PLANTING THE FLAG OR BURYING THE HATCHET: SOVEREIGNTY AND THE HIGH COURT DECISION IN *MABO* V *QUEENSLAND.*

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The decision of the High Court in *Mabo* v *Queensland*[1] is being hailed, at least in academic circles, as the culmination of twenty years' legal research and argument. It has finally laid to rest the ghost of *Milirrpum* v *Nabalco,*[2] a decision of a single judge of the Northern Territory Supreme Court which refused to accord common law recognition to Aboriginal proprietary interests in land.

Meanwhile the debate amongst many Aboriginal people has moved on. The first published recommendation of a conference in June 1992 on Aboriginal Justice Issues, organised by the Australian Institute of Criminology and attended by many prominent Aboriginal leaders, reads:

> 1. That any Federal Aboriginal Affairs Minister, upon taking up this position publicly declare that the Aboriginal people are the rightful owners of this country and have an historical law that governed this country. Failing this public statement the Minister will be forced to resign.[3]

The recommendations also include a call for the International Court of Justice to determine 'who are the true and legal owners of the land, water

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1 (1992) 66 ALJR 408. I will refer to the decision as the *Mabo* case for the remainder of the body of the paper.

2 (1971) 17 FLR 141.

3 See 'Draft Recommendations on Aboriginal Justice Issues', incorporating the recommendations of the Aboriginal Justice Issues Conference, Cairns, 23-25 June 1992, a publication of the Australian Institute of Criminology, Canberra. The first section of these draft recommendations is entitled 'Practical Steps Towards Sovereignty and Royal Commission Recommendations'.

and territories of the continent of Australia'.[4]

It would seem, then, that while the High Court has contented itself with asking whether Aboriginal people could have a common law *proprietary* interest in land under the Anglo-Australian legal system, Aboriginal people themselves are asking whether they might still have *sovereignty* over land in Australia: and not such sovereignty as is granted them by the Anglo-Australian courts or legislatures, but sovereignty in their own right.[5]

This paper will examine the extent to which a claim for Aboriginal sovereignty over Australian land is still arguable in an Australian court. In particular it will argue that the unequivocal rejection of the notion of Aboriginal sovereignty expressed by all High Court judges in the *Mabo* case is not dictated by Australian law. The argument will proceed in four stages as follows:

1. An outline of the approach to the question of sovereignty taken by the High Court judges in the *Mabo* case together with an examination of the legal doctrine upon which the High Court approach is said to be founded.

2. A consideration of the relevance of international law principles to principles applicable in an Australian court.

3. A consideration of relevant principles of legal philosophy, and in particular the applicability of the reasoning of judges in the so-called revolution cases to the issue of sovereignty in an Australian court.

4. A brief synthesis of the various approaches considered. A

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4 See 'Draft Recommendations', *ibid.* The quoted recommendation reads, in full:

> That in pursuance of their process of reconciliation we ask the Commonwealth Government to seek the jurisdiction for a declaration of the International Court of Justice as to who are true and legal owners of the land, water and territories of the continent of Australia.

5 For example, see M Mansell, 'They can keep their justice - we'll keep our country: the APG view', unpublished paper delivered at Aboriginal Justice Issues conference, Cairns, June 23-25, 1992 at 9:

> Aboriginal political and economic independence are likely to take place only when whites give up their belief of having the divine right to maintain their control over Aborigines. One of the best indicators of a shift will be the withdrawal of claims of legal jurisdiction, whether made gradually or with haste, allowing for community control at that most basic but critical level.

comparison is made of the approach taken in Australian with the jurisprudence developed in the United States, and suggestions are offered for directions which a future Australian High Court might pursue in examining the issue of sovereignty. This final stage of the paper will also include an assessment of the practical implications of a possible reopening by the High Court of the sovereignty issue. Briefly it will be argued that these implications are not necessarily as far-reaching as they might at first appear, and are certainly no reason for the High Court not to reconsider its summary dismissal of the issue in the *Mabo* case.

1. Sovereignty and the High Court in the *Mabo* case.

The majority of the High Court judges in the *Mabo* case drew a clear distinction between the question of whether the Crown had acquired sovereignty over the Murray Islands when it incorporated them into the colony of Queensland, and whether in so doing it had acquired beneficial ownership over the islands. Toohey J drew the distinction most clearly:

> In considering the consequences of the annexation of the Islands, the distinction between sovereignty and title to or rights in the land is crucial. The distinction was blurred in English law because the sovereignty of the Crown over England derived from the feudal notion that the King owned the land of that country. It was ownership of the land that produced the theory of tenures, of obligations owed to the Crown in return for an estate in land. The position of the Crown as the ultimate owner of land, the holder of the radical title, has persisted and is not really in issue in these proceedings. What is in issue is the consequences that flow from that radical title.[6]

Brennan J, with whom Mason CJ and McHugh J concurred, also accepted this distinction in considering the defendant's chain of argument,[7] as do Deane and Gaudron JJ.[8] Only Dawson J in dissent

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6 *Supra n 1* at 483.

7 *Ibid* at 417:

> We start with the proposition that the Imperial Crown acquired sovereignty on 1 August 1879 and that the laws of Queensland (including the common law) became the law of the Murray Islands on