THE IMPACT OF LAW IN HISTORY AND HISTORY ON LAW AND A REVIEW OF:

Kirkby, D. and Coleborne, C. (eds)
Law, History, Colonialism - The Reach of Empire

Buck, A., McLaren, J. and Wright, N. (eds)
Land and Freedom - Law, Property Rights and the British Diaspora

Karsten, P.
Between Law and Custom – "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand, 1600-1900

And

Benton, L.
Law and Colonial Cultures - Legal Regimes in World History, 1400-1900

Judge H.H. Jackson*

Abstract

Judge Jackson's review provides a useful overview and insight to the four books reviewed and in doing so provides a useful starting point for readers interested in the interaction of history and law within the periods of history covered by the books. It is noted in the introduction the shift in focus of historical text, for, 'historico-legal studies have largely moved away from the Anglo-Saxon and medieval fields which dominated for so long, to focus on the 'modern' era and especially on the 18th and 19th centuries'. The books reviewed by Judge Jackson include such examples of this new literature.

The reviewer not only examines the breadth of coverage of the periods of history dealt with in each of the books reviewed, rather, Judge Jackson also highlights various essays or chapters from the books as being of particular interest to an Australian reader. For example, the essay by

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Parsonson 'The Fate of Maori Land Rights in Early Colonial New Zealand: The Limits of the Treaty of Waitangi and the Doctrine of Aboriginal Title' in the book: *Law, History, Colonialism - The Reach of Empire.*

Judge Jackson in examining the books also provides a useful guide to the format of each of the books. For some, such as the works edited by Kirkby and Coleborne and Buck, McLaren, and Wright are collections of essays from the 1998 and 1999 annual conferences of the Australian and New Zealand Society of Legal History. Whereas the books by Karsten and Benton are each entirely the work of the respective authors.

The common thread running through each of the books reviewed is the relationship between law and history and the impact one has on the other. The style and tone of each of the books can also be gauged by the inclusion of extensive quotes from each of the works reviewed.

INTRODUCTION

It is said, I think usually correctly, that historians should not attempt to be lawyers nor lawyers, historians. The problems are discussed by Justice Gummow in his recent book *Change and Continuity - Statute, Equity and Federalism*.[1] At one point, his Honour comments:

> 'The dissatisfaction which historians may suffer when observing the efforts of lawyers may be compared to that suffered by philosophers when lawyers expound "causation"'.[2]

As one of the essays[3] in *Law, History, Colonialism – The Reach of Empire* notes, his Honour had reason to look to the uses of history in legal reasoning in his judgment in *Wik Peoples v Queensland*.[4]

In *Change and Continuity – Statute, Equity and Federalism*, after reviewing United States controversies, his Honour adds:

> 'But, then, one might think, history and rhetoric are no strangers and neither muse has led a cloistered life. The advocate's use of history is pragmatic and instrumental, so that if it assists to win a case it has served its purpose, whilst to the Court history is more than a mere instrument of decision. Nor, "as the historians sometimes view it", is history a research project. Rather, where it is employed in the reasoning of the Court, to which precedental force is then attached, history assists in the

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1 Gummow, W. *Change and Continuity – Statute, Equity and Federalism*. New York: Oxford University Press, 1999, 78-88.

2 Gummow, W. *Change and Continuity – Statute, Equity and Federalism*. New York: Oxford University Press, 1999, 84.

3 Walters, M. Towards a 'Taxonomy' for the Common Law: Legal History and the Recognition of Aboriginal Customary Law. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 125-139.

4 *Wik Peoples v Queensland* (1996) 141 ALR 129 at 231.

5 Gummow, W. *Change and Continuity – Statute, Equity and Federalism*. New York: Oxford University Press, 1999, 86.

transmission throughout the body politic of ... doctrine.'[5]

The differences of aspect and role are discussed in one of the essays[6] in *Law, History, Colonialism – The Reach of Empire*, where, after considering judicial comment by Olney J in *Yorta Yorta v State of Victoria*[7] and by Lee J in *Ben Ward v State of Western Australia*[8], historian Christine Choo[9] comments:

> 'It appears that the legal profession has much to learn about history as a professional discipline, and the value of the processes, method and analysis techniques of professional historians, who are not simply "gatherers of facts". In the context of litigation for native title, the legal profession and the courts appear to be leaning towards such a limited view of professional historians as "gatherers of facts", with the lawyer taking on the role of historian and interpreter of historical "facts". Here is an example of the blurring of professional boundaries - a practice of which, in court, lawyers are so critical ... The evidence assembled by historians and the opinions they formulate are part of an intensely political process in which a number of different perspectives are pitted against each other in court. Often the same historical material may be subjected to a number of divergent and incompatible interpretations by historians working to very different briefs. Another significant aspect is the problem of reconciling the research and the debates with the imperatives of the judicial discourse and its notion that objective truths can be discovered. The rhetoric of objectivity which is at the heart of the judicial treatment of historical evidence obscures the senses in which both the analytical process and the facts it interrogates reflect power relations associated with race, gender, ethnicity, class, etc.
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> One of the most significant aspects in this discussion is the question of cultural difference and different knowledges. Representations of the past are culturally specific. European historiography and the rules of evidence around which it revolves are grounded in a tradition of positivism and Enlightenment rationalism. Western historiography is embedded in the tradition of written discourse and the idea of linearity, while the conceptions of time, place and story which emerge from Aboriginal epistemology are vastly different, sometimes incomprehensible to Westerners.
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> The tendency of Western historians to value written traces of the past more than other traces (for example, individual memory, story, dance, visual art, etc.) often obscures minority voices and renders them invisible.
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> My review of the use of professional historians in litigation for native title confirms my opinion that we have a long way to go in improving the dialogue between lawyers and historians, between legal processes and

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6 Choo, C. Historians and Native Title: The Question of Evidence. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 261-276.

