

REVIVING INDIGENOUS SOVEREIGNTY?

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Questions about sovereignty have received comparatively little attention in Australia. There seems to be nothing much to be discussed; no contentions to be resolved. Unlike the North American Indians or the Maoris, at the time of the European arrival (and long after it), Australian Aborigines were thought to be without laws and government. There was, then, no need for a treaty or treaties. The tribes could never be considered domestic dependent nations with partial, subsidiary sovereignty. Nor had there been any need, as in America, to deal with prior, competing sovereignties – French, Spanish, Dutch, Russian, Mexican, Hawaiian – by means of conquest, cession or purchase.

There were no land borders to dispute and delineate. Local history was reassuringly simple. Australia was a land without a sovereign – a *territorium nullius* – as well as a land where there was no tenure – a *terra nullius*. When Britain claimed sovereignty in 1788, 1824, 1829 and 1879, the Crown acquired an original title. She was the first sovereign – the only one there had ever been. What is more the Crown also became the beneficial owner of all the land which Australia comprised. Australia was, then, a continent without either frontiers or foreigners – a place where settlers and indigenous alike became subjects of the Crown. In a poem to the process of colonisation W K Hancock declared in 1930:

For six generations they [the settlers] have swarmed inland from the sea, pressing forward to their economic frontiers which are the only frontiers Australia knows¹

This passage captures so much about settler attitudes. As they moved out into new country they usually thought of themselves as occupying land which was without a legitimate owner. Very few considered that they might be breaking the laws of the place – the *lex loci* – or entering areas under Aboriginal jurisdiction.

Historians have found little to dispute in this assessment. They have accepted at face value Edmund Barton's famous aphorism of 1901 that federation had created a nation for a continent and a continent for a nation. The courts have similarly failed

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¹ W K Hancock, *Australia* (1930) 11.

to advance any contrary point of view. When they have been required to consider the question of sovereignty they have adopted the position that the acquisition of territory is an act of state which cannot be questioned by the municipal courts. This may be sound in law but it fails to explain what actually happened during the process of colonisation.

The greatest difficulty, and one which is at the heart of the current view, is the apparently irrefutable assumption that the Aborigines had no sovereignty to lose – an assumption which, post-*Mabo*,² must nonetheless be assailed. If contemporary opinion can no longer accept the erstwhile proposition that the Aborigines were too primitive to be landowners, how much longer can the linked claim of a land without sovereignty survive? The problem was outlined in the 1920s by M F Lindley in his classic work *The Acquisition and Government of Backward Territory in International Law*.³

It was difficult, he observed,

to see why, if the natives are to be regarded as capable of possessing and transferring property, they should not also be considered competent to hold and transfer the sovereignty which they actually exercised.⁴

One can appreciate the reluctance of any court to enter into so difficult and contentious a territory because the question of prior Aboriginal sovereignty raises so many issues – jurisprudential, political and moral. But ultimately the Crown will be required to establish how and when Aboriginal sovereignty was overridden. It will not be enough to assert that at the moment of annexation it disappeared in the blink of an eye over vast areas and among people who, in some cases, did not even see their first Europeans for many years. To advance such fanciful propositions would invite ridicule and ill serve the intellectual reputation of the judiciary.

Interpretations of sovereignty lie at the heart of the problem. The common law has been deeply influenced by the idea of what Blackstone called the supreme, irresistible, absolute, uncontrolled authority.⁵ But such a view gets in the way of any assessment of the law as it actually functioned outside Britain itself. It was a problem addressed by distinguished jurists in the age of the Empire. In his study *International Law* Sir Henry Maine discussed the contrast between the British idea of ‘indivisible sovereignty’ and the one found in international law where it was held that the power of sovereigns was ‘a bundle or collection of powers’ which were often separated one from another.⁶ Maine’s insight was taken up by W E Hall in his book of 1894, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* in which he observed that there was overwhelming evidence from the

² *Mabo & Ors v Queensland (No. 2)* (1992) 175 CLR 1 (‘*Mabo*’).

³ M F Lindley, *The Acquisition and Government of Backward Territory in International Law* (1928).

