

RESPONSES TO HENRY REYNOLDS

CHRIS CUNNEEN*

One of the great contributions Henry Reynolds has made to the post-*Mabo* legal debate has been the identification of the essential contradiction at the heart of Australian jurisprudence. His short essay reiterates this contradiction: if Aboriginal law exists and can be recognised for the purposes of native title, then why does it not exist in other areas of law? If Aboriginal laws were extinguished then precisely where and when did this occur? To ignore Aboriginal law (and sovereignty) is to maintain a legal fiction – a fiction that reinstates a colonial paradigm about the nature of Aboriginal society and ultimately, the human worth of Aboriginal people.

For to be without law is to be *uncivilised*, to be placed outside the realm of civil and political society. While the racialised hierarchies of the nineteenth and early twentieth centuries discursively constructed Aboriginal people as beings of lesser human worth, the contemporary failure to understand Aboriginal law and sovereignty continues to re-position Aboriginal people outside civilised society. The alternatives available to Aboriginal people are simple and few: they may choose to fit within (Anglo-Australian) law, in which case they must assimilate to the values and norms of Anglo-Australian society, or they will remain forever lawless.

Of course at times we do ‘recognise’ Aboriginal custom - witness the current debate about child sexual assault in Aboriginal communities in the Northern Territory and the linking of this to an *idea* of Aboriginal ‘customary’ law. In this instance, what we ‘recognise’ in Aboriginal customary law is unspeakable barbarity: the sacrificing of babies and children for the sexual gratification of ‘traditional’ or ‘initiated’ men. How could a civilised society provide legal recognition to these practices? Again the alternatives are clear: these people must either assimilate into dominant Anglo-Australian civil society, or remain outside its realm (which is how we can contemplate the need ‘to send in the army’ to fix the situation).

Reynold’s argument demands that we treat Aboriginal sovereignty and law seriously, and that we should do so in a context of historical continuity. It challenges us to think of a new Australian political framework in which Aboriginal

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people could be part of a civil and political order both inclusive and diverse, in which citizenship is re-imagined as pluralistic and differentiated.

All these goals may perhaps be achieved by the firm location of Aboriginal law within a rights-based agenda which recognises Indigenous political rights in relation to the maintenance and development of Indigenous jurisdiction/s. In this way, the Indigenous right to make law would be recognised, albeit within a framework of accepted international human rights standards. Such an approach would rely on the collective right of peoples to self-determination. The recognition of this right has been at the forefront of Indigenous political struggle, both in Australia and internationally, and, it seems to me, it is a right which goes to the heart of the question of Indigenous sovereignty.

In the new civil and political order resulting from such an approach, the Aboriginal domain would continue to survive and develop, sovereign power would no longer reside as the sole prerogative of the liberal state but would be divested to multiple levels of governance and the legal monism of 'One Law for All' would be replaced by respect, tolerance, diversity and multiplicity.

MEGAN DAVIS*

Henry Reynolds is correct in stating that the question of sovereignty receives very little attention in contemporary Australia. So little, in fact, that it would appear to an outsider that the issue of Aboriginal sovereignty had been resolved long ago. For many Australians it probably was – because it is not something Australians ordinarily think about. Indeed it is clear that most Australians rarely cogitate on anything to do with their nation's history or public institutions – Aboriginal or not. Even so, the fact remains that there has been no formal resolution of the issue of Aboriginal sovereignty and that legacy is evident in the dysfunction that defines the relationship between Aboriginal people and the State and the perennial exclusion and dislocation experienced by Aboriginal people from Australia's public institutions.

An outsider only has to follow contemporary political discussion on Indigenous issues in the post-Aboriginal and Torres Strait Islander Commission (ATSIC) leadership vacuum to hear complex issues of sovereignty or even self-determination typically 'dumbed down'. The debate is excruciatingly unsophisticated – particularly compared to comparative political debates in Canada or even Latin American 'radical' democracies. For example, the national President of the Australian Labour Party (ALP) has argued that Aboriginal people have to 'earn' sovereignty, Federal Health Minister Tony Abbott has suggested that self-determination should be replaced by a 'new paternalism' and Amanda Vanstone has

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explained that self-determination should be abandoned because ‘we’ refused to play cricket with a country that had ‘separate systems’.