7 *Yorta Yorta Aboriginal Community, Members of v Victoria* (1996) 1 AILR 402.

8 *Ward v Western Australia* (1999) 163 ALR 149.

9 Among Choo's writing is: *Mission Girls – Aboriginal Women on Catholic Missions in the Kimberley, Western Australia, 1900-1950*. Crawley: University of Western Australia Press, 2001.

> historiography. We must continue our dialogue to clarify understanding of our particular professional expertise and professional boundaries. Some lawyers, like many other people, think that "anyone can do history". Lawyers therefore must be educated about the uses of history, the value of historical evidence and the professional expertise which historians can offer in court. Historians have a responsibility to prepare themselves for increasing scrutiny of their profession and their methodologies, and to develop the confidence to deal with these issues publicly.'[10]

As a dilettante reader in each field, however, I have found the interface fascinating now that historico-legal studies have largely moved away from the Anglo-Saxon and medieval fields which dominated for so long, to focus on the 'modern' era and especially on the 18th and 19th centuries. This, of course, is merely a personal comment. A study of the lists of English publishers will show a vibrant field of early and early modern legal history writing. But, for me, the interest is elsewhere. No doubt Australia's position at the edge of empire and, with both similarities and differences from other imperial areas, the recent surges of interest in both the pluralisms and uncertainties of early colonial law and in the positions of indigenous peoples are contributing factors in this fascination.

Land, government, citizenship, the definition of crime and its enforcement, gender, family and inheritance and, in some situations, the existence of slavery or penal settlements all form part of the complexity and the interest. In contemporary Australia, the largest controversies about legal uses of history have probably arisen in areas of indigenous interactions with the law. Yet, as students 40 years ago, we were taught of a teleological progress calmly, rationally and uniformly imposed by Westminster on a grateful wilderness after emerging from a medieval European swamp and ending pretty much, save for some technical reforms in the late 19th century, at the 17th century. Not then the contingencies of post-modernism.

The interests (and complexities) of some of the new literature are illustrated in the works here reviewed. The first two books: *Law, History, Colonialism – The Reach of Empire* and *Land and Freedom – Law, Property Rights and the British Diaspora*[11] come out of academic conference papers and reflect the commonality of interests of historians of modern law, especially from North America and the Antipodes, but

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10 Choo, C. Historians and Native Title: The Question of Evidence. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 272-274.

11 Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001; and Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001.

with input from the United Kingdom and about South Africa, the Indian sub-continent and the South Pacific. They are collections of essays from the 1998 and 1999 annual conferences of the Australian and New Zealand Society of Legal History but, surprisingly to me, were both published in the United Kingdom, albeit by major publishers of learned works in this field.

One of the disadvantages of conferences where papers are given in streams is that attendees cannot hear them all. One of the joys of such books is that they usually include a number of those missed. Others are often picked up in subsequent periodical literature.[12]

Most of the chapters are written by historians, rather than by lawyers. Rather than explain the law to historians, they (inter alia) explain history to the lawyers. All are brief and concise, despite the nature of their subject matter. However, the first is probably inevitable - and not inappropriate - and, in each case, the brevity is balanced by references and footnotes which enable those interested to follow up the matters raised.

But how, in a review of reasonable length, is it possible to deal with a total of 27 papers covering some 500 pages. Ignoring the (absent) problems of layout, editing or typography and of the (present) ever-increasing price of imported books, perhaps it is best to give some idea of the content, and focus on a few which strike the reviewer as the most significant or the most interesting. But that may be too idiosyncratic.

Or attempt an overall synopsis or synthesis. But one problem with collections of conference papers is that they often lack a theme or a perspective, so that a difficulty with publishing conference papers is to fit the papers into the theme of the volume – judgments will vary[13] and, of course, not all papers are available for publication.

Perhaps, instead, in a review for lawyers of essays mainly by historians, the drawing to attention of insights into the law which lawyers themselves might miss. Two which struck me were these:

> 'The rule of law can embrace not only generic imperial, national or colony-wide law and justice, but also law and justice embodying local community aspirations and needs. Thus, when tension developed

12 Some may later be expanded or developed: see also footnotes 16 and 17 below.

13 Perhaps these essays are such examples: D'Souza, R. International Law – Recolonizing the Third World? Law and Conflicts Over Water in the Krishna River Basin. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 243-260; and Havemann, P. Freedom, Serfdom and Internet Governance: Private Domain or Cybercommons? IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 177-196.