⁴ *Ibid* 21.

⁵ W Blackstone, *Commentaries on the Laws of England* (18th ed, 1823) vol 1, 9.

⁶ H S Maine, *International Law* (1890) 38.

Empire itself that the sovereign power was frequently divided between different authorities. He also provided many examples of the assorted arrangements seen in the establishment of protectorates and other spheres of influence.⁷ In particular there were the many and varied ways in which internal and external sovereignty was distributed and exercised.

These examples are pertinent to any consideration of Australia. As regards external sovereignty, Britain's formal annexations of sections of the continent were clearly carried through with reference to other, potentially competing powers. Given Britain's naval supremacy at the time, no other country ever challenged that sovereignty, and there is no doubt that the Imperial government would have forcibly resisted any foreign incursion into the continent.

However internal sovereignty is another matter altogether. Could a situation have existed where Britain's unchallenged external sovereignty lived side by side for long periods with Aboriginal internal sovereignty? Such an arrangement would have been unexceptional in the Empire at the time.⁸ But we can advance the argument even further than that by examining a situation where the British government provided the theoretical justification for just such an arrangement.

The situation arose from a dispute between Britain and Nicaragua about the status of the Mosquito Indians of the Atlantic coast which was taken to international mediation in the 1880s. Nicaragua argued that her sovereignty as a successor state to the Spanish Empire was unquestioned and had been settled for many years. The Indians lived within the acknowledged boundaries of the Republic and they were too primitive to exercise any degree of independence. They lived by hunting and by fishing, were without arts, commerce, laws or religion or any of the other attributes which would suggest to the civilised world that they composed a regular society. Britain argued that all Nicaragua had was not 'an absolute sovereignty' but one of a 'qualified and limited order'. This was due to the fact that neither Spain nor Nicaragua had 'actually exercised the pretended rightful sovereignty'. The asserted occupation lacked the 'essential element of taking possession in fact'. As a result the Indians were able to maintain not only their actual freedom but to operate as a separate community. The incorporation of the Mosquito district into the Republic was 'a relative and incomplete incorporation'.⁹ Consequently the Indians were exercising the last remnant of the freedom and self-dependence claimed by them for centuries.¹⁰

Within Australia itself there were always some people who questioned the conventional view and realised that the reality was more complicated than the theory. In South Australia in the 1840s Justice Cooper drew a clear distinction

⁷ W E Hall, *A Treatise on the Foreign Powers and Jurisdictions of the British Crowns* (1894) 212, 218.

⁸ Ibid. See also H Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (1091) 166-199.

⁹ See J B Moore (ed), *History and Digest of International Arbitrations* (1898) vol 5, 4954-4966.

¹⁰ Ibid.

between the Aborigines who lived in proximity to the Europeans and those who did not, although their country was within the prescribed limits of South Australia. But it had 'never been occupied by settlers' and they were 'people who have never submitted themselves to our dominion, and between whom and the settlers has been no social intercourse'.¹¹

The South Australian Governor George Gawler had similar views. He observed that

it may be necessary to view such tribes, however savage and barbarous their manners, as a separate state or nation, not acknowledging, but acting independent of, and in opposition to British interests and authority.¹²

Queensland's Governor C F Bowen recognised the existence of a frontier line within the limits of his colony. He believed that in defending this line from the 'numerous and hostile savages of this portion of Australia', Queensland was making a contribution to the general defence of the Empire, 'since the inland boundary of Queensland is the boundary of the Empire.'¹³

If the Crown is ever forced to establish when and how it acquired internal sovereignty from the Aboriginal nations it will have to deal with the question of effective occupation. The two matters are closely interrelated. Without effective occupation there can only be sovereignty of 'a qualified and limited order'. This interrelationship was one of considerable importance in the 19th century as the European powers competed for colonies. Any significant discrepancy between the two elements making up the interrelationship invited endless disputation. This problem was dealt with by the international Berlin Conference of 1885 at which guidelines for the acquisition and administration of colonies were set out.¹⁵ While designed for African conditions, the principles embodied in the Conference's General Act came to have much wider application. A critical issue was the question of what requirements were necessary for a country to claim to exercise sovereignty over a piece of territory to the exclusion of competing powers. It was here that the principle of effective occupation became of overriding importance. Lindley explained that the condition necessary for a full title to territory was

the existence there of sufficient authority to protect life and property; and, so far as an absolute title is concerned, the broad rule is that the possession of a Power extends as far as, and no further, than its administrative machinery is in efficient exercise.¹⁶

¹¹ *Adelaide Chronicle* (Adelaide), 4 November 1840.