This debate is frustrating for Indigenous peoples because the classical statist version of sovereignty has limitations in contemporary post-colonial liberal democracies in which power is dependent upon ‘popular sovereignty’ and is defined and limited by a Constitution and the rule of law.

Yet sovereignty is a shifting and malleable construct. This is highlighted by international law and particularly by international trade law. There are trade agreements that represent the kind of intrusive incursion upon state sovereignty that may enable supra-national institutions and foreign states to alter the laws and regulations of sovereign Parliaments within a state. This type of incursion is rarely countenanced as fracturing the state because ‘sovereignty’ is conveniently renovated to include the economic imperatives of the private sector. Increasingly, free trade is perceived to be of unquestioned economic and social benefit to the governed. Meanwhile, resolving the conundrum of Aboriginal sovereignty is perceived to have no electoral appeal and therefore no economic or social benefit to the state despite the fact that Aboriginal people argue that there is a link between institutional reform and Aboriginal health and well being.

As long as sovereignty theory is inconsistent and endlessly contested, the debate does matter. It matters because history matters. No liberal democracy can flourish when it is founded upon injustice and inequality. Reynolds is right in that questions of sovereignty are rarely countenanced in Australia. That is why the way forward must, to my mind, involve – two crucial elements: firstly, the kind of scholarship Reynolds produces, that persistently chips away at state mythologies and frustrates the insidious Howard history war. And secondly, Aboriginal people articulating with greater specificity than we have in the past what we actually mean by sovereignty and self-determination.

HAMAR FOSTER*

It was a great age for making claims. The pope claimed to be the disposer of the kingdoms of this world, but as a matter of fact he was not. The King of England claimed to be the King of France, but he was not. The King of France claimed to be the ruler of ‘the western extremity of Asia’ because Jacques Cartier had discovered Hochelaga; but he was not. The rulers of those days were good claimers, but they could not make their claims good. (Tom MacIness, *Report on the Indian Title in Canada* (1909).)

Stripped to its essence, any comment I have to make on Henry Reynolds’ short essay has been made already by Tom MacIness in his 1909 legal opinion for the Canadian government, above, and in the passage from M F Lindley’s *The Acquisition and Government of Backward Territory in International Law* (1928)

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that Reynolds quotes. Lindley notes that it is difficult to understand why, if Indigenous peoples are capable of possessing and transferring property, they are not capable of holding and transferring the sovereignty 'which they actually exercised.'

The short answer to Lindley's question is that they are so capable. In New Zealand, for example, the chiefs who signed the Treaty of Waitangi in 1840 ceded in Article One the 'kawanatanga' (sovereignty) of their territories to the Queen.¹ In America, the Indian tribes were 'domestic dependent nations' which, subject to prohibitions on conveying their lands to Europeans and conducting foreign relations with states other than the United States, continued to enjoy their pre-contact land and government rights. Insofar as the Anglo-American settler jurisdictions of Australia, New Zealand, Canada and the United States are concerned, it was only in Australia and parts of Canada – including British Columbia – that this was denied.

Over the past thirty years or so, Canada has come round. Aboriginal and treaty rights have been constitutionalised, the inherent right of self-government has been politically affirmed, and at least one court has ruled that the Canadian Constitution protects a limited, inherent right of Aboriginal self-government, specifically that negotiated in the treaty made between the Nisga'a, British Columbia and Canada in 2000.²

But of course it is not as simple as this. When the Attorney-General of New Zealand advised the Governor in the 1840s that his government had no jurisdiction over a tribe that had not signed the Treaty of Waitangi, the response of the colonial office was blunt. The permanent undersecretary informed the governor that an imperial statute had declared the Queen to be New Zealand's sovereign, a unilateral act that trumped any quibbles about treaties; if the Attorney-General did not understand that, he added, the Attorney-General should resign.

