WARDSHIP WITHOUT DISCRIMINATION— THE ABORIGINAL DILEMMA

By the HONOURABLE MR. JUSTICE BLACKBURN

Delivered at a meeting of the Medico-Legal Society held on 5th October 1974, at 8.30 p.m. at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The chairman of the meeting was the President, the Rt. Hon. Mr. Justice Stephen.

IT is a very great honour to be invited to address so distinguished a body as the Medico-Legal Society of Victoria. But the preparation of the address has left me with a strong sense of my inadequacy for I have been privileged to read some of the papers read to this Society in the past. I note that many of them have dealt with subjects which *are* truly medico-legal; but not all of them. When the legal Secretary conveyed to me your Society's invitation, he was kind enough to suggest a title for my remarks, and I was bold enough to reserve the right to stray out of the field suggested by that title. This evening I propose to exercise, to some extent at least, that reserved right.

I would like at this early stage to say something which is to apply to everything else I say. My own opinions may often appear to rest on confident certainty. For the sake of brevity, may I say now that this appearance is false? All that I have to say is, more or less, tentative.

The conflict of wardship and discrimination neatly expresses one of the greatest of the many difficulties which beset the relations between white and black people in Australia. There may be many different opinions about the proper policy which Australian Governments should adopt towards aboriginals. But on almost any conceivable view, the white inhabitants of the continent are under a responsibility, or duty, to make some degree of special care or provision for them. In other words, the relationship of aboriginals to the white community has always been, officially at least, that of wardship. If there are any white Australians who would now want to reverse that proposition—that is to say, propose to let the aboriginals sink or swim, making no provision for them which is not made for every other Australian citizen—they should reflect that *that* is a completely novel attitude; it has never been the policy of any Australian authority. In 1787, when the word "Australia" had no meaning, and this continent had none

but black inhabitants, an unknown civil servant composed these words, and had them included among the instructions to Governor Phillip:

> You are 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 he was further instructed to

> punish those who would wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations

But that was nothing new either. In 1670, when as far as is known no Englishman had sighted or set foot on this continent, King Charles II gave very similar instructions to his Council of Foreign Plantations, in reference to the natives of North America and the Caribbean. The only difference was that he instructed them to employ persons to learn the native languages—an instruction which was not given to Governor Phillip.

The official attitude to aboriginals has never been other than that they are a people to whom the rest of the community has *special* responsibilities. But plainly the placing of the aboriginal people in a special class—making them "wards" in itself involves discrimination, since we have to distinguish between those who are entitled to be wards, and those who are not. At all times in our history this inherent contradiction has troubled our relations with the aboriginal people. To this very day it produces extremes of feeling and outbursts of animosity. White people who are feeling the pinch of poverty and disadvantage in areas where there are significant numbers of aboriginals, tend to complain loudly that welfare policies are biased in favour of aboriginals—and it is quite easy to find particular points at which they are right. Black people constantly complain that in practice, discrimination does exist. And once again, of course, they are at various points quite right.

To reject both discrimination and wardship must mean one of two solutions—or possibly both. One is to set up another nation; to cede a territory to an aboriginal government. This will be called for by some extremists in the next decade or so, I have no doubt—it is probably talked of already. The other is to let aboriginals sink or swim; a few white extremists may want this, but it cannot be seriously considered. Obviously then, a proper aboriginal policy, whatever it is, must involve *both* wardship *and* discrimination.

I must not pose as an authority either on what aboriginals want, or on what is good for them. I am only slightly better informed, if at all, than the ordinary Australian of average education and intelligence. But I have had the good fortune to live in the Northern Territory where the mere existence of the aboriginal people is an ever-present fact of daily life to a far greater extent than anywhere in this corner of the continent. I have also necessarily had some first-hand experience of the relations between aboriginals and the law. So notwithstanding that I am *not* an authority, I propose to mention one matter which I believe the aboriginals want, and which I also believe would be good for them. That matter is the recognition, by Australian law, of "aboriginal land rights" in relation to some defined areas of land.

I suppose that few will deny that some aboriginals want this, but some may suspect that it is a wish confined to a handful of professional demagogues who know how to keep their ideas in the public eye. I believe on the other hand, that it is a wish which is *not* so confined, but is shared by many thousands of black people, who, even if they are illiterate, understand perfectly well what they want. I myself have heard it from the lips not only of quite unsophisticated aboriginals but also from more educated ones, and some of them far from being in the young or rebellious category. My experience of the urban aboriginals who (many of them mixed blood) live in quite large numbers in some of the big cities in Australia (notably Sydney), is very limited indeed. But I am nevertheless quite satisfied that the desire for "aboriginal land rights" is sincere and strong among these people too—even though they would not imagine themselves as ever going to settle in "aboriginal land" if it were established, say, somewhere in the Northern Territory. To apply an analogy in which there is nothing intended but respect for both the peoples being compared: just as I know perfectly well that there are thousands of Jews living in Australia who sincerely and enthusiastically support Zionism—the return of the Jews from the Diaspora and the establishment of the Jewish National Home in Israel, though they have not the least intention of going to live there, so I know perfectly well that there are many aboriginals living in Australian cities who earnestly desire the establishment of aboriginal land rights, though they have no intention of going to live in Arnhem Land or any such place: indeed, would hardly know what to do if they got there.