¹² *South Australian Register*, 19 September 1840.

¹³ G F Bowen, 'Executive Council Minute', 7 January 1861, *Queensland State Archives* EXE/E3/61/1.

¹⁵ See A B Keith, *The Belgian Congo and the Berlin Act* (1919); F D Lugard, *The Dual Mandate in British Tropical Africa* [1922] (1965); Lindley, above n 3, 271.

¹⁶ Lindley, above n 3, 271.

Britain herself adopted the principles enunciated at the Congress of Berlin. In 1887 Lord Salisbury declared that it was now admitted by all parties involved that a claim of sovereignty in Africa could only be maintained by 'real occupation of the territory claim'.¹⁷ He also used the principle to deny a Portuguese claim to territory in central Africa on the Zambezi River because

in the greater part of the region there was no sign of Portuguese jurisdiction or authority; and he refused to recognise any claim to sovereignty which was not based on real occupation.¹⁸

What was true of the Portuguese position in central Africa was clearly also true of the Australian colonists' claims to be in effective possession of much of north Australia. At the time of claiming sovereignty, there were only a few thousand Europeans in the whole of the continent north of the Tropic of Capricorn apart from the narrow coastal plains along the Queensland coast and the adjacent gold fields. It is very hard indeed to see how Australia could have asserted that it exercised sovereignty over unexplored, unadministered territory and uncontacted indigenous nations in the Kimberley, Arnhem Land, the West Coast of Cape York and the central deserts. It was not, in international legal terms, a *real* occupation.

This was apparent to contemporaries. In an article in the *Empire Review* in 1910 F A W Gisborne feared that hordes of 'invading Aseatics' might take possession of a region which,

on the principle held by the British Government some years ago to invalidate Portugal's claim to the valley of the upper Zambezi, might be regarded by their governments as insufficiently occupied.¹⁹

The American scholar J F Abbott, an instructor at the Japanese Naval College, observed that north Australia was not 'effectively occupied' by any race. 'Some day it will be', he declared, but 'not by whites'.²⁰ In an article in a London paper in 1907, H P Lyne argued that there was no 'effective occupation' of Australia in the sense that international law required.²¹ He said that individual Japanese lost no opportunity of reminding Australians of the situation.²²

Prominent Australians were also incensed by the problem of the empty, unoccupied north. In his speech on the *Immigration Restrictions Bill* in the fledgling federal parliament in 1901, Alfred Deakin observed that settlement was clustered on the eastern littoral and that they were legislating for the future of the whole continent before they had 'effectively occupied a quarter of it' and with the great bulk of its

¹⁷ Lugard, above n 14, 34.

¹⁸ Lindley, above n 3, 213. See also Keith, above n 14.

¹⁹ 'Social Problems in Australia' (1909) XVIII *Empire Review* 150.

²⁰ J F Abbott, *Japanese Expansion and American Policies* (1916) 155.

²¹ The article was reproduced in full in *The Japan Times*, 4 February 1907.

²² Ibid.