14 McLaren, J. Reflections on the Rule of Law: The Georgian Colonies of New South Wales and Upper Canada, 1788-1837. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 47-

> between an imperial Government committed to preserving deference, order and imperial hierarchy and a colonial majority pressing for political equality and the removal of constitutional and legal impediments to their development, the notion of the rule of law could be passionately and honestly invoked by both sides.'[14]

and, returning to Gummow J and Christine Choo,

> 'In the Western tradition, historians have tended to assume that relatively objective and linear historical realities can be identified through interpretations of written records in which the historian attempts both to keep his or her own cultural and historical perspective at a distance and to produce interpretations of history relevant to that particular cultural and historical position. In contrast, Aboriginal conceptions of history are informed by oral traditions that are generally non-linear, and the goal is not to seek an objective truth detached from the present but to tell a story of the past in which the assumptions and aspirations of the teller and the listeners are more of an integral part. At least in relation to *legal* history, common-law reasoning tends to resemble the native rather than the non-native conception of history: judges tell stories of the legal past not to identify its historical reality but to derive rules and principles that have moral resonance and therefore normative force for those listening, i.e. the people whose lives today will be affected by the outcome of litigation.'[15]

Book One and Two:

Law, History, Colonialism – The Reach Of Empire And *Land And Freedom: Law, Property Rights And The British Diaspora*

The first of the books reviewed, *Law, History, Colonialism – The Reach of Empire,* is divided into five parts, each of three or four chapter essays: Part I – Colonialism's legality, Part II – Imperialism and citizenship, Part III – Justice, custom and the common law, Part IV – Land, sovereignty and imperial frontiers, and Part V – Colonialism's legacy. The second volume under review is entitled *Land and Freedom: Law, Property Rights and the British Diaspora.* But the difference in titles is perhaps misleading - the two volumes have very considerable overlaps of content and interest. Indeed, a number of the essays in *Law, History, Colonialism – The Reach of Empire* could well have been found under the title *Land and Freedom – Law, Property Rights and the British Diaspora*. Both books deal with two primary and inter-related issues - the legal framework of colonial expansion and the issue of personal and

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15 Walters, M. Towards a 'Taxonomy' for the Common Law: Legal history and Recognition of Aboriginal Customary Law. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press,

property rights along colonial frontiers. *Law, History, Colonialism – The Reach of Empire*, however, also runs wider in time and place, as well as subject matter, with such essays as Christopher Tomlins' 'Law's Empire: Chartering English Colonies on the American Mainland in the Seventeenth Century'[16], Julie Evans and David Phillips'"When There's No Safety in Numbers": Fear and the Franchise in South Africa - the Case of Natal'[17] and Helen Gardner's 'Assuming Judicial Control: George Brown's Narrative Defence of the "New Britain Raid"'.[18] It should be said that in some cases, for example, the last two mentioned, the subject matter is historical rather than raising any peculiarly legal issues. Other essays such as Nancy Wright's 'The Problem of Aboriginal Evidence in Early Colonial New South Wales'[19] and Christine Choo's 'Historians and Native Title: The Question of Evidence'[20], of course, deal with issues more legal.

But the question of land is central to both these books as it was to colonial expansion. The essays are not limited either to the interface between the colonists and indigenes in Australia, New Zealand and Canada, although those issues are dealt with in a significant number of the chapter essays. Golder and Kirkby deal in *Law, History, Colonialism – The Reach of Empire* with 'Land, Conveyancing Reform and the Problem of the Married Woman in Colonial Australia'.[21] In *Land and*

2001, 125-126.

16 Tomlins, C. Law's Empire: Chartering English Colonies on the American Mainland in the Seventeenth Century. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 26-45. See the following for an expanded version: Tomlins, C. 'The Legal Cartography of Colonization the Legal Polyphony of Settlement: English Intrustions on the American Mainland in the Seventeenth Century' (2001) 26 *Law and Social Inquiry*, 315.

17 Evans, J. and Phillips, D. 'When There's No Safety in Numbers': Fear and Franchise in South Africa – the Case of Natal. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 91-105. Now see: Evans, J., Grimshaw, P., Phillips, D. and Swain, S. (eds) *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830-1910*. Manchester: Manchester University Press, 2003.

18 Gardner, H. Assuming Judicial Control: George Brown's Narrative Defence of the 'New Britain Raid'. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 156-170.

19 Wright, N. The problem of Aboriginal Evidence in Early Colonial New South Wales. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 140-155.

20 Choo, C. Historians and Native Title: The Question of Evidence. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 261-276.

21 Golder, H. and Kirkby, D. Land, Conveyancing Reform and the Problem of the Married Woman in Colonial Australia. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 207-220.