In the United States it soon became clear that the sovereignty of domestic dependent Native American nations was subject to the plenary authority of Congress to extinguish that sovereignty unilaterally. Only in Canada does the possibility of a limited sovereignty that is essentially immune from unilateral state extinguishment exist, although to date exercise of that Indigenous sovereignty still does not approach that which many United States tribes exercise.

So: what is the point? As I have said, it is that, logically, Lindley's query hits the mark; and since 1971, the year of the *Milirrpum* case,³ how can it be contended that Australian Aborigines were 'without laws' given that that case stated that, on the

¹ Article Two, however, confirmed the chiefs' 'rangatiritanga' (chieftainship), a much more powerful concept, and this has generated a controversy that continues today.

² *Campbell v British Columbia (Attorney General)*, [2000] BCJ No 1524 (Williamson J.)

³ *Milirrpum et al v Nabalco Pty Ltd and the Commonwealth of Australia* [1971] 17 FLR 141.

evidence, it was clear that the Rirratjingu and Gumatj clans *were* governed by laws?⁴

Nonetheless, even in jurisdictions where a measure of Indigenous sovereignty has been acknowledged, the politics of power have diluted legal logic and made sovereignty (or jurisdiction, or self-government) a matter for negotiated compromise. The alternatives are simply not viable. To allow logic to trump history is practically impossible, and to allow history to trump logic is morally indefensible. Either way, we risk hopeless double standards. For example, when Canada asserts its sovereignty over its own ‘empty, unoccupied north,’ which global warming may well make increasingly accessible to others, can it continue to assert in its domestic courtrooms that First Nations who moved through their traditional territories on a seasonal round have no title in or jurisdiction over those lands? More bluntly: is an Eskimo with a rifle transported by Ottawa north of the Arctic circle to assert Canadian sovereignty a more credible marker of “effective occupation” than a Tsilhqot’in or Salish family that visits a clam bed or a fishing station every summer?⁵

I think, therefore, that Indigenous and colonizing peoples everywhere must ensure that the weight of history is borne equally. And that is no small task.

ALISON HOLLAND*

In this article Henry Reynolds speaks to what has proven to be an, if not the, enduring concern of his collected works, a concern first raised in a statement made by the South Australian Governor, George Gawler, in 1840: ‘if the claims of the natives are not void before all, they are preliminary to all. They cannot occupy a middle station.’⁶ In this piece Reynolds specifically raises the possibility of a divisible sovereignty. Of course, the judgement in *Mabo & Ors v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) rejected the possibility of a plurality of sovereignties while, at the same time, recognising the force of Indigenous culture and law: simultaneously preserving and disavowing the colonial sovereign event that founded the colony.⁷ The question is, as Reynolds sees it, whether Australian society can live with this contradiction.

⁴ *Milirrpum et al v Nabalco Pty Ltd and the Commonwealth of Australia* [1971] 17 FLR 141. Blackburn, J ruled however that whether the plaintiffs were governed by laws was itself a question of law, not fact; and because the Judicial Committee of the Privy Council had ruled in *Cooper v Stuart* (1889) 14 App Cas 286 that Australia had no ‘settled law’ when annexed by Great Britain, that was the end of that – notwithstanding the evidence that had been led before him. In *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, the High Court of Australia overruled *Milirrpum* and refused to follow *Cooper*.

⁵ The most recent pronouncement by the Supreme Court of Canada on the degree of ‘effective control’ necessary to constitute Aboriginal title is in *R v Marshall; R v Bernard*, [2005] SCJ 43.

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⁶ Henry Reynolds, *The Law of the Land* (1992) 2.

