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COLONIAL LOGIC AND THE COORONG MASSACRES

I Introduction

Soon after I enrolled to study law in 1979, I read Stephen Lendrum's article about the 1840 Coorong massacre in the *Adelaide Law Review*.[1] I belong to the land and peoples of the Coorong, and had been aware of the Coorong massacre from stories told to me by my family and elders. I had an Aboriginal worldview of the colonial frontier. The Coorong massacre occurred after 26 new settlers, who had survived the *Maria* shipwreck, died at the hands of Coorong Tanganekald Milmendjeri people. A punitive expedition was dispatched from Adelaide, and the number of First Nations Peoples' lives lost to the punitive mission remains unknown. Our Aboriginal oral history maintains that it was many. The punitive mission might have been intended to bring the offenders to 'justice', but it was an unlawful process under British law, and unlawful in respect of Aboriginal law. The British did not declare martial law at the time, and two Aboriginal men were executed without trial.

The conflict and contradictions arising from the illegal treatment of the Milmendjeri people remain unresolved, but in alignment with the ongoing colonial project. This brief article interrogates some historical and contemporary relationships between First Nations and the colonial settlers, revealing how those relations situated colonial power and violence in the shaping and constituting of an Australian law that was, and remains, founded on terra nullius.

I studied Australian law while knowing and feeling how onerous it was to shift the power of colonialism. However, I knew that I could nevertheless learn and understand how colonisation legitimised and justified the theft of Aboriginal territories, and enabled an attempted genocide. I learnt how the colonial logic prevailed, while knowing how an Aboriginal way of being survived, holding on to life under the duress of it.

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1 Stephen Lendrum, 'The "Coorong Massacre": Martial Law and the Aborigines at First Settlement' (1977) 6(1) *Adelaide Law Review* 27.

II Naming, Renaming and Reclaiming

The ancient identity and name of the Milmendjeri, one of the Tanganekald peoples, belong to the Coorong. They are ancient names that have become almost lost to living memory. Post-invasion, the peoples and territories of the Coorong have become known as Ngarrindjeri — this name is now privileged in native title claims over the lands and affairs of traditional First Nations nations such as Ramindjeri, Tanganekald, and Yaralde. Our ancient precolonial names are falling away from more common usage. Why did this occur? I have always wondered if along with the annihilation of the Milmendjeri people, the erasing of the Milmendjeri identity was a means of annihilating our ancient identities and memories of precolonial ways of being.

My Aboriginal identity belongs to Tangalun, a place known to the Tanganekald and Meintangk Peoples as the end place of the Tangane language. It's at the southern end of the Coorong, and it is where Tanganekald country meets Meintangk people's lands and territories. It was renamed Kingston by colonial settlers in 1851.

III Aboriginal Territory, Shipwrecks and Massacres

In July 1840, a British ship, the *Maria*, was wrecked within a few kilometeres of Tangalun — now called Kingston SE.[2] The Maria Creek in Kingston was renamed to commemorate the ship. It is also the birthplace of my mother. Twenty-six survivors of the shipwreck began to make their way towards Adelaide along the Coorong beach, on which they were later found dead. It was alleged that they were murdered by members of the Tanganekald-Milmendjiri people. The colonial authorities decided to mount a punitive expedition, and in retribution and without trial, two Aboriginal men were accused of the settlers' deaths and hanged on the beach. Afterwards, a massacre of many others ensued, to this day unacknowledged.

Now, at the outset of the invasion of South Australia in December 1836, the British had declared that First Nations Peoples were henceforth British subjects, to be accorded all rights and privileges under British law. However, the *Maria* incident and the way that British law should be applied was hotly debated, raising issue with the application of British law to 'British subjects' who were not British, but sovereign First Nations Peoples. Advocate-General William Smillie justified the event as follows:

> Necessity warranted the Executive Government, in abandoning ordinary forms, which were inadequate to the emergency, to take upon itself the responsibility

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2 Lendrum (n 1). In this text, the reference to massacres applies to the survivors of the ship wrecked *Maria*. I invoke the massacre of my ancestors who occupied the Coorong and Lower South East region in the 1840s. The evidence for the massacre of Aboriginal Peoples is found in the population reduction of the region and the advancement from 1840 onwards of colonial settlement of the region.

> of putting forth those more ample powers and prerogatives, with which, for the welfare of the state and the peace of society, it is constitutionally vested.[3]

And Justice Cooper of the Supreme Court of South Australia argued that in fact British law could not take effect:

> I feel it impossible to try according to the forms of English Law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse.[4]

Nevertheless, within a few years our population was drastically reduced, we had been dispossessed of our lands, and Tangalun became a 'secure' colonial territory.

Privileging the welfare of the State at the time of the Coorong massacres is not dissimilar to the contemporary quandaries that international law finds itself in when considering how to 'recognise' self-determination and land ownership of Indigenous Peoples. It is the territorial integrity of a colonial state that will always be privileged.[5] But there is a blind spot when it comes to the territorial integrity of Indigenous Peoples. Conflict is pronounced in international law when the power of a state intent upon upholding its territorial integrity confronts Indigenous Peoples' sovereignty and ownership. The welfare of a colonial state has historically come at the expense of Aboriginal Peoples, while the 'peace of society' was, and remains, secured through the containment, eradication and now assimilation of Aboriginal Peoples.

IV In the Place of an Unacknowledged Invasion — Who Am I?

For the people of the place Tangalun, named by the ancestors and now renamed by the invader, there is an ongoing struggle to resist and hold onto who we have always been. Our territories remain threatened by the colonial hunger for resources. We struggle to protect the natural world and our underground aquifers from conventional

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3 Letters from Governor George Gawler to Justice Charles Cooper of the Supreme Court, 12 August 1840, cited in Lendrum (n 1) 31.