That comparison suggests another which I would like to mention. It was, I believe, a famous Zionist who, in answer to the criticism that Israel was admitting as immigrants some people who could not truthfully claim to be of pure Jewish blood, replied "Every man who thinks he is a Jew, is a Jew". One often hears an assertion that there is a complete distinction between aboriginals of the full blood (most of whom live in remote parts of Australia) and part-aboriginals, as most of those living in the capital cities are. The assertion usually carries the implication that the part-aboriginals who in fact make most of the public pronouncements and conduct the incessant campaign in support of aboriginal claims, are somehow insincere, or have no moral right to speak for the full-bloods. I suggest, on the contrary, that it would be well to adopt the phrase of the Zionist, and remind ourselves that everyone who thinks he is an aboriginal, is an aboriginal. In my experience, though there is certainly some degree of discrimination made by *some* full-blooded aboriginals against those who are not of the full blood, it is simply not true that full-bloods maintain a kind of apartheid against all who are not of full blood, as some white people seem to believe. I have seen traditional dances performed at Broom in Western Australia by men who were not, and did not claim to be, of the full blood, but knew the details of their tribal ancestry, and were proud of it. Last year there was held in Canberra a conference of various people, white, coloured, and black, interested in aboriginal arts and crafts. The part-aboriginals from such places as Sydney suburbs and southern country towns, who were at the conference, made it plain that they looked to the full-bloods from Arnhem Land and such places, with their still lively tradition of dance and song, as the bearers of a trust for all aboriginal people: and the Arnhem Landers showed that they accepted this position and also accepted the urban part-aboriginals as in a special relationship to them—a relationship from which white people were excluded.

It is of course perfectly true that there are enormous differences between aboriginals. But that does not alter the fact—as I believe it to be—that there is a solidarity, both actual and potential, between all the people in this continent who claim to have aboriginal blood. It is a delusion, which we whites cannot afford, to believe that the distinction between aboriginals of the full blood and those of the mixed blood has any great significance in the solution of aboriginal problems.

If ever there was a movement bedevilled by mal-definition, or non-definition, of terms, it is the movement towards "land for aboriginals". Some of its supporters no doubt want the slogan "land rights" kept pure and undefined, believing that the rhetorical effect of a slogan is too valuable to be lost by clarification. They cannot fairly be criticized for this attitude; they only imitate their white brothers. I will say what I mean, and what I believe many aboriginals mean, by "aboriginal land rights".

Nothing prevents, or ever prevented, individual aboriginals from having rights in land of exactly the same kind that white people may have. There is nothing in law to prevent an aboriginal from owning a block of land in Collins Street. But that is not what the campaigners for "aboriginal land rights" want.

It is important to distinguish, at this point, two categories of "aboriginal land" which do *not* satisfy the campaigners. First, there are aboriginal *reserves*. The practice of setting up, by law, areas in which aboriginals may live—sometimes *must* live—goes back to the earliest days of white settlement in Australia. The practice does not satisfy the aboriginals because for one thing, the areas are defined by governments without consulting them. In fact, aboriginal reserves have often been established in land which white men do not wish to occupy or exploit. It is also undeniable that sometimes reserves of this kind, after being established, have been altered or reduced in size because white men changed their minds and decided that they wanted some of the land after all. This is not a myth of black propaganda, or a bad habit which we have outgrown long ago: on the contrary, a fully documented instance of it occurred in Darwin in the 1960s, and is related in Mr. Justice Woodward's report. Moreover, the reserves are not controlled by aboriginals. The principal feature which all aboriginal reserves have in common is that white men have to get permission from other white men before they can enter them.

The second kind of "aboriginal land" which does not fully satisfy the campaigners for "land rights"—though they do not reject it outright—is that of land for aboriginal commercial enterprises—for example, cattle stations. There are some such enterprises in the Northern Territory and elsewhere, and no doubt there will be more. But they are simply commercial enterprises—they provide living areas for a handful of people, and it is hoped, profits which may be used for the benefit of others—or of aboriginals generally. But they do not do much towards providing land with which aboriginals can feel identified.

