*Libby Carroll**

ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE AND NATION

Henry Reynolds

Allen & Unwin; Sydney 1996
xviii, 221pp
ISBN 1 86373 969 6

HENRY Reynolds' book, *Aboriginal Sovereignty: Reflections on Race, State and Nation*,[1] is both an original contribution to Australian legal history and a programmatic statement of action for the future. While it presents a substantial addition to understanding of the relationships between the discourses of law and non-Aboriginal history with regard to Aboriginal sovereignty, its treatment of the different stories told by non-Aboriginal history and Aboriginal history is not so adept.

Reynolds states in Chapter 1, "Terra Nullius and Sovereignty", that the High Court's decision in *Mabo*,[2] which overturned the doctrine of terra nullius in relation to land tenure, did not go far enough:

> For 200 years Australian law was secured to the rock of terra nullius. One pinioned arm represented property, the other sovereignty. With great courage the High Court recognised native title in the *Mabo* judgment and released one arm from its shackles. The other remains as firmly secured as ever and seems destined to remain there for some time.[3]

In this passage Reynolds pictures terra nullius as having two aspects, one of land tenure and one of sovereignty. By only recognising Aboriginal land tenure and accepting British assertions of sovereignty through

---

* Graduate Diploma in Legal Practice student, Australian National University.

1 (Allen & Unwin, Sydney 1996).

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

3 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p15.

settlement, the High Court avoided important issues regarding Aboriginal sovereignty. Reynolds takes these issues as the subject for this book.

Reynolds compares different discourses on the topic of Aboriginal sovereignty. In Chapter 2, "Assessment of Aboriginal Society", the views of Aboriginal society held by historians and anthropologists are compared to the legal views contained in two nineteenth century cases: *R v Murrell,*[4] an 1836 New South Wales Supreme Court decision, and *Cooper v Stuart,*[5] decided by the Privy Council in 1889. In relation to *Murrell,* Reynolds concludes that Burton J's view that Aborigines had no law and no sovereignty was inaccurate, but in accordance with the facts as known by non-Aboriginal Australians at the time.[6] In view of the anthropological evidence published from the 1840s onwards, Reynolds finds Lord Watson's comment in *Cooper v Stuart* that Australia was "a tract of territory practically unoccupied without settled inhabitants or settled law" was "totally out of touch with what was widely known at the time both in Australia and in Britain."[7]

Chapter 3, "Were Aboriginal Tribes Sovereigns?" compares international law and domestic law on sovereignty. After examining eminent international jurists' views on sovereignty, Reynolds argues that under international law at the time of *Murrell* Aboriginal tribes would have been considered sovereign.[8] However, it appears from Burton J's notebooks that he may have only had access to the work of Vattel which is contradictory on the subject.[9] This ambiguity allowed him to conclude that the requirements of sovereignty were not present.[10] By the late nineteenth century, criteria of civilisation and fixed population had been introduced as pre-requisites for sovereignty. Therefore *Cooper v Stuart* was consistent with contemporary international law which represented "the interests of the European powers at the high noon of imperialism and white racism."[11] With the *Western Sahara* case of 1975, these additional

4 [1836] 1 Legge 72 per Burton J.
5 (1889) 14 App Case 286. Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p16.
6 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p36. Note also Castles, *An Australian Legal History* (Law Book Company, Sydney 1982) pp14-17.
7 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p37.
8 At p54.
9 At p52.
10 As above.
11 At p55.

criteria were removed.[12] Reynolds argues Aboriginal sovereignty should be reflected in present Australian law.[13]

Chapter 4, "Customary Law", presents conflicting voices on the status of Aboriginal law within Australian law.[14] In contrast to the legal position which came to dominate, Reynolds points out that there is a long tradition of non-Aboriginal people advocating recognition of a place for Aboriginal law within the Australian legal system.[15] He uses comparative material to illustrate the flexibility with which the common law could treat indigenous legal systems.[16] These examples could have been used as a model for the recognition of Aboriginal law within the Australian legal system.[17]

In the next two chapters, Reynolds examines why the discourses of Australian law and Aboriginal law remained separate. Chapter 5 investigates the question: "How Did Australia Become British?" Reynolds queries the legal validity of British claims of sovereignty in 1788, 1824, 1829 and 1879.[18] He argues that the claims were invalid because of the broadness of their scope. On the basis of statements by Banks and descriptions contemporary to taking of territory as being completed by "war" or "conquest", Reynolds characterises the arrival of the First Fleet and later expansion as an "invasion".[19]