22 McLaren, J. The Canadian Doukhobors and the Land Question: Religious

Freedom – Law, Property Rights and the British Diaspora, John McLaren discusses 'The Canadian Doukhobors and the Land Question: Religious Communalists in a Fee-Simple World'.[22]

For an Australian reader, the studies of New Zealand developments are among the most interesting, illustrating, as they do, the differences between our own story and theirs - the result of demography and culture, reflected in the *Treaty of Waitangi*.[23] These include the development of 'leases' by Maori clans to Pakeha 'leaseholders'[24], the *Native Land Purchase Ordinance 1846*[25] and the punitive land confiscation of Maori land in the 1860s.[26]

For this reviewer, another of the most interesting essays is the piece on the way in which, in 1939 the Supreme Court of Canada ruled that the concept of 'Indian' in the *Indian Act 1924* included Eskimos without any reference to evidence or submissions from either, and rejected anthropological evidence as well, thereby illustrating one of the differences between historical and legal technique.[27]

Land and Freedom – Law, Property Rights and the British Diaspora commences with a series of chapters discussing issues concerning the conceptual basis of land entertained over time in Britain and its Empire. It begins with Laura Brace's essay[28] on the debate over 'improvement' and the ideas of Diggers like Winstanley in the 16th century. This is followed by an essay by Pat Moloney[29] focusing on early Victorian

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Communalists in a Fee-Simple World. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 135-149.

23 *Treaty of Waitangi 1840* and *Treaty of Waitangi Act 1975* (NZ).

24 See the essay by: Parsonson, A. The Fate of Maori Land Rights in Early Colonial New Zealand: The Limits of the Treaty of Waitangi and the Doctrine of Aboriginal Title. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 173-189.

25 See the essay by: Weaver, J. The Construction of Property Rights on Imperial Frontiers: The Case of the New Zealand Native Land Purchase Ordinance of 1846. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 221-239.

26 See the essay by: Gilling, B. *Raupatu:* The Punitive Confiscation of Maori Land in the 1860s. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 117-134.

27 Backhouse, C. 'Race' Definition Run Amuck: 'Slaying the Dragon of Eskimo Status' before the Supreme Court of Canada, 1939. IN Kirkby, D. and Coleborne, C. (eds) *Law, History, Colonialism: The Reach of Empire*. Manchester: Manchester University Press, 2001, 65-77.

28 Brace, L. Husbanding the Earth and Hedging out the Poor. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 5-18.

29 Moloney, P. Colonisation, Civilisation and Cultivation: Early Victorians' Theories of Property Rights and Sovereignty. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 23-

theories such as those of Edward Gibbon Wakefield reflecting on the writings of Adam Smith, Thomas Malthus and others. The third essay is by Andrew Buck[30] on the parallel dispossessions of the poor from commons and waste land in Britain and of indigenous people in the Empire. Peter Karsten[31] then discusses the ways squatters and miners in North America (and, dealt with briefly, the Antipodes) resisted formal land law by reference to informal custom and the responses of parliaments, officials, judges and juries.[32]

The following chapter by Bruce Kercher on 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836'[33] before 1836 is, perhaps, out of context in a work dominated by questions of land. It does, however, remind the reader of the contestability of so many subsequently received legal doctrines, to which *Mabo (No 2)*[34] came, not so much as a revolution, but as a revival of old issues.[35] Not so Stuart Rush's essay on 'Aboriginal Title and the State's Fiduciary Obligations'[36] in Canada where the issue has led to developments not yet adopted in Australia.

Finally, one mentions that the essay by editors Buck and Wright[37] on the 19th century discourse on improvement in New South Wales in the context of the 1860s *Robertson Land Acts*, echoes earlier

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30 Buck, A. 'Strangers in Their Own Land': Capitalism, Dispossession and the Law. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 39-56.

31 Karsten, P. 'They Seem to Argue that Custom has made a Higher Law': Formal and Informal Law on the Frontier. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 63-81.

32 These issues and many more are now pursued in vast detail in his book: Karsten, P. *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand, 1600-1900*. Cambridge: Cambridge University Press, 2002, reviewed below.

33 Kercher, B. The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 83-102.

34 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

35 Kercher's efforts in making available the early decision of New South Wales' courts has reaped rewards in a number of fields, of which this is but one, see: <http://www.law.mq.edu.au/scnsw/html/introduction.html>.

36 Rush, S. Aboriginal Title and the State's Fiduciary Obligations. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 155-175.

'improvements' debates and adds the dimension of facilitating denial of indigenous claims.

BOOK THREE:

BETWEEN LAW AND CUSTOM: "HIGH" AND "LOW" LEGAL CULTURES IN THE LANDS OF THE BRITISH DIASPORA – THE UNITED STATES, CANADA, AUSTRALIA AND NEW ZEALAND, 1600-1900

The 1960s and 1970s, of course, saw the blossoming of historical studies of the impact of the centralised nation state, industrialisation and agricultural modernisation on common and customary practices in England by writers such as E.P. Thompson and his colleagues in works such as Thompson's *Customs in Common*[38], and some of the collection in *Albion's Fatal Tree*: *Crime and Society in Eighteenth-Century England*[39] dealing with areas in which local practices clashed with 'modern' national legal concepts. Christopher Hill's *Liberty Against the Law - Some Seventeenth Century Controversies*[40] dealt with 17th century examples of the clashes between centralising law and local custom. But whilst Australian lawyers will be most familiar with English studies such as these, the fields of interest range far and wide - as, for example, in the Spanish relationships of Crown, Church, local custom, Jewish and Moorish laws in Iberia, and Crown, Church and Indian customs in the Americas, and, of course, the development of law in North America, the Antipodes and other parts of the British Empire in the 17th, 18th and 19th centuries. The next two books reviewed deal with some of these issues but totally different ones.