What is meant by the campaign for "aboriginal land rights" is the establishment of some defined areas of land each of which the law recognizes as being in the collective ownership of a defined group of aboriginals. The group, of course, is to be defined by aboriginal standards. For the moment, let us leave aside what the nature of the group is to be—whether "tribal" (a word which has far more complicated connotations than are generally realized) or "communal"—that is to say a group based on a community which itself is the result of the contact between the black and white races. The essential point is that the group will be one which has meaning in aboriginal minds. The group will have the sole right to occupy, to use, possibly to exploit in a commercial sense its defined area of land, and the right to exclude others, white or black, from it, to whatever extent is desired by the group. There will, of course, be some difficulties of a legal kind. The law provides for ownership of land only on the footing that there must be an identifiable person who at any moment is the owner. He may be a real person, or he may be only a legal person—i.e. an incorporated body. An indeterminate group of persons, subject to the constant occurrences of births and deaths, is not a person and cannot be the owner of a piece of land. Yet such a group may, in the minds of aboriginals, be a very real entity—vastly more significant than any individual. But this is not a serious difficulty. Mr. Justice Woodward's report suggests one way in which it may be got round, and there are certainly others. The law has an ample stock of technical devices. To go into them here would be boring and unnecessary.

I have just attempted to describe what I believe is meant by the claim for "aboriginal land rights". I do not suggest for a moment that many aboriginals could put it as precisely as I have tried to do. Nor do I ignore that there are a vociferous few who shout ill-defined slogans and are prepared to call for separate national status—the cession of at least some Australian territory to an aboriginal nation. But I believe, on the other hand, that there are probably many thousands of black people who do have a clear enough idea of the sort of "land rights" which I have outlined; and that to put such ideas into effect would be *seen* by them as an enormous step in a direction in which they want to move.

But is the fact that the aboriginal people want something a sufficient justification for giving it to them? I believe that it is of capital importance for us non-aboriginals to consider whether

there is a moral obligation on our society to concede some "land rights"—and if so, *why* there is such an obligation—what is the true basis of the obligation? Popular and journalistic discussion of the problem is usually entirely lacking, or superficial in the extreme. For example:

> The whites took away the land from the blacks in the first place. *Therefore* the whites should give some of the land back to the blacks.

Notice that the conclusion is a perversion of the morality suggested by the premise. If it was wrong to take the Australian continent from the aboriginals, the only thing that can be right is to give it back to them. Everyone who thinks that the whites stole the land from the blacks should therefore be packing up to leave Australia without delay. To return only part of what you have stolen may be good tactics but is shocking morality. Moreover, there are other consequences which the popular moral principle has to face. If we give land back to aboriginals, it must be theirs in the fullest sense, to do what they want with it, including selling it to whichever mining company, or speculative property developer, will give them the highest price. Is that acceptable? If not, we must find a moral principle to justify the prohibition of such mercenary conduct, which is only fit for the white capitalist, not for the noble savage. We must find a moral justification for that prohibition somewhere else, for we obviously cannot find it in the principle of the restoration of stolen property.

I believe that it is of some importance to formulate a reasoned reply to the "theft" argument, because there is a great deal of justifiable popular sympathy for the aboriginal people, and unfortunately there is some danger that the "theft" argument may be accepted as standard. Popular feeling has a way of being powerful and basically right and yet of being mixed up with false historical judgments and dubious morality. Let us apply the "theft" argument to other historical situations. What if it were established from archaeological evidence, that the aboriginals, when they came across the land bridges to this continent, themselves dispossessed an earlier people? Would they then have any right to reprove the whites? The supposition is by no means certain not to be the truth, and it may yet be established by archaeological research. What about the Norman Conquest, whereby the wicked Normans stole England from the innocent English? What about the Romans, those thieves who stole most of the Western world from its rightful owners? The

condemnation must extend to most of the history of mankind. The point is that to pass an adverse moral judgment on the occupation of the Australian continent by the British is to be guilty of crude moralizing on the footing of nothing but hindsight; it is to be historically illiterate. History is a dangerous thing to be illiterate about; it has a way of making victims of those who abuse it.

To make a moral judgment on the occupation of the Australian continent only makes sense in a full historical context. One matter, among many, which would have to be remembered by anyone who tried to do so would be that in the 18th century there was a commonly held principle (perhaps ultimately derived from Genesis 1. 28 "Be fruitful, and multiply and replenish the earth and subdue it") that the *whole* human race—not any part of it more than another—had a duty and a right to exploit the earth's resources to the full. Most people would want to qualify that today, but that is not to condemn our ancestors for holding it to be true.

My point is not, of course, that no harm has befallen the aboriginals from the occupation of the land by the white race; on the contrary, I think that is one of the principal reasons for the great harm that has befallen them. Nor do I suggest that there is *no* good reason for setting up "aboriginal title" to *some* land in Australia. Quite the contrary: I think there are very good reasons for doing so as soon as possible. My point is that it is important that we should do so for good reasons and not for bad reasons, because the bad reasons may affect what we do and how we go about it, and indeed may in the long run be the undoing of what we are now trying to achieve. It would be disastrous if, say, fifty years from now, there were to be a reaction against the crudity of the notion that in establishing "aboriginal lands" we were only restoring stolen property and consequently a demand that the aboriginal lands be surrendered, for exploitation by the whole community. I believe that to represent the establishment of aboriginal lands as the restoration of stolen property would be to invite posterity to expose it as humbug.