⁷ Stewart Motha, ‘The Failure of ‘Postcolonial’ Sovereignty in Australia’ (2005) 22 *The*

He posits that Aboriginal groups may have retained an internal sovereignty (as against Britain's external sovereignty) during much of Australia's history. The examples with which he supports this argument are located within a variety of historic and geographic frames – 1840s South Australia, 1860s Queensland and through to the Northern Territory of 1940. A glance at some aspects of the relevant history, particularly that of the Northern Territory, suggests that Reynolds' argument may be correct. For example, from the time the Federal Government took administrative control of the Northern Territory in 1911 its focus was driven by two particular motives: firstly, making the region productive and plentiful, and secondly, securing it. Much of the contemporaneous rhetoric of the 'empty north' presumed a kind of indigenous invisibility or soon-to-be invisibility. But there were counter narratives.

During the 1930s members of the anthropological fraternity were establishing important links between territoriality and Indigenous political systems. At the same time, Indigenous groups in the far north were demonstrating an intransigence to foreign intrusions into their country and law on a scale and in a manner similar to Indigenous groups elsewhere, and a nascent humanitarian movement was hypothesizing about the vital importance of land to Indigenous survival. At the very least this suggested that, in their own minds, Indigenous groups had not forfeited their sovereignty. Such a conclusion is arguably supported by the panic associated with the rising part-Indigenous community in the region in the inter-war period. This panic could be attributed to a sense of attack from within, a sense of battle between a stubborn Indigenous minority, defending its land and law, leaching into the non-Indigenous majority and usurping colonial power.

The question of sovereignty has been/is receiving some attention within academe and from those working in the area of native title. It has also received attention from the Federal government to the extent that there has been a determinedly antagonistic response to it, a response which some might say has driven the Government's so-called 'quiet revolution' in Indigenous affairs. However, Reynolds is right: it is a question which needs much closer interrogation. Such interrogation should emphasise an Indigenous perspective, as the question of sovereignty is tied up with a history of Indigenous rights which has not yet been fully told, even though the idea of sovereignty as self-determination and self-government has arguably propelled an Indigenous rights movement from day one. (For example, Indigenous recognition of their sovereign right to self-government, autonomy and independence could be said to have underpinned key moments in their claims to citizenship, equality and compensation.)

Admittedly, part of the significance of such a history would be symbolic. It would speak to an engagement with Indigenous claims both then and now and potentially in the future. Never has this seemed more urgent than at the present time.

MARCIA LANGTON*

In this, his most recent foray into the question of Aboriginal sovereignty, Henry Reynolds once again challenges the persistent assumption that Aborigines had no sovereignty to lose. In *Mabo & Ors v Queensland (No. 2)* (1992) 175 CLR 1 ('*Mabo*') the High Court held that that the acquisition of territory is an act of state which cannot be questioned by the municipal courts. Reynolds' view is that this position is unsustainable and will 'invite ridicule and ill serve the intellectual reputation of the judiciary'. His contention that 'white Australia's administrative hold over large areas of the continent was so feeble that it could not have extinguished ancient pre-existing sovereignty' may be irrelevant at law, but his rhetorical, but nevertheless important, point is that the onus is on the Crown to set out the principles of law involved – or, I must add, to correct this racist legacy by recognising the rights of Aboriginal people in the Constitution. The sovereignty of the state and the honour of the Crown are founded on an indefensible proposition argued in the terms of the legal discourse that de-humanised and de-historicised Aboriginal people, permanently rendering them mere wandering brutes of Hobbesian mythology. While the High Court in *Mabo* could not tolerate this logic with respect to native title, the judges were unable to find a way to refute this absurdity with respect to Indigenous sovereignty. Noel Pearson's response to this dilemma was to argue that a concept of sovereignty inhered in Aboriginal groups prior to European invasion insofar as those Aboriginal people had concepts of having laws, land and institutions without interference from outside their society. He proposed: 'This must be a necessary implication of the decision in *Mabo* against *terra nullius*'.⁸ He also argued that, with the development of human rights standards relating to Aboriginal people at international law, 'recognition of "local Indigenous sovereignty" could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded'.⁹

Reynolds states that questions about sovereignty have received comparatively little attention in Australia. Reynolds is first and foremost an historian, and his article reflects his concern with sources from the records of the colonial period and of nation-building, although he does conclude with the words of a Yawuru elder: 'The anthropologist of yesteryears have done us great injustice [sic] by not recording our system of governance.' This judgement of anthropological dereliction may be unfair. There are some notable exceptions, for example, the book *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* by anthropologist Nancy Williams.¹⁰

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⁸ N Pearson, 'Indigenous Peoples and International Law', Address to the Evatt Foundation Annual Dinner, 28 July 1995, unpublished speech.