In *Between Law and Custom,* Karsten, a Professor of History at Pittsburgh University, sets out to deal with questions he formulates in his Introduction thus:

> 'I was not simply searching for innovations, or attempting to document the source of such innovations in the fashion of a history of ideas. Given what we know of British Colonial and Dominion courts prior to the present generation, I would have been very surprised to find much willingness to challenge directly British precedent in Canada, Australia, or New Zealand, at least after the first few decades of what Bruce Kercher has styled "frontier law." What I was looking for was evidence of how these CANZ <that is Canadian Australian and New Zealand> jurists faced problems in property, contract, and tort similar to those that had

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37 Wright, N. and Buck, A. Property Rights and the Discourse of Improvement in Nineteenth-Century New South Wales. IN Buck, A., McLaren, J. and Wright, N. (eds) *Land and Freedom: Law, Property Rights and the British Diaspora*. Aldershot: Ashgate, 2001, 103-116.

38 Thompson, E. *Customs in Common*. London: The Merlin Press Ltd, 1991.

perplexed American jurists as these regions opened to settlement, experienced modernization, and witnessed the creation of new enterprises and entities, new farms, ranches, factories, cities, streetcars, macadamized roads, insurance companies, steamships, and railroads. I wondered whether some of these Westminster-bound jurists in one or more colonies might display traits, attitudes, or propensities comparable to one or another of the perspectives that American legal historians have identified in the opinions of nineteenth century American jurists. How often did one or another of these perspectives ever inform the judgements of any CANZ jurists? I knew that by 1837 *English* jurists were treating American opinions as being merely "of interest" rather than in any way authoritative, and I suspected that CANZ jurists would have eventually felt compelled to follow that lead, but how completely? I was thus interested to see whether CANZ jurists, faced with problems generated by such enterprises and entities, made use of the non-English ways that certain American jurisdictions had faced them. But, in the absence of evidence that they actually knew of the actions of their American peers, I was content simply to learn how they faced their own problems, given the constraints of their colonial or Dominion status.

These questions are, by their nature, those of the field of Comparative intellectual history: Why did "great minds" (or in this case great, and a number of not-as-great jurists) favor one view of what "the Law" is, or should in the case before them be, over another?

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Knowing how CANZ jurists dealt with English (and American) precedents, and with Canadian and Australasian "circumstances and conditions," is interesting; but at *least* as interesting is the question of how important The Law actually *was* in the lands of the British Diaspora. To answer *that* question, one first has to know what The Law *was*, *not* just to legislatures and high court jurists, but to trial judges, attorneys, arbitration panels, magistrates, juries, and others in Britain, the United States, Canada, Australia, and New Zealand. How often were statutes and high court rules avoided, evaded, or ignored? Secondly, at a more basic level, one has to know what the "informal laws" (that is the customs and popular norms of conduct) were that ordinary folk in Britain and her Diaspora lands actually observed in conducting such everyday (but important) affairs as the resolution of land-title, boundary, leasehold, sales, labor-contract, trespass, or injury disputes. In short, quite apart from high court *haute culture*, what were the "low" legal cultures like in the lands of the British Diaspora during the three centuries before World War I?

Drawing upon the insights and findings of anthropologists, sociologists, and social historians, we know first that lower courts do not always follow religiously the rules and norms set down for them by supreme court jurists, and, second, that many potential legal disputes do not reach the entry-level stage of a lawsuit, let alone the full-fledged status of courtroom litigation. Resolution of disputes often occur at the unofficial level of the insurance adjustor, or at a more private, interpersonal level governed by expected neighborly norms. Sometimes these norms appear to have been shaped by forces largely indifferent to the rules enunciated with care by high-court jurists, and at times they appear to have been quite contrary to them.

Aware of these modern-day observations, I wanted to know something of

> both the private, interpersonal "law" of individuals and the more public legal culture of magistrates and juries in the British Diaspora lands that would serve as a complement and counterpart to what I sought to know about the high court jurists of these jurisdictions.
> A few examples, drawn from the domain of property law: Despite the niceties of the Law with regard to real property, squatters abounded in the British Diaspora lands of North America and the Antipodes. Those entitled to be styled "Proprietors," by virtue of their possession of some document granting them lawful title to land, could find their forests laid waste in ways every bit as bold as any yeoman with blackened face did to a forest or its keeper in early or mid-eighteenth century England.
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> Other "daring disturbers of the public peace" claimed to hold possessory rights derived from previous squatters, via purchase from indigenous people, or in more radical fashion (sometimes citing John Locke) by virtue of their having mixed their labor with the land, instead of from the Crown or one who had acquired title from the Crown. ... Meanwhile, "down under," those who "squatted" on the land were the great graziers, who eventually secured vast leaseholds for a few farthings an acre, and then openly threatened farmers who sought to "select" land on these vast leaseholds under new statutory provisions. Similarly, the Law of slavery was widely resisted, both by slaves themselves and, eventually, by their sympathizers, the Abolitionists, as well. Moreover, though the Law of fencing and animal trespass was clearly spelled out in colonial statutes and municipal ordinances, people tended to ignore such laws and make arrangements more convenient in these matters … Of course even these "common law" popular norms could be violated, ... This sort of trespass could lead to similar tension in the other lands of the British Diaspora ...
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> How often and under what circumstances did popular norms conflict with the Common or statutory Law? When it did, how did that conflict play out? When did the Law win? When was it simply ignored or supplanted by "common law"? The mere identification of such conflict is one thing, but I also ask (if I do not always fully answer, to my satisfaction) what the difference was - that is, *why* did the Law win certain conflicts, the "common law" of popular norms, others?
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> ...
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> This book concerns tensions between the Law and popular norms regarding three central human domains: Land (Property Law), Agreements (Contract Law), and Accidents (Tort Law). Issues within each of these three arenas are addressed in a "high" and "low" legal culture mode. The first chapter explores both the Law and "customs" with regard to property, including the customary property rights of Aboriginal people;[41] the second explores the same conflict over landlord-tenant relations; the third, over questions of title to land; the fourth, over encroachment on one's title, such as "takings," trespasses, and easements. A fifth chapter compares "high" and "low" legal cultures with regard to sales agreements, third-party beneficiary contracts, and