Wardship and discrimination, I have already said, seem to go together: they are almost two sides of one coin. It seems to me that anything which will lessen the need for wardship—anything which will satisfy, or help to satisfy, the need of the aboriginal for independence, status, dignity, a sense of purpose; any such thing will be a step away from the total, or almost total, ab-

original dependence that we see today, and thus a step in the direction of removing the need for wardship.

I believe that a step in the direction of establishing that degree of independence would be the establishment of some aboriginal lands, of the kind I have described. I believe, in other words, that a good and proper reason for the establishment of "aboriginal land rights" is that *that* would be a significant step away from wardship.

I propose to say something about the aboriginal's relationship with land in the centuries before white settlement on the continent began. I am well aware that I am not an anthropologist, and that some here present probably are; and also that there are obvious dangers in making generalizations about the social organization of all aboriginals, on the strength of a little knowledge gained in the Northern Territory, and especially about a small number of tribes in a corner of Arnhem Land. Making all such allowance, it may still, I believe, be permissible to sketch an outline which will have some element of truth as an account of aboriginal ways before 1788. No doubt there were great differences of detail but it seems probable that there were broad patterns of similarity.

In the whole aboriginal population there were many groups, tribes, or clans, which were the foundation of aboriginal life. A group, which can be called a tribe or a clan so long as assumptions are not too readily made about the implications of those English words, had characteristics which distinguished it from other groups. It had a religious significance—a basis in myth. It had a connecting thread of blood relationship, for birth was the essential fact which vested membership of the group in an individual. It had a link in language; every aboriginal felt himself related to those who spoke *his* language and less closely, or not, related, to those who spoke languages which were not his, even though he may have been able to speak some of those other languages. (Let me interpolate here that in Arnhem Land the name of the language is often used as the name of the group; and further, that bilingual aboriginals are so common as to be unremarkable, and quadrilingual aboriginals not uncommon. Yet the languages in question are so different that a white man may be fluent in one and find all the others unintelligible.) Religion, blood relationship, language—these were three marks of the group, and a fourth might be particular social, or economic, rules. Yet all these four were as one, and the religious bond was the one which encom-

passed them all. The spiritual and the physical were not thought of as distinct. The group was a continuing entity of which an individual was an organic party. The birth or death of an individual was an event in a timeless spiritual-physical continuum which comprehended not only the person concerned, his ancestors, and his descendants, but also the animal kingdom, the plant world, all natural phenomena, the earth, its rivers and lakes, and the sea.

With this for their philosophy—it would be wrong to call it either religious or secular, rather it was neither one nor the other, but both—the aboriginals had, it appears, a subtle, elaborate, flexible system of social life, with a large number of sophisticated rules, adapted to the terrain and the climate in which they lived, and it was a system which gave them a high degree of order and stability in their lives. Consider two extremely opposed views of the relationship of man and society which have been held in Western civilization: one, that the State exists only for the sake of the individual and cannot be justified except in so far as it protects or assists him; and two, that the individual's purpose is to serve the State, and his glory is to sacrifice himself to it. Both, it seems to me, are quite irrelevant to the aboriginal world. It is not true to say that the aboriginal world was midway between them; it was not even related to either of them.

No doubt the picture I have tried to paint is open to at least two weighty criticisms. In the first place it is vastly oversimplified. It is the broadest of generalizations. Secondly, it probably idealizes. Historians of the future may say that in this decade we tended to form an unduly admiring view of aboriginal society, perhaps partly because we are so disillusioned about our own, and partly because we have acquired such a sensitive conscience about our past dealings with the aboriginals. It is an interesting recrudescence of an idea which was current in the latter half of the eighteenth century—the idea of "the noble savage". I am willing to accept both these criticisms without conceding that my picture of aboriginal society is altogether false or useless.

With the same qualifications, I now venture on an account of the place of *land* in the aboriginal universe; that is to say the relation between the group and a particular area of land. Here even more than before, I may be generalizing too boldly from a limited knowledge. I am content at this point to talk only about what I learned of the Gove Peninsula. It is enough if something like that was true of *some* other parts of the continent. A group—