Chapter 6, "Law and History", explores the gap highlighted in the previous chapter between Australian law's view of the method of gaining sovereignty and history's view. Reynolds argues that the legal position on sovereignty should reflect the gradual acquisition of territory so that sovereignty, like land title, was gained piecemeal as each tract of land was taken.[20] On this view, externally, British claims of sovereignty were effective as against other European nations, however, internally, the

---

12 *Advisory Opinion on Western Sahara* [1975] ICJR.
13 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p59.
14 At pp63ff.
15 As above (for example, Justice Charles Cooper, South Australian Grand Jury of 1847, EW Landor, Justice Willis). For a detailed treatment of the theme of non-Aboriginal agitation for greater recognition of Aboriginal rights see Reynolds, *This Whispering in Our Hearts* (Allen & Unwin, Sydney 1998).
16 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* pp74ff.
17 As above.
18 At p86.
19 At pp96ff.
20 At pp117-118.

claims were "an ambition for the future rather than an objective achieved."[21]

The focus of the book then changes from the past, and its implications for the present, to the future. A range of Aboriginal and Torres Strait Islander views on self-government are set out, but all call for greater autonomy for indigenous people.[22] The cries for self-determination in Australia are placed in the context of a global demand by indigenous populations.[23] However, Reynolds notes that granting self-determination through recognition of sovereignty is argued against by commentators such as Alfred Cobban and Anthony Smith who fear that state unity will be undermined by "post-modern tribalism."[24]

Reynolds seeks to meet the needs of both indigenous populations and the advocates of state unity by separating the ideas of nation and state: "Definitions of nations ... are concerned with culture, traditions, descent and identity. States, on the other hand, are legal, political and constitutional institutions."[25] The terms are not necessarily correlative, a position demonstrated by Canada's and the United States' recognition of their indigenous populations as first nations and domestic, dependant nations respectively. Similarly, Reynolds proposes that Aboriginal and Islander communities be recognised as nations, so that "there is not one but three nations encased within the Australian state."[26] Reynolds advocates a process of negotiating agreements between these nations;[27] creating greater autonomy for indigenous Australians as part of an innovative form of federalism.[28] Reynolds admits that his vision is possibly a "utopian dream", but leaves the reader with the thought that "perhaps more than most societies Australia has a chance to pursue that dream. It is a goal worth seeking."[29] Thus Reynolds, a historian, ends *Aboriginal Sovereignty* with a call for legal reform, just as he started with a legal question.

---

21 At p117.
22 At pp136ff. For example, Lois O'Donaghue, Michael Dodson, Michael Mansell.
23 At pp164-165.
24 At p168.
25 At p176.
26 At p177.
27 At pp146-154.
28 At pp182ff.
29 At p186.

Throughout *Aboriginal Sovereignty* the importance of the connections between the discourses of law and history are apparent. Reynolds has been labelled the chief exponent of the "new Australian history."[30] These investigations into the history of the interactions between Aboriginal and non-Aboriginal Australians had much influence on the *Mabo* decision, in which explicit reference was made to Reynolds' *Law of the Land*[31] and the work of the new Australian historians.[32] One view is that the *Mabo* decision can be explained by saying that the gap between the discourses of law and history had begun to undermine the law's credibility, forcing the law to change.[33] In *Aboriginal Sovereignty,* Reynolds' wish to reform the law further is explicit. Reynolds takes a legal question, prompted by the *Mabo* decision, and argues for a particular answer to it with reference to historical sources, often of a legal nature.

Similarities exist between the methods of discourse employed by the new Australian history and law.[34] Both are positivist disciplines using the same system of reasoning; issues are isolated, evidence is collected, tested and weighed with reference to competing claims until arriving at an objective truth.[35] An illustration of the application of such a method of discourse within *Aboriginal Sovereignty* is that used to arrive at the conclusion that the First Fleet was sent to Australia with the intention of invasion.[36] The issue isolated is whether or not Australia was invaded. The conclusion that Australia was invaded is primarily supported by the description of frontier conflicts which occurred during the expansions of Australian settlements as war or conquest, a matter which is well documented.[37] However, this method of discourse appears unable to deal with historical causation. The result of this isolation of issues is that the only views examined are those which directly contradict or support the

30 Attwood, "The Past as Future: Aborigines, Australia and the (Dis)course of History" in Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, Sydney 1996) p.xv.

31 Reynolds, *The Law of the Land* (Penguin, Melbourne, 2nd ed 1992).

32 *Mabo* at 120 per Deane and Gaudron JJ; at 178 per Toohey J.