⁹ Ibid.

¹⁰ Nancy M Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (1987).

Williams has also written extensively about the *Gove Land Rights* case¹¹ in which Blackburn J argued the inability of the law to recognise native title on the grounds of Blackstone's doctrine of ceded and conquered colonies.¹² She has noted that '[t]o perceive other peoples' institutions as lacking the familiar features of one's own society is an old habit, and anthropologists as well as lawyers, historians, and philosophers continue to deal with the effects of it'.¹³ This habit, perhaps even more than the conceptual chasm which Blackburn J confronted in hearing the Yolngu evidence in that case, explains the conclusion which he drew. As Williams notes, he referred to the

... principle which was a philosophical justification for the colonization of the territory of the less civilized peoples; that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced.¹⁴

This is a virulent and persistent notion, and one that continues to surface in modern Australian law and policy-making. With the hegemony of the radical right in Australian politics, and notably, the reception of Keith Windschuttle and Michael O'Connor's misguided tracts in government circles, scholarship on the recognition of Aboriginal rights in the Australian Constitution is more necessary than ever if we hope to achieve the full flowering of human rights in this country.

There has been some interesting scholarship on these matters, much of it written in response to renewed debates about the possibility of a treaty or treaties between Indigenous people and the political/legal systems which have come to dominate their traditional lands.¹⁵ Australian contributions to this body of scholarship have been concerned with how the rights of Aboriginal peoples, including their right to self-governance, might be formulated and recognised, and more specifically, with the potential for recognising Aboriginal rights in an amended Constitution. This ongoing discussion is important, as until such rights are recognised the politics of Indigenous status will remain trapped in nineteenth century absolutist concepts of colonised citizens, and so will continue to fall far short of developments

¹¹ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

¹² Nancy M Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for Its Recognition* (1986).

¹³ *Ibid* 126.

¹⁴ *Ibid*.

¹⁵ Much of the international literature on this subject is referred to in the edited collection Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, *Honour among Nations. Treaties and Agreements with Indigenous People* (2004). Other works of note include Larissa Behrendt, Sean Brennan and George Williams, *Treaty* (2005), Noel Pearson 'Reconciliation: To Be or not to Be?' (1993) 3 *Aboriginal Law Bulletin* 61, ATSIIC *Treaty. Let's Get It Right* (2003), Marcia Langton, 'Dominion and Dishonour' (2001) 4 *Journal of Postcolonial Studies* 13, and Marcia Langton, 'Senses of Place' (2002) 166 *Overland* 75. Scholars from other fields such as law (see, for example, the work of Barbara Hocking) and philosophy (Janna Thompson and Paul Patton) have also tackled the subject.

elsewhere,¹⁶ where treaties and modern agreements provide not only Indigenous rights but also an honourable basis for the sovereignty of the Crown.

PAUL PATTON*

Henry Reynolds has long challenged the assumption at the heart of the Australian constitutional settlement that Aboriginal peoples lacked sovereignty. In this paper, he pursues one issue raised by the abandonment of this assumption, namely how and when Aboriginal sovereignty was overridden. His answer points to the importance of the principle of effective occupation of land in international law and British Imperial practice. If this principle were applied to the history of the colonization of the Australian continent, we would have to see the acquisition of sovereignty as a gradual extension of effective rule, a piecemeal process that parallels the present legal understanding of the extinction of native title. The interaction of these two processes, acquisition of sovereignty and extinguishment of native title, might raise further problems in some parts of the country, for example, in relation to the question of whether leases and other titles to land were always granted pursuant to the acquisition of sovereignty.