the tribe or clan as described—had a unique relationship with a definable area of land. Unique, because no other group had that same relationship. If there were feuds about land relationships—and perhaps there were—they were probably about marginal or limited areas. No Napoleon or Hitler laid claim to a continent. Mythology established the group's connection with the land, and other groups' connections with other lands. A group was not confined to the land to which it was related; its members might be found there and also elsewhere. Indeed, the group was not to be found all together at one place and time: religious obligations might sometimes have this result, but the group was not organized as such for economic purposes, or for day to day living. The members of the group did not need the particular area to which the group was related, for physical subsistence; they used it, and other areas too, for that purpose. The area was a defined area, but the precision of the definition was not our kind of precision. There being no cultivation and no animal husbandry, measurement of the area was unnecessary; boundaries were no more exact than was required. (Neither, of course, are ours). The people generally, in all their groups, needed a relatively large area for subsistence: their bands moved about seeking animal and plant food wherever it could be found. The most profound sense in which the group existed as an organic part of the whole spiritual—physical universe which gave meaning to aboriginal life, was as related to a particular, defined area of land, the special abode of the spirits which were the founders of the group. These links between groups and areas were immemorial and unchangeable. To what extent changes have ever taken place, as matters of historical fact, is a question for the anthropologists: but the historical fact is one thing, the theological doctrine—if I may so describe it—quite another. The point is that the doctrine was what gave life to the group: the doctrine that a particular piece of land was the spiritual home of the group. So basic was this link between group and land that there is one area in the Gove Peninsula which was universally recognized as the land related to a group or clan. This group or clan was, by 1970, reduced to two women. Since the clans in the Gove Peninsula depend on patrilineal descent, that clan will certainly become extinct. Another clan is universally recognized as the custodian of the land for the dying clan, and in theory the clan, though extinct, and its connection with the land, will always be remembered. I mention that special case only as an illustration of the

significance of the relationship between the group and its land.

This, then, was the relationship of the clan to the land which was put before the court, with a wealth of evidence, in the Gove Peninsula case against the mining company and the Commonwealth.

The essence of the aboriginals' claim in that case was that, that relationship being what it was, the clans who were related to the particular land on which the mining company conducted its operations, had a proprietary interest—a right of property—in that land. Rightly or wrongly, I decided that whatever this relationship was, it could not be called a right of property. The result was that in the existing state of the law, the aboriginal groups had no right to object to the activities of the mining company. The essence of the *current* demand for "aboriginal land rights" is that our law should use its own device, or mechanism, or conceptual scheme, called "the law of property" to re-establish and protect groups of aboriginals in their respective relationships with the appropriate areas of land. If one believes that to re-establish and protect those relationships is desirable; and if one believes that that can be done by means of the device of "property"—in other words by legislation creating rights of property—then let it be so done. Neither black man nor white man can with reason object to the employment of the white man's law of property to protect the black man's ancestral link with his land.

It is of some interest to look at what successive authorities, both in Great Britain and in Australia, since 1788, have made of the relationship of the aboriginal to the land.

I have already mentioned the instructions which Governor Phillip had about his dealings with the aboriginals; they included an instruction to punish persons who should give the natives

> any unnecessary interruption in the exercise of their several occupations.

It is impossible to resist the conclusion that this instruction showed a complete ignorance of the real nature of the aboriginals' relationship to the land. That is not surprising. It is possible, and understandable, that what the draftsman had in mind was some kind of simple territorial relationship between a "tribe"—ruled by a "chieftain"—and a defined area of land. It may have been thought that some areas would be "occupied" by the natives, and others "vacant". At any rate, it is now possible to see—if there

is any truth in my picture of the aboriginals' relation to the land—that the mere establishment of the settlement at Sydney was to the aboriginals "an interruption in the exercise of their several occupations". But what must have appeared to Governor Phillip was that the settlement did not affect the aboriginals: they did not appear to be dispossessed from any particular area: as they did not cultivate, they were not concerned with boundaries. In July 1788 he wrote in a despatch:

> When I shall have time to mix more with them, every means shall be used to reconcile them to live amongst us, and to teach them the advantages they will reap from cultivation of the land.

The next stage was the realization that the occupation and cultivation of land by the whites, and the depasturing of flocks on it, *did* adversely affect the aboriginals. By the time of Governor Macquarie this was clear, though there was still no understanding of why this should be so, or of how the land was significant to the aboriginals. Macquarie set aside various tracts of land for them—one of 10,000 acres. In 1822 he wrote that he

> prevailed upon five different tribes to become settlers, giving them their choice of situations. Three of the tribes chose to settle on the shores of Port Jackson . . . the other two tribes preferred taking their farms in the Interior.

The establishments soon disappeared from history. They represent the beginning of the policy of native *reserves* which exists to this day. It is significant that there was no suggestion that any of Macquarie's five tribes had any *right* to particular land.

By the 1830s it had become well known among the better informed people in England that native peoples, not only in Australia but in many other places throughout the world, had suffered enormous harm by reason of the occupation and settlement of territory by colonizing Europeans. In 1837 a Select Committee of the House of Commons reported on the state of aboriginal peoples throughout the British Empire. It did not mince its words: the Report is a terrible indictment of the harm done to native peoples. I cannot refrain from quoting a passage not directly relevant to my theme, remarkable not only for its stark substance, but as proof that there was once a time when official prose, as used in official documents, was also good prose. The passage is as follows, and it is all that the Committee said about the aboriginal race of the West Indies:

> Of the Caribs, the native inhabitants of the West Indies, we need not speak, as of them little more remains than the tradition that they once existed.