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39 Hay, D. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. London: A. Lane, 1975.

40 Hill, C. *Liberty Against the Law – Some Seventeenth Century Controversies*. London:

> contingency-fee contracts; the sixth does the same with regard to labor, construction, and service contracts. A seventh chapter considers the formal Law of negligence (accident law); an eighth explores the "real" law of accidents - that is, the arenas of settlements, trial courts, and jury awards. A concluding chapter adds some data on other legal issues not falling clearly into one of the three issues addressed ...'[42]

He adds:

> 'I can't address every issue in a single book covering three centuries and plenty of territory; hence I have omitted from consideration the domains of family law, constitutional law, and criminal law[43] (except as these have coincidentally overlapped at times one or another aspect of a topic being addressed).
>
> While I refer from time to time to slavery, I have not included this involuntary life-long labor "contract" in the scope of this study.'[44]

This is clearly a massive undertaking and the resulting book is of some 540 pages, each densely written, plus thousands of footnotes, bibliographical references and indexed details, and a significant number of reproduced photographs and cartoons. The ironies of history are not lost on the author as he details innumerable cases of those whose customary and communal rights in the old world having been swept aside, in turn swept aside those of indigenous peoples in the new world, of the tensions between new world governments and those they tried to govern and between the competing claims of differing social groups. The relationships between the needs of new colonies and the imported laws of the old kingdom are explored and also compared with the results of lawmaking by judges in what became the United States.

What is custom for this purpose? In fact, Karsten ranges over a variety of situations, some of which are or may be on the evidence presented simply illustrative of the unruly reactions of frontier settlers rather than indications of their understandings of their rights. In other cases, the book makes clear that juries and legislative bodies frequently acted in accord with popular pressures rather than what would have been as customary right. In others again, as with disputes between squatters and

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Penguin Books Ltd, 1996.

41 Australian background is also available in: Reynolds, H. *The Law of the Land*. 2nd ed. Ringwood: Penguin Books Australia Ltd, 1992; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; and in some subsequent decisions, as well as other sources.

42 Karsten, P. *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand, 1600-1900*. Cambridge: Cambridge University Press, 2002, 13-17.

43 In this field, in the case of New South Wales between 1810 and 1830, see: Byrne, P. *Criminal Law and Colonial Subject: New South Wales 1810-1830*. Cambridge: Press Syndicate of the University of Cambridge, 1993; and Woods, G. *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*. Sydney: The Federation

Crown or small farmers, moral claims of entitlement justified self-interests. In others again, the long-term need to get on with neighbours overrode purely legal considerations.

Karsten, at various points, discusses his researches, based not only in case law, but on monographs and journals, on his own researches in archives, newspapers of the day and elsewhere, to test the earlier writings of American legal historians like Willard Hurst and Morton Horwitz and the theories and researches of Coase, Ellickson and Posner and the Law and Economics school in areas such as fencing disputes and animal trespasses.

Almost half of the book is given over to issues concerning land, 100 pages deal with issues concerning agreements including labour contracts and 130 with negligence and accident claims. The final chapter is concerned with a number of conclusions made from the author's voluminous researches - the role of American decisions in the British diaspora, the clashes between Westminster law and local imperatives and the often unsatisfactory results, local statutory innovations, and the role of lesser players including the legal profession and magistrates. A number of illustrative examples are given throughout.

I am always concerned at the ever-increasing price of imported books. Given the scholarship, it is disappointing to find considerable evidence of lack of adequate indexing and lack of a bibliography or of adequate proof-reading. On the other hand, no doubt, it is much better that such books can continue to be sold at all than that the economics of monograph publication renders this impossible. The book is a mine of information and source material. Its price, to me, ordered direct from Cambridge University Press in England, was $75. At that price, it is a bargain. It is to be hoped that its usefulness is not too much limited by the lack of indexing and bibliography. Certainly, the footnotes are generous but, in the absence of real case lists etc., how long does it take a reader looking at a limited matter to hit the target?