33 See Hunter, "Aboriginal Histories, Australian History and the Law" in Attwood (ed), *In the Age of Mabo* p1.

34 Goodall, "The Whole Truth and Nothing But; Some Interactions of Western Law, Aboriginal History and Community Memory" in Attwood & Arnold (eds), *Power, Knowledge and Aborigines* (La Trobe University Press, Bundoora 1992) pp107-108.

35 As above.

36 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* pp101-103.

37 At pp96-101.

claim of invasion. Alternative explanations for sending the fleet are not dealt with, even for the purpose of refutation.[38] The conclusion is thus presented as the objective truth, although a reader familiar with other explanations will probably find the treatment unsatisfactory.

The claim of objectivity which the positivist discourse presents is false because the collection, selection and evaluation of material involves contestable interpretations.[39] This is demonstrated by the sole piece of positive evidence presented to support the claim that the First Fleet was intended as an invading force:

> Committee: Is the coast in General or the particular part you have mentioned much inhabited?
>
> Banks: There are very few inhabitants.
>
> Committee: Are they of peaceable or hostile Disposition?
>
> Banks: Though they seemed inclined to hostilities they did not appear at all to be feared. We never saw more than 30 or 40 together ...
>
> Committee: Do you think that 500 men being put on shore there would meet with that Obstruction from the Natives which might prevent them settling there?
>
> Banks: Certainly not - from the experience I have had of the Natives of another part of the same coast I am inclined to believe that they would speedily abandon the country to the newcomers.
>
> Committee: Were the Natives armed and in what Manner?

38 At pp101-103. For a range of possible reasons for settling Australia not mentioned: Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Sun Books, Melbourne, 1st ed 1982) pp18-39.

39 Hunter, "Aboriginal Histories, Australian History and the Law" in Attwood (ed), *In the Age of Mabo* p5.

> Banks: They were armed with spears headed with fish bones but none of them we saw in Botany Bay appeared at all formidable.[40]

This evidence may be interpreted in a range of possible ways. The view proposed by Reynolds is that these questions show an intention to invade, presumably based on the idea that the questions were designed to elicit the state of the enemy in preparation for sending an invading force. However, it is also possible that the committee's primary concern was the protection of any British people sent and that Banks' answers suggest a voluntary and peaceable abandonment of a small piece of land was envisaged as likely. In part the objection regarding the capacity for varied interpretation of sources is met by the inclusion of a variety of extant primary sources often quoted at length, the Banks evidence being an example in point. This is a particular asset for those who wish to make their own assessments of the arguments presented.

The presentation of selected evidence does not address the fact that there are a wide variety of other pieces of evidence and alternative viewpoints which are simply not discussed.[41] However, it seems unfair to judge the work as an attempt to present a complete historical appraisal of events, as this does not appear to be its aim. The historical information is only provided as evidence to support a legal argument. Reynolds presents his views not in the style of historical narration, but as an advocate vigorously arguing for the acceptance of a particular view of law and history. The opposing view (of the conservative Australian history and traditional Australian law) is assumed to be well known to the reader, so there is no need to engage with conflicting arguments explicitly. The book is a reply to those arguments with an alternative viewpoint. In assessing the book's presentation of history, this aspect of employing history as advocacy must be borne in mind, but it does not undermine *Aboriginal Sovereignty*'s worth as a source of information and ideas relevant to the legal history of Australia.

Reynolds' book is extremely valuable as a work of legal history in its detailed treatment of selected cases and issues. Although information is always proffered through the medium of a sustained legal argument, a comprehensive index offers a useful tool for those who wish to investigate

---

40 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p103.

41 For example, for reasons for settling Australia, see Blainey, *The Tyranny of Distance* pp18-39.

particular people, cases or questions. An example of the carefully researched historical information contained within the book is that relating to *R v Murrell*. Reynolds presents details gleaned from Burton J's case notes, such as the evidence presented by a missionary on Aboriginal customs and law[42] and that only one international law book was apparently available to Burton J.[43] General information on the level of knowledge of Aboriginal society at the time and the state of international law provide a contextual background.[44] In addition, the reaction to a later contrary judgement by Willis J, which provoked the disapproval of the Chief Justice and a letter from the Governor to the Chief Justice, illuminates the status the judgment held within the colony.[45] All these elements contribute to a detailed understanding of the decision. Other cases, such as *Cooper v Stuart*, and issues, such as legal pluralism within the colony, receive attention revealing information of equal interest.

Reynolds' use of comparative material from other areas formerly under British control, such as India,[46] Ireland,[47] Canada[48] and the United States,[49] enhances an understanding of Australian legal history. Examples of such legal approaches emphasise that models for recognition of indigenous populations and legal pluralism within the common law system did exist elsewhere.