Of the Australian aboriginals the Committee had much to say. The passage which I will quote is remarkably revealing in regard both to what the Committee understood and to what it did not understand: to what it deplored and to what it recommended.

> Such indeed is the barbarous state of these people, and so entirely destitute are they of even the rudest forms of civil polity, that their claims, whether as sovereigns or as proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force, and by the commissions under which the Australian colonies are governed, Her Majesty's sovereignty over the whole of New Holland is asserted without reserve. It follows, therefore, that the aboriginals of the whole territory must be considered as within the allegiance of the Queen, and as entitled to her protection. Whatever may have been the injustice of this encroachment, there is no reason to suppose that either justice or humanity would now be consulted by receding from it.

The Committee proceeded to recommend that care should be taken to restrict white settlement to *vacant* lands. In short, it saw clearly enough that the aboriginals had suffered because of white occupation of land, but failed to understand why this was so, and could only recommend a course which in the light of our knowledge seems unrealistic. It did not—it could not—occur to the Committee to ask what meaning the word "vacant" could have.

The same unresolved conflict appears clearly in the story of the foundation of the Province of South Australia—at almost the same time. The Act authorizing the foundation of the Province was passed in 1834; it contained no mention of aboriginals, much less of the problem of settling colonists on land which the aboriginals might be occupying. But in the two years which elapsed before the Province was actually established by Letters Patent pursuant to the Act, it was realized that there would, or might be, such a problem. The Letters Patent therefore contained a proviso purporting to preserve

> the rights of any aboriginal natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives.

But this was no more than a kindly gesture, probably void in law and certainly without practical effect. Note once again the assumption that some land is occupied by the aboriginals and some is not. As we can now see, this is a meaningless distinction: one might say with equal truth that all the land was occupied by the aboriginals, or that none was: it all depends on what one means by occupation. Of course I do not criticize the men of the 1830s for not seeing it then.

Not surprisingly, the good intentions of the Government, based on such mistaken ideas, were ineffective. The instructions to the first two Governors contained this clause:

> You will see that no lands which the natives may possess in occupation or enjoyment be offered for sale unless previously ceded by the natives . . . you will take care that the aborigines are not disturbed in the enjoyment of lands over which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer.

I find it easy to understand how these two Governors could not detect any signs of the exercise of "proprietary rights" over land by the aboriginals. In the letter which accompanied the instructions to the third Governor (afterwards the celebrated Sir George Grey) there occurs this passage, referring to the clause I quoted above in the instructions to his predecessors:

> We have expunged (this) clause not because we are in any way insensible to the claims of the aborigines to protection and consideration, but because we believe that it is neither practicable nor expedient to negotiate with the natives of New Holland for a formal cession of the lands they occupy. We think it better, therefore, that general measures should be adopted for their preservation and protection, than that bargains or treaties should be made with them, for the surrender of any proprietary rights which they may be supposed to possess.

And that was the end of the idea of recognition of any legal rights in the aboriginals to any land.

For almost all the time we whites have been on this continent, therefore, the picture has been much the same. We *have* perceived that the separation of the black man from the land has been harmful to him; we have often felt it was wrong; but we have not understood the true relation between the aboriginal and the land; and we have not—until very recently—begun to think that something could be done to redress the balance by

establishing aboriginal groups as the actual owners of defined areas of land. The history has been the same everywhere in Australia, and though I have singled out Governor Macquarie, and the House of Commons Select Committee of 1837, and the pioneers of South Australia, for special mention, I hope I have made it clear that these are only examples of an attitude which has been the same everywhere. I also hope that I am not assumed to be passing an adverse moral judgment on these opinions, or on those who have held them in the past.

A Report containing a programme for the establishment of aboriginal land rights has recently been published. Its author was Mr. Justice Woodward, who was appointed a Royal Commissioner to inquire into and report on

> the appropriate means to recognize and establish the traditional rights of the Aborigines in and in relation to land. . . .

I would not venture to comment on his findings and recommendations beyond saying that with great respect, I am in agreement with them. They are based on a much more detailed and exact knowledge than I have of the present situation of aboriginals in all parts of the Northern Territory. I recommend a reading of that admirable Report to anyone who asks what can or should be done to put my rather vague ideas into practical effect.

It need hardly be said that the establishment of aboriginal title to some areas of land will be far from being a solution to all the problems of relations between aboriginal and white people in Australia. But such a step would, I believe, have a quite marked and rapid effect on the morale, dignity, and social and economic advancement of those thousands of aboriginals who are still living in the remoter areas of Australia, and probably a less direct effect on the urban and rural aboriginal communities in populated areas. Some of the latter have recently been cultivating a militant, extreme, and very vocal antagonism to white society altogether. The establishment of aboriginal lands might well have, in the long run, a tendency countervailing to the extremist call for a "black nation".