BOOK FOUR:

LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400 - 1900

Illustrating the scope of current historical studies of legal systems, because at the other end of the scale of enquiry, lie the concerns of Lauren Benton's *Law and Colonial Cultures – Legal Regimes in World History 1400 - 1900*. The publisher describes the work thus:

> '*Law and Colonial Cultures* advances a new perspective in world

> history, arguing that cultural practice and institutions - not just the global economy - shaped colonial rule and the international order. The book examines the shift from the multicentric law of early modern empires to the state-centered law of high colonialism. In the early modern world, the special legal status of cultural and religious minorities provided institutional continuity across empires. Colonial and postcolonial states developed in the nineteenth century in part as a response to conflicts over the legal status of indigenous subjects and cultural others. The book analyzes these processes by juxtaposing discussion of broad institutional change with microstudies of selected legal cases.'[45]

Those 'microstudies' are of chapter length. The structure and contents of the book are set out at more length at the end of Chapter 1.

> 'The contested historical movement from truly plural legal orders to state-dominated legal orders is the subject of this book. The analysis of disputes about jurisdiction and the rules of group interaction in law moves the focus from seemingly small conflicts ... to legal cases that were widely regarded as defining the very nature of dominium. The aim of shifting the scale and scope of analysis from individual legal cases to broader patterns of colonial rule, and to international shifts, is to show the connection between particular legal conflicts over jurisdictional boundaries and larger (global) institutional shifts. The result is an intentional juxtaposition of microhistories and macrohistorical argument.
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> Each of the book's chapters pairs an overview of legal change in colonial contexts with analysis of specific legal cases. The approach risks offending regional specialists. Though I resist claims about the representativeness of the particular conflicts selected for study, the cases were chosen because they illustrate more pervasive tensions. I selected them by a process of narrowing: learning about larger legal and political trends and searching for records of cases that distilled widely diffused conflicts. World historians will, I hope, appreciate the importance of demonstrating the interconnections between small conflicts in particular historical settings and the revision of "master narratives" about global change, at the same time that they will recognize that a narrative produced by this method can hardly aspire to being comprehensive.
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> In addition to replicating a case study approach, each chapter focuses on a particular dynamic of legal politics and cultural change. Chapter 2 argues that jurisdictional fluidity was a consistent feature across diverse regions of the South Atlantic world. By forming a framework for the relation of communities in diaspora to host polities, the fragmented nature of the legal order supplied a known context for cross-cultural interactions. The next chapter shifts analysis to places where conquest brought more decisive claims of legal authority over culturally different subject populations. Rather than resolving tensions inside imposed legal orders, conquest and colonization often exacerbated those tensions, a point illustrated through discussions of the legal status of religious minorities in the Portuguese and Ottoman empires, and by the more detailed analysis of a particular case study of jurisdictional conflict in the

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Press, 2002.

44 Karsten, P. *Between Law and Custom: "High" and "Low" Legal Cultures in the lands of the British Diaspora - The United States, Canada, Australia and New Zealand,*

> Spanish colonial borderlands.
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> The fragmented legal order and the conflicts it generated tended to promote the institutional "fix" of rising colonial state power. This process was halting and only indirectly the result of planning. Chapter 4 analyzes cases from India and Africa to show the ways in which legal jockeying helped to create a space for the colonial state, even before such an entity formally existed. Policies promoting a structured legal pluralism brought challenges that in turn drew the state into a leading role in ordering multiple legal authorities, producing implicit and at times explicit claims for legal hegemony. Developing this theme further, Chapter 5 turns to cases in which only a weak pluralism was established. Here, too, we can identify a mid-nineteenth-century shift toward a state-centered legal order and more expansive claims of sovereignty. The shifting treatment of the Khoi in South Africa and the Aborigines in Australia shows that this change responded in no small part to the entanglement of seemingly separate issues, viz., the legal status of indigenous peoples and of subordinate factions in European settlers. Finally, Chapter 7 examines the impact of extraterritoriality on the legal construction of sovereignty in the nineteenth century in areas of informal empire. Paradoxically, foreigners' claims to immunity from national law tended to reinforce pressures for the creation of state-centered legal orders. In different ways, these three chapters support the argument that legal conflicts in the long nineteenth century contributed to the formation of a global interstate order.'[46]

Amongst the groups and interests jockeying for jurisdiction are religious, military, ethnic, commercial, customary and state authorities. Sharia law and canon law are claimants for jurisdiction, but so are others. Amongst the issues are local or central authority, the classification of matters as public or private, and questions of citizenship. Foreign states and merchants seek 'extra-territorial' privileges and immunities. State central hegemony is gradually established and pluralisms reduced. Interesting examples are given of local indigenes using or playing off colonial authorities against each other for private purposes but, ultimately, causing the strengthening of the very systems they were exploiting.

The author adds the following comment:

> 'A fortuitous, and not entirely accidental, byproduct of the book is to provide historical perspective for considering some of the disruptive forces of global politics in our own time. Cultural and religious factions have been neatly constrained by the nineteenth-century model of state-centered legal pluralism to choose among unsatisfying political alternatives: to press weak claims for sovereignty; pursue narrow, rights-based legal challenges; trade autonomous governance for civic - or status - based associations; or seek control over the state apparatus in an attempt to resurrect nonstate moral or religious authority. In response, the choices of supporting repression, on the one hand, or seeming to

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1600-1900. Cambridge: Cambridge University Press, 2002, 17.

45 Benton, L. *Law and Colonial Cultures: Legal Regimes in World History, 1400 - 1900*. Cambridge: Cambridge University Press, 2002, back cover.

