination Act* 1975 (Cth) could also be invoked to arrive at the same conclusion.[72]

A third objection might be that grave difficulties of administration and comprehension will result from the running of two separate legal systems within the one nation. This may be true if both systems were greatly overlapping in scope and their delineation was not carefully spelt out. But it need not be the case if the conditions required for native criminal jurisdiction to operate were clearly expressed and the scope of jurisdiction made to fall within certain narrow perimeters. For instance, native criminal jurisdiction could be confined to designated Aboriginal community areas. Before jurisdiction can be handed over, there must be proof that the community possesses a system of native criminal laws and has the capacity to establish a tribal court. Native criminal jurisdiction could be confined to all incidents committed within the Aboriginal community area, but it should cover both Aboriginal and non-Aboriginal offenders. The jurisdiction of tribal courts may, however, extend to an incident occurring outside the area provided both the offender and victim were Aborigines and involved the carrying out of the traditional punishment of the tribe to which they belonged.[73] In relation to traditional punishments meted out by the tribal court, it would be necessary to ensure that they conformed with (or were modified to meet) contemporary notions of just and humane punishment such as those specified in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It is heartening to observe that the move towards Aboriginal self-management of social behaviour and good order within their own communities has already begun. Both the Australian Law Reform Commission[74] and the Royal Commission into Aboriginal Deaths in Custody[75] have proposed recommendations toward self-determination for local communities. The legislatures of Queensland[76] and Western Australia[77] have gone a step further to actually

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70 Id at par 164.

71 Id at par 165.

72 See the previous discussion of this provision in the main text accompanying note 60.

73 This was envisaged by the Victorian Law Reform Commission and led it to propose a customary law defence as a partial defence to murder: Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) pars 227–229.

74 Above n31, Vol 2, pars 828–832. The Commission proposed implementing, on a trial basis, a scheme developed by the Yirrkala people of Arnhem Land. See further Coombs, H, Brandl, M and Snowden, W, *A Certain Heritage* (1983) at 205–211.

75 *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), chs 27 and 29.

76 *Community Services (Aborigines) Act* 1984 (Qld); *Community Services (Torres Straits) Act* 1984 (Qld). Even greater self-determination by Aboriginal communities will be afforded should the Queensland government adopt the proposals of a government instituted review committee comprising Aborigines and Torres Strait Islanders, see "The Final Report. Recommendations of the Legislation Review Committee" (1992) 55 *Abor L Bull* 8.

77 *Aboriginal Communities Act* 1979 (WA). For a review, see Wilkie, M, *Aboriginal Justice Programs in Western Australia* (1991).

hand over criminal jurisdiction within designated Aboriginal community areas to community courts. Other legislatures should be quick to follow suit.

Conclusion

The High Court decision in *Mabo* spells out a step-by-step approach which courts should follow when determining whether a particular area of native law or a form of native jurisdiction still exists under Australian law. This article has attempted to apply that approach to the area of native criminal laws and jurisdictions. The tentative conclusion reached is that native criminal laws and jurisdictions survived the establishment of British settlement in 1788. They would have continued to exist within the body of the common law (in the same way as native title exists as held by *Mabo*) had they not been subsequently extinguished by legislation and executive acts.

But the legacy left by *Mabo* to the recognition of native laws does not permit the enquiry to end there. The High Court did acknowledge the fact that Aborigines were sovereign peoples with their own sophisticated legal systems. Furthermore, the Court did declare Australian common law to be a living law which should, and be seen to, correspond with contemporary attitudes on justice, human rights and fundamental freedoms. The court also allowed for the possibility of limited forms of native laws and jurisdictions to co-exist alongside the ordinary laws of the nation. These rulings collectively serve a powerful impetus for Federal, State and Territory legislatures to pass laws which reinstate native criminal jurisdictions in Aboriginal communities. The cultural and religious underpinnings of native laws governing social behaviour are precisely the same ones as those underlying the connection between Aborigines and their lands. It is fitting that the legislatures should be the branch of government reviving native criminal jurisdictions since they were the ones which committed the mistake and injustice of extinguishing them in the first place. In this respect, the Commonwealth government should take the lead by including a form of native criminal jurisdiction within the "social justice package" currently being worked out with Aboriginal leaders. The last word should come from these leaders:[78]

> Let's have more discussion about it. But let us keep in mind there is every reason for Australian law to move aside to accommodate the rights of traditional people to apply traditional laws.
>
> — Michael Mansell, Aboriginal activist

> In places like the Kimberley and Arnhem Land, the customary law is still very strong. It is not well understood that the ability of many Aboriginal people to participate in the wider community depends on the integrity of their law.
>
> — Peter Yu, Kimberley Land Council Director

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78 The following quotations are from an article by David Nason who interviewed several Aboriginal leaders on the promised social justice package for Aborigines: "The Next Battle", *The Weekend Australian*, 15–16 January 1994.