Having said that the establishment of aboriginal lands will not solve all the problems connected with aboriginals in Australia, of course I must immediately add the words "and it will undoubtedly *create* a number of problems". The most pressing is what is to be done about the economic exploitation of the ab-

original lands, and in particular what is to be done about the minerals. Perhaps slightly less urgent but akin to it, and very real, are the problems of flora and fauna conservation, forestry, and animal husbandry, in particular of course cattle raising. All these problems are considered, and recommendations are made, in Mr Justice Woodward's report, and I do not want to say more about them here. What *I* propose to say is a little about the criminal law as it is applied to aboriginals now in the Northern Territory, with some suggestions about what the future may hold if aboriginal title to land is established.

In early days in Australia there was for a time some doubt about the status of aboriginals in the criminal law. In the case of *Murrell* in 1836, the Supreme Court of New South Wales decided that, unless it is expressly provided otherwise, the criminal law applies to aboriginals as fully as to white men. The accused was an aboriginal charged with the murder of another aboriginal. Counsel for the accused contended that the indictment for murder was unlawful on the ground that the criminal law did not apply to aboriginals in their dealings with each other. According to the report, he said:

> The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws. . . . They are not therefore bound by laws which afford them no protection.

This argument was only partly true, since aboriginals were protected by the laws of New South Wales to the extent that they chose to enter into any dealings with white men; but there was of course a strong element of reason and common sense in the argument that to the extent that aboriginals were minding their own business, and no white men were involved, there was no reason why they should be made amenable to the criminal law. I am not, of course, saying that I think this argument ought to have prevailed. The Court apparently without any difficulty came to the conclusion that the indictment was valid and that aboriginals therefore are in principle subject to the ordinary criminal law. It is, however, of great interest that the judgment of the Chief Justice (Sir Francis Forbes) indicated that an unofficial discretion was exercised in applying the criminal law to aboriginals, and we shall see more of this unofficial discretion later in Australian history. The Chief Justice is reported as having said:

> On a former occasion of this kind, His Majesty's Attorney-General had put it to the Court whether he should bring such a case before the Court, and whether it was the description of crime which would be recognized by the laws of England; the judges had then stated that it was for him to use his sound discretion in the case, but on that occasion no discussion took place as to the authority of the Court—no opinion was given as to their jurisdiction.

In other words, the Chief Justice was in effect saying that there was no doubt about the law, but that discretion should be used as to whether in such circumstances aboriginals should be prosecuted.

Only four years later, in 1840, Cooper J. of the Supreme Court of South Australia advised the Governor—not by way of a judgment delivered in Court—that the murder of one unsophisticated tribal aboriginal by another was not a crime against the law of South Australia, on the ground that, claiming no protection from the law, the aboriginals owed it no allegiance. A year later, in 1841, Mr. Justice Willis, then the Resident Judge in the Port Phillip district, expressed a similar opinion in Court, in a judgment remarkable both for its emotional appeal and its florid and elaborate literary style.

These however, are curiosities; there has been no doubt for more than a century that the law as expressed by the Supreme Court of New South Wales in Murrell's case is correct, and there has really never been any doubt about the position of an aboriginal who commits a crime against a white man.

It is true, however, that some degree of executive discretion has always been ready at hand in dealing with crimes by aboriginals, especially where the victim of the crime is another aboriginal, and the background is one of absence, or relative absence, of contact with white society. The most obvious instance is the offence of having carnal knowledge of a girl under the age of consent. Aboriginal marriage customs being what they are, and tribal marriages not being recognized as marriages in the eyes of the law, this situation must be a common one. So far as I am aware, no such case has arisen in the courts. On the other hand, where an aboriginal committed such an offence against a girl in circumstances in which it was a crime against aboriginal law then the case might well come before the ordinary Courts. I remember one such case which came before me. The accused was a full-blooded aboriginal who lived and worked in Darwin

and had had many years of contact with white society, but was nevertheless fully aware of his status in the tribe or clan to which he belonged and of its rules. The prosecutrix was a young girl who was not only within a prohibited degree of relationship to him for the purpose of marriage, but was also his ward in the sense that he had special obligations to her because of the death of one or both of her parents. The interesting feature of the case was that, so far as I could tell from the evidence which was given, the aboriginals concerned had no hesitation in appealing to the white man's law, or at any rate had no hesitation in giving evidence as to the relationship involved and as to the tribal law in the matter. Aboriginals have a deeply ingrained respect of law, not only their own law, but white law as well. I have heard aboriginals say, in effect, "Your law says (A) and our law says (B), and that makes a problem because they are both the law". It is an interesting contrast with the attitude of some white men who scorn the law unless it happens to be in their favour.