> endorse a fragmenting parochialism, on the other, are deeply disturbing and limiting. By revealing modern state-centered legal pluralism as historically recent and contingent, we may perhaps help to make space for other frameworks that would allow for greater legitimacy for alternative political authorities without threatening the rule of law. Such an act of imagination may be forced upon us by challenges to traditionally defined states across the globe. But it may be helpful to begin by contemplating historical examples of "orderly disorder" as a way of preparing ourselves for the future.'[47]

Given controversies in Australia in recent years about Aboriginal land title, customary law and even a treaty, these may not be matters of merely historical interest.

The author ranges far and wide, especially across Africa, India and Latin America, illustrating the pluralities both of empire and within societies such as early modern Spain and frontier New Mexico in illustrating the complex webs of legal pluralism and the gradual strengthening of state authority. Australia, in many respects, is to be seen as an exception rather than the norm, but then each colonial situation was. The author stresses similarities rather than differences. However, the Australian situation was different. For the Australian reader, Chapter 5, 'Subjects and Witnesses: Cultural and Legal Hierarchies in the Cape Colony and New South Wales'[48], is of most interest. The chapter contains an extensive discussion of early developments in New South Wales as to the early position of both convicts and Aborigines. Indeed, Benton spends some pages drawing out the parallels and differences between the evolving positions of the convicts and emancipists and that of the Aborigines. Jurisdictional issues once again marked cultural and social difference. Ultimately, what Bruce Kercher has called the weak pluralism of the Francis Forbes era was replaced in the 1830s and, later, by state hegemony and terra nullius doctrines.

The final chapter sets the author's findings against those of E.P. Thompson's *Whigs and Hunters: The Origin of the Black Act*[49] and others. Benton concludes:

> 'In the earlier period, this was a story about law's belonging to bounded communities. Later, conflicts over the shape of the legal order urged a function and a place for state law that had not existed before. Jurisdictional disputes, struggles over the legal status of cultural and legal intermediaries, and conflicts over the definition and control of property

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46 Benton, L. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 2002, 28-29.

47 Benton, L. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 2002, 29-30.

48 Benton, L. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 2002, 167-209.

> connected to this historical turn. As the case studies have shown, there is no single protagonist of this narrative - and certainly not a Western model of governance or its proponents. The instability of colonial legal politics, the appeals of litigants to a still-forming state legal authority, the cultural uncertainties of boundary crossing, the independent interests of colonial settlers and outside investors - these processes combined to shape a place for the colonial state as a state, in many cases decades before imperial powers were ready either to concede or consciously to propel such a shift, and before colonial elites were motivated or prepared to advocate it.
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> ...
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> I began this book by commenting on the possibility of drawing connections to the legal politics of the colonial past and the political conflicts of the postcolonial world. Many of the legal issues discussed in these pages are still with us: debates about the legal status of Aborigines, indigenous Canadians, American Indians, Mexican Indians, South African Zulus, Indonesian Chinese, Egyptian Copts, and many other groups call forth competing theories about legal pluralism and the relative authority of the state. Added to such cases are the challenges of governance of new forms of transnational association. The shift toward state legal hegemony has not foreclosed possibilities for the emergence of alternative legal authorities centered in ethnic subpolities or cross-border communities. Nor does the institutional continuity provided by jurisdictional fluidity in the early modern period offer a model for a future of diminished states. If anything, the knowledge that pluralist visions of the law contributed to state making should suggest that state *un*making (or re-making) would involve another historical shift matching widespread legal and cultural reordering. Struggles surrounding such a shift would invoke many of the old routines for organizing difference, with some groups claiming that these patterns are immutable products of one or another legal tradition. We should beware of such claims. And we should look to seemingly small struggles over cultural boundaries in the law as having a potentially profound impact on new structures of power everywhere.'[50]

CONCLUSION

The field of law and history is not just legal history, but broad and deep - the impact of law in history and history on law, as well as the narrower concerns that occupy more traditional understandings. The world is wide and the times to be looked at are limited only by human occupation. Sources may be oral or written, official or private.

Most of the work here reviewed is that of historians. Lawyers tend to see the law as fixed in time and place - the very opposite of modern historical thinking. But some lawyers jump the fence. The issue is important - the

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49 Thompson, E. *Whigs and Hunters: The Origin of the Black Act*. Harmondsworth: Penguin, 1977.

50 Benton, L. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 2002, 263-265.

furore about judicial activism in Australia in recent times reached its peak after *Mabo (No 2)*[51] and, recently, conservatives have accused the High Court of Australia not just of getting the law wrong in that case, but the history too. From the other flank also, courts are accused of failing to understand the history enough - as *Yorta Yorta*[52] commentaries demonstrate. The history and the law each have something to say - the history of the law, though only part, is an important, but often underrated, part of each. If the judicial activist feels freer to change the law than his more restrained colleagues, both may benefit from an understanding not just of the shackles of the accepted version of the legal past, but of the potentials that other histories of the law open up. In that process, the insights of the historian might just have greater value than those of the lawyer, or than the lawyer is prepared to grant.

51 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
52 *Yorta Yorta Aboriginal Community, Members of v Victoria* (1996) 1 AILR 402.