²⁴ *Commonwealth Parliamentary Debates* (1901) vol IV, 4806-7.

immense extent 'little more than explored or with a sparse settlement'. It would be for future generations, he said, 'to enter into and possess the country of which we at present only hold the border'.²⁴

There were other, quite demanding, before effective occupation could be affirmed – requirements which Australia was similarly unable to satisfy. Lindley outlined the circumstances under consideration:

In the early stages of the government of backward territory, the only method of bringing unruly tribes to reason and maintaining order in outlying parts of the territory may be by way of punitive military expeditions directed against a tribe or district as a whole, without its being possible to distinguish between innocent and guilty individuals. But the requirements of 'effective occupation' clearly involves [sic] the duty on the part of the acquiring State of taking steps to secure the administration and policing of the whole territory under its full sovereignty or protection so as to render it possible, within a reasonable time to mete out punishment to the guilty individually.²⁵

The inability of Australian governments to meet these conditions will be immediately apparent to anyone who knows anything of the history of north Australia. The Government Resident for the Northern Territory addressed the problem in a report to the South Australian parliament in 1898 in which he declared that it was impossible to stop white men kidnapping and raping Aboriginal women:

Considering the vast area of country, sparsely populated, over which it is utterly impossible to maintain any control, it is difficult indeed to suggest any remedy which would *effectually* cope with the evil which undoubtedly exists. Those who occupy the 'backblocks' are, in most cases, a law unto themselves as regards their relations with the natives.²⁶

Even more exalted officials commented on the lack of effective occupation in the north. After a tour of the Northern Territory the Governor of South Australia observed that only a small fraction of the Aboriginal population was 'under any control' or indeed 'in any contact with any form of Government or civilisation'.²⁷ The situation had not changed much before the Second World War. In 1940 the Protector of Aborigines, J A Carrodus, wrote to the Administrator of the Northern Territory, referring to the relatively uncivilised natives who lived

more or less permanently in remote areas, who are not under any form of permanent European control, assistance or supervision, and who depend for internal stability on the free exercise of their own native customs.²⁸

²⁵ Lindley, above n 3, 271.

²⁶ *South Australian Parliamentary Papers* (1899) vol II, no 45, 3.

²⁷ *Commonwealth Parliamentary Papers*, (1905) vol II, no 37, 14.

²⁸ 'Carrodus to Administrator', 8 March 1940, *Archives*, A432/81, 1938/758.

Alfred Deakin and his contemporaries were concerned about the empty north, of which they only held the border, as it affected their ability to assert effective control against other powers outside Australia. They were clearly unsure whether they had achieved any more than a relative and incomplete incorporation. By the early 20th century the pertinent international law was clear – the possession of a power extended only so far as its administrative machinery was in efficient exercise.³¹ Fortunately for Australia no other power challenged the young federation's sovereignty over the territory in question. But principles that could potentially be applied from outside must also have internal relevance. (This was not something that concerned most Australians, who had generally started with the assumption that the Aborigines had never had any sovereignty to lose or that they had lost it long ago when Britain annexed their territory.) We can no longer continue to allow such fictions to underpin our national life and, more specifically, our jurisprudence. We must put Australia back into the Empire and see our history as part of that international experience rather than continuing to live with the illusion that the continent was no more than an extension of the Home Counties. Australia's hold over the north of the continent must be judged in the same way that the European powers assessed whether claims to exercise jurisdiction beyond the seas were based on actual achievement or on ambition and bluster.

This returns us to the critical question of whether the Aborigines exercised a form of sovereignty over the continent before the arrival of the British, because if the answer is 'yes' the ramifications are far-reaching. The onus is on the Crown to establish by what principles of law Aboriginal sovereignty was overridden.

In either case, what is clear is that white Australia's administrative hold over large areas of the continent was so feeble that it could not have extinguished pre-existing, ancient sovereignty.

The last word should be left to an elder of the Yawuru nation who some years ago outlined his views on the question of Aboriginal sovereignty:

It's time our Aboriginal lawyers – so called Aboriginal leaders came to the East and West Kimberleys, so that we the Elders of the Independent Nations can teach them of our system of governance, sovereignty.

Even today we still respect each nation Sovereignty over their specific country, we all are independent of outside authority.

It has been our system of governance since time immemorial ... Each nation governed within their territorial borders[. O]ur system was harsh but just. ...

³¹ Lindley, above n 3, 271.

³⁴ Letter to H Reynolds, 6 June 2000.

Internal sovereignty is paramount power over all action within. The anthropologist[s] of yesteryears have done us great injustice by not recording our system of governance, and that we were not our nation.³⁴