The facts of this case I have just described made the choice of a proper sentence unusually difficult. The accused pleaded guilty and seemed to be fully aware of the gravity of his offence. But on his behalf it was proved that whatever sentence the court imposed, the aboriginal people—by their own due processes—would impose a punishment on him when he had served his term of imprisonment: and that the degree of severity of the aboriginal punishment could not really be predicted. I felt bound to impose a substantial term of imprisonment nevertheless.

I think that when aboriginal lands are established and occupied there will have to be some special provisions of the criminal law, the like of which has not been seen before in this country. Adultery is not a crime in our society: some aboriginals will want to make it so: that is only one example of what I have in mind. Another example is the custom among some aboriginal peoples whereby a young girl can, by her parents, be promised in marriage to a much older man, one which is insisted on by some aboriginal leaders in the Northern Territory—and it arouses very strong feelings. It may be that the law will have to make special provision for it: one of the difficulties at present is that the custom itself is felt as oppressive by some sections of the aboriginal community—especially young girls themselves—and also some young men. A tendency to apply to the white man's law to escape from the consequences of a "bride-promise" is by no means unknown. Such a case occurred in Arnhem Land three

years ago: the girl was 14, at school in Darwin, and when she went back for school holidays to her tribe in Arnhem Land she was claimed by her promised husband—a man of some education and with many years' contact with white society. On her appeal for help to the police, a charge of assault was laid against the man: a conviction without penalty resulted. I am far from saying that I know the solution to difficulties such as these: all that I suggest is that in the past we have probably been somewhat too ready to condemn such customs because they seem barbarous to us, and to apply our law to such a situation, when it would possibly be wiser to provide a plurality of laws—one for the white community, one for the black man in his transactions with the white community, and one for the black man living in aboriginal land. My suggestion is of course only a very rough sketch of what I have in mind. I do *not* mean that I envisage a tract of aboriginal land as a sort of enclave—an Alsatia into which the law does not penetrate. That is out of the question if for no other reason than that I do not for a moment believe that that is what the aboriginals will want.

The difficulties are obviously many and great; yet I believe that we shall have to devise a more complex set of laws to regulate these matters than we have yet tried to do. I have mentioned that there is in fact some discretion exercised in prosecution. I might mention also a particular provision of Northern Territory law which is almost the only special discriminatory provision which now applies in the field of criminal law. An aboriginal convicted of murder need not be sentenced to life imprisonment, as a white man must: the court has a complete discretion, and can consider all relevant circumstances including native law or custom. This of course sometimes raises a problem for the sentencing judge. Thus, in a case in Alice Springs, where the accused was totally unsophisticated, I sentenced him to one year's imprisonment and made a special recommendation that he should be unconditionally released if it appeared that imprisonment was killing him—as it was feared that it might. In another case, where the accused had a good command of English and had worked as a stockman for some years, yet was under the pressure of tribal authority to commit the crime, I thought that three years' imprisonment was appropriate.

I mention these cases only to illustrate the undoubted difficulties which exist, as matters are now, in applying the standard criminal law to aboriginals in a society such as exists in the

Northern Territory. No doubt there are similar difficulties in Western Australia and Queensland. I am convinced that for a time, at least, we shall have to go much further in a similar direction; to make special provisions in the law for special situations. Our established principle of one law for all, white and black, laudable and philosophically satisfying though it may be, will have to accept some qualifications. After all, there is nothing novel about the growth of the law away from unity and simplicity and towards diversity and complexity. That has been its history. I do not think we need shrink from a movement towards diversity in a new direction.

I return to the theme suggested by the title of this paper. The essence of my reason for supporting a system of "aboriginal land rights" is that we whites have a responsibility to take steps for the benefit of the aboriginals which they, the aboriginals, appear to want. That proposal is based on wardship—an obligation of care, and a desire to benefit. Among the benefits which one would hope to see accrue to the aboriginal people from such a scheme would be a growth in their independence—a move away from wardship.

On the other hand, it could be said that the scheme is inherently discriminatory, at any rate for those aboriginals who wish to take advantage of it. Nothing should prevent the assimilation—the opposite of discrimination—of any aboriginals who prefer to follow that path. But plainly, I think, many do not want to follow that path, and it is for these that the proposal for aboriginal land rights has a strong appeal. That proposal—and the consequences which would follow from its adoption—are undoubtedly discriminatory. I have tried to suggest some of these consequences in one limited field, that of the criminal law. It is a field from which hitherto discrimination has been markedly absent. There will be those who will say that any step in the direction of discrimination must be a backward step—that we should not allow the aboriginals to do themselves harm by emphasizing racial discrimination. In its rhetorical, or possibly political, form, this argument may be put as "we don't want apartheid in Australia."

To this I reply that I believe we can, and must, accept some controlled discrimination between white man and black man, as being yet another facet of the growing diversity or plurality of our society. I believe that it is possible for such a degree of discrimination to be contained, by appropriate laws, within the

total Australian community. I believe that diversity does not necessitate divisiveness; on the contrary, I hope that out of diversity there can emerge a better society for both aboriginals and whites.