The principle of effective occupation is relevant above all to the question of *when* British or Australian sovereignty was established in various parts of the country. However, once we accept that Aboriginal nations were sovereign, the question of *how* sovereignty was transferred also demands an answer. Reynold's approach opens up the possibility that there is no single response to this question. Moreover, both of the options available in international law - conquest or cession - raise further problems for the moral foundations and legitimacy of the Australian constitutional order. Conquest may accurately describe how some Aboriginal peoples lost their sovereignty, but we would then have to work through the legal and moral consequences of this revision to the national imaginary. For other Aboriginal peoples, subjection to the effective control of Australian governments occurred well after the establishment of the Commonwealth in 1901 and in the absence of any agreements or treaties. These peoples were not consulted and therefore not party to the constituent power of the people expressed in the present constitution. Can they legitimately be considered subject to its authority?

Contemporary liberal political theory does not base legitimacy solely on the historical process followed but also on whether it would now be considered reasonable and just to consent to the principles expressed in the constitutional settlement. In 1967, the Australian people no longer considered it reasonable or just to exclude Aboriginal peoples from the census. In the same way, we should now ask whether it is reasonable and just today that peoples living on their own lands, under their own laws and customs, should be compelled to live under the laws and customs of another people? Or whether they should simply be subject to the

¹⁶ Such as in Canada and New Zealand.

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authority of the Commonwealth without treaties or other conditions governing their relationship as distinct sovereign peoples? The concept of legitimacy is at least as contested as the concept of sovereignty, but its centrality to the concept of constitutional democracy and its connections with the concepts of reasonableness and justice provide further reason for believing that, sooner or later, these questions will have to be answered.

ALEXANDER REILLY*

Reynolds puts the case that if Aboriginal peoples in Australia had sovereignty prior to the arrival of the British, then the Crown could not simply make an abstract claim to sovereignty over the whole of the Australian territory as it purported to do. Ultimately, Reynolds argues, the Crown will be required to establish how and when Aboriginal sovereignty was overridden. He believes that doing so will raise 'jurisprudential, political and moral issues'.

Reynolds' outline of the weaknesses in the Australian jurisprudence on sovereignty is persuasive. Also persuasive is his argument that international law at the time required actual occupation or effective administrative control to secure external sovereignty, and that this did not occur in some parts of Australia until well into the 20th century. What is left unclear in Reynolds' discussion is what follows from the weakness of the British claim to sovereignty. Reynolds claims that 'much else follows' but I am not sure that this is necessarily the case. Furthermore, I believe there are powerful reasons not to put the Crown to the test on the question of sovereignty, for what follows may in fact be detrimental to Aboriginal claims to cultural and political rights.

There are two problems with pursuing the sovereignty question further. First, there may be nothing to gain by pushing the Crown to fully articulate how and when full British sovereignty was secured over Australia. The difficulty with relying on international law to bolster claims for Indigenous sovereignty is that anything resembling an Aboriginal claim to sovereignty only began to be made in the 1930s, by which time British colonisation had probably progressed far enough for a comprehensive claim of sovereignty to be made, whether by settlement or conquest. Certainly if an Aboriginal community in the Kimberley, Arnhem Land, the West Coast of Cape York or the central deserts had made a claim to sovereignty that was communicated to a relevant international or British authority in the 19th century, it should have been persuasive. But such claims were either not made in such terms, or even if they were, they were not acknowledged to have been made.