4 Ibid 26.

5 The territorial integrity of the states is a principle of international law which ensures the stability and security of state borders. The principle is affirmed in Art 46(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*') which states: 'Nothing in this Declaration may be … construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. This provision ensures the colonial state remains, and is safeguarded in international law, while the dismemberment of Indigenous Peoples' territories continues to be enabled without international intervention or remedy. See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*? (Routledge, 1st ed, 2015).

gas and fracking development, and threats to develop a low-grade coal mine to provide a cheap source of fertiliser will further risk the quality of our water supplies. We hold no paper title. All we can attempt is to buy our own land back, or look to a future that offers a 'native' title to the land — a vulnerable title that can be extinguished at the whim of government policy changes.[6]

Across colonial history, the Tanganekald and Meintangk peoples have been governed as the included-excluded, as British subjects, yet illegally executed under an un-declared 'state of emergency'. Justice Cooper, with the view in 1840 that his court had no jurisdiction over 'frontier' Aborigines stated:

> My objection to try the natives of the Big Murray tribe is founded, not on any supposed defect of right on their part, but on my want of jurisdiction. It is founded on the opinion that such only of the native population as have of some degree acquiesced in our dominion can be considered subject of our laws, and that with regard to all others, we must be considered as much strangers as Governor Hindmarsh and the first settlers were to the whole native population when they raised the British standard, on their landing at Glenelg. [7]

The remarkable aspect of these admissions on behalf of Cooper is their truth — that the colonial logic of genocide and theft involving the 'settled', 'contained' and 'acquiescent' native becoming the included British subject, while Aboriginal relationships to land were ignored, unrecognised and open to a legitimised land theft, was, in reality, a fiction.[8] Fiction it may have been, but it prevailed, and Aboriginal

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6 Article 27 of *UNDRIP* recognises the right to restitution of the lands, territories and resources that Indigenous Peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without free and fair compensation. Article 28 recognises the right to redress, which could include restitution when lands, territories and resources have been confiscated, occupied, used or damaged without free, prior and informed consent. Where restitution is not possible there is a right to just, fair and equitable compensation. However, *UNDRIP* is a soft law that, while persuasive, is merely aspirational. Australian law is weak in its protection of Aboriginal lands.

7 Lendrum (n 1) 26, sourced from the Grand Jury of the Supreme Court 3 November 1840, as reported in 'Criminal Session', *The Adelaide Chronicle and South Australian Literary Record* (Adelaide, 4 November 1840) 175. This is just four years after the 'official settlement' of Adelaide.

8 There are other examples of states of emergency being called over Aboriginal Peoples across Australian legal history. A state of emergency was called in 2004 in response to the Palm Island 'riots' following the death of Mr Doomadgee in police custody. Another recent example is the Northern Territory Emergency Response 2007. In 1840, Aboriginal people were rounded up and contained — the 2004 Palm Island event was a 'settling down' and return to containment, and the 2007 Northern Territory Intervention was aimed at taking back control of the land and communities under the pretext of providing protection for the children. Tony Koch and Andrew Fraser, 'Police run for their lives as rioters torch buildings in a tropical island rampage', *The Weekend Australian* (Australia, 27 November 2004) 1; The Australian Federal Howard

life is still excluded from the normative expectations and experiences of modern state citizens — we remain the included-excluded.

As a law student, I was confounded by the persistent construction of the Aboriginal person as a British subject, and the lack of acknowledgement that there had never been a dialogue between us and the British on the question of our legal and political status. At no stage had Aboriginal Peoples been informed of our coming to being as 'British subjects', let alone consented to it.

What makes us human and how is that determined? Who defines our humanness, — ourselves, our communities, other people, the states, or the stock markets? The question of what it is to be human is significant here. It is our connection to land that makes First Nations who we are. Aboriginal law holds the land and our identity as peoples is with the land. Protection of human rights is unnecessary.[9] The concept of human rights is a construct of colonising powers — colonialism necessitates the need for human rights. Pre-invasion Aboriginal Peoples didn't talk about human rights — human relationships and belonging to country ensured security. Both humans and other living forms were accorded a voice and a rightful space to co-exist.

But since becoming 'British subjects', Aboriginal Peoples are instead constructed as lacking — so lacking that the invasion of our lands and lives was, and remains, justified. We are known as peoples in need of salvation and rescue from our accursed native ways of being. 'Human rights interventions' came to our 'aid' but often resemble the 'rational' state's civilising missions of the past. A human rights discourse came into being when our ways of being and life were invaded, and made vulnerable when we became subjects of an attempted genocide. That mentality, a 'killing fields' kind of thinking, led to the punitive expedition along the Coorong in 1840, and that thinking remains. It still views the territories of First Nations as grist for any mill; any environmentally destructive developments down to dumping sites for nuclear waste.

The state continues to dismiss that the inter-generational impact of colonialism is a reality, but it is the key to the contemporary position of Aboriginal Peoples. What might alter these subjugated relationships? While the colonial logic that enabled and continues to legitimise genocide and theft of land prevails, the same can only continue. The future of the continent is dependent upon enabling Aboriginal truths and ways of being to continue and to be freed from the duress of colonialism.

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government on 21 June 2007 announced its intention to use Commonwealth powers to impose a number of emergency measures; this response followed the Northern Territory Government, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

9 There is substantial evidence of Indigenous societies living a safer, more sustainable, and healthier lifestyle pre-invasion. Language itself is an indicator. There are few Indigenous language words that describe suffer, torture, war, and starvation.