Comparative material is also fruitfully employed as a source for developing new legal approaches. For example, a recent Canadian dissenting judgement in *Delgamuukw v British Columbia*[50] which suggests that sovereignty was only gained as possession was effectively taken, is used to suggest a similar approach to the acquisition of sovereignty in Australia.[51] The Canadian conception of indigenous peoples as constitutionally recognised "First Nations" is clearly a major source of inspiration for Reynolds' proposal to acknowledge Aboriginal and Torres

---

42 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* p62.
43 At p52.
44 At pp21ff and pp40ff.
45 At pp69-71.
46 At pp78-79.
47 At p74.
48 At pp130-135.
49 At pp124-129.
50 (1993) 104 DLR 470.
51 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* pp130-131.

Strait Islander nations within the Australian state.[52] These innovative ideas for future legal interpretation and reform are a major strength of the book.

This focus on the future highlights the most important aspect of the relationship between law and history examined. The connection between the past, present and future is continually emphasised. The historical narrative is always continued to the present and the findings made are used to advocate action for the future. In this way, the view that history is about the past and law is separate from temporal context is effectively challenged.

The history of Australia is clearly closely related to our present identity, and, for those people who like an idealised past, the book is potentially disturbing. Reynolds is careful to only judge people by standards contemporary to them,[53] but shows that there was a variety of legal views available within the colony on Aboriginal sovereignty and the choices made to adopt a particular stance were not simply an inevitable product of their time. From early on in Australia's legal history, there were people who disagreed with terra nullius and its corollaries, but they were ignored because their view of the law, although more soundly based in fact, conflicted with the colonial agenda.[54] Thus the book will not satisfy those for whom any questioning of the record of Australia's past is "black armband" history.[55] However, the book's optimism for the future does not accord with the label of "black armband." At its core *Aboriginal Sovereignty* is about forging a new way forward which meets the needs of all Australians.

While exploration of the interaction between Australian law and Australian history is coherently presented throughout the work, Aboriginal history, in the sense of that encompassing the particular view point of the Australian Aboriginals,[56] receives scant attention. For a book entitled *Aboriginal Sovereignty* and dealing explicitly with relations between Aboriginal and non-Aboriginal Australians, a singular reference to an

52 At pp177, 180.
53 For example at pp16, 36-37, 54, 102.
54 At pp54, 71.
55 See Blainey, "Black Future" *Bulletin* , 8 April 1997, p22. See also Attwood, "The Past as Future: Aborigines, Australia and the (Dis)course of History" in Attwood (ed), *In the Age of Mabo*.
56 Hunter uses the phrase in this sense in her work "Aboriginal Histories, Australian Histories and the Law" in Attwood (ed), *In the Age of Mabo*.

Aboriginal historical viewpoint on the issue of sovereignty seems inadequate.[57] This passage in the introduction recounts the story of the introduction of law, as told by the Worora people, showing that the Worora saw themselves as having undergone the transition from natural to civil society required for sovereignty.[58] Indigenous voices only really come to the fore in the section on current Aboriginal and Torres Strait Islander proposals for implementing self-determination.[59] It comes as a breath of fresh air to be offered a range of indigenous Australians' viewpoints in their own words,[60] in stark contrast to the previous six chapters in which information about Aboriginal sovereignty is elicited exclusively through the lens of non-Aboriginal observers.

This long suppression of Aboriginal voices, mirroring the invisibility of Aboriginal voices in Australian discourse generally, results from adopting a view point internal to the law. For Reynolds, because Aboriginal evidence was not directly presented in the early legal cases, an assessment of judgments made at the time does not require exposition of the Aboriginal view point. On this reasoning, it is what non-Aboriginals understood of Aboriginal culture (as opposed to what it actually was) which is important to an assessment of their views on Aboriginal sovereignty. However, considering the focus of the book on the gulf between the stories told by history and the law, more information on Aboriginal society and sovereignty through the discourse of Aboriginal history seems necessary.

While *Aboriginal Sovereignty*'s deficiencies in the coverage of Aboriginal history are disappointing, they are more than outweighed by its contribution in other areas. Reynolds presents an alternative point of view to that told by the traditional discourses of Australian law and history with the aim of inspiring legal reform. As a source of original research and ideas important to law, history and legal history, Reynolds' latest book is certainly worthy of attention.

---

57 Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* pp*xvii-xviii*.

58 As above.

59 At pp136ff.

60 As above. For example, Michael Mansell, spokesperson for the Aboriginal Provisional Government and Aboriginal and Islander Review Committee; Getano Lui, Chairperson of the Torres Strait Regional Authority.