Furthermore, if the British could only secure sovereignty over these areas through occupation or effective administrative control, there is probably a reasonable legal argument that these conditions were satisfied by the time land was divided into titles granted of and from the Crown. In holding that all statutory grants conferred

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prior to 1975 were rightfully conferred even if inconsistent with native title, the High Court would seem to have acknowledged as much.¹⁷

Second, there may be something to lose by pursuing the sovereignty question further. The focus on sovereignty is a distraction from, and may even undermine, the powerful political claims Aboriginal Australians make for the official recognition of their different status and rights within the Australian community. In this sense, Reynolds finishes his discussion of sovereignty at the point where I believe it should start. The elder of the Yawuru nation quoted at the end of Reynolds' analysis makes a statement of an authority that exists *regardless* of any official recognition of Indigenous internal or external sovereignty by the courts. Although he employs the language of sovereignty, his true focus is on an existing system of governance, which does not rely on an imposed concept of sovereignty.

The danger of pushing an official claim to sovereignty is that it devalues the strength of Aboriginal claims to a self-governing authority which pits itself against the State. The legal uncertainty surrounding the origins of British sovereignty generates political possibilities. Tying up the loose ends of the sovereignty question may narrow the space for making Aboriginal claims to self-government and other rights. Relevantly, Taiaiake Alfred has argued that sovereignty ought to be abandoned as a concept to advance Indigenous claims because it is an 'exclusionary concept rooted in an adversarial and coercive Western notion of power'.¹⁸ There is considerable force in Alfred's critique: reclaiming a concept which is rooted in non-Indigenous claims to ultimate legal authority is to begin a discussion of political rights from a position of profound disadvantage.

NICOLE WATSON*

On 3 June 1992 the Australian High Court provided the nation with a narrow and short-lived window into a world where law not only followed justice, but allowed itself to be shaped by international human rights standards. That window has all but closed since then. Over the intervening decade and a half, Indigenous land relationships have been distorted in an attempt to fit them into incongruous European concepts such as partial extinguishment. The test for the maintenance of an ongoing traditional connection has descended into a perverse interrogation of Indigenous identity. In this context, Henry Reynolds' questioning of how Aboriginal sovereignty was overridden is refreshing. It is a noble attempt to re-open a window that once held so much promise.

¹⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J summarising the position of the Court on this issue).

¹⁸ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) 59.

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However, I believe that his meticulous research would be complemented by greater engagement with Indigenous world views. For many Indigenous people the crucial issue is not determining precisely *when* sovereignty was taken from us according to international norms, but *if* in fact sovereignty was ever taken at all.

The last two centuries contain countless expressions symbolic of Indigenous sovereignty. From early freedom fighters such as Pemulwuy, to the 'Day of Mourning' on Australia Day in 1938 and the appeals of the Aboriginal Provisional Government to Libya's Colonel Gaddafi for assistance in the late 1980s, Indigenous Australian leadership has always asserted rights that emanate from our status as sovereign peoples.

Arguably, resistance to the Howard Government's drive to mainstream services delivered to Indigenous communities and widespread dissatisfaction with the government appointed advisory body, the National Indigenous Council, are contemporary expressions of this status. Significantly, such contemporary expressions of sovereignty are not only made on the political stage but also between ourselves: every day, meetings throughout the country begin with an acknowledgement of the traditional owners of the land on which the meeting is being held.

Contemporary expressions of sovereignty are not necessarily inconsistent with Reynolds' work. Indeed they highlight the absurdity of the assertion that at the date of annexation our sovereignty 'disappeared in the blink of an eye'.

Reynolds has not excluded Indigenous voices altogether because he reserves the last words for an elder of the Yawuru nation. However, it would have been beneficial to weave Indigenous world views into his analysis. In the absence of such an engagement there is a risk that our aspirations will become a hostage to others' convenience. The limited success of the *Native Title Act 1993* (Cth) is a case in point. Many of the Act's requirements contradict Indigenous experiences. In particular, the necessity for an ongoing traditional connection with the land¹⁹ punishes those whose ancestors were the victims of forced removals and encourages the view that such individuals are not genuine Aborigines. So when Reynolds referred to the 'empty, unoccupied north', while omitting any reference to the cities of the east, I could not help but feel a sense of *deja vu*.

¹⁹ *Native Title Act 1993* (Cth) s 190B(7).