

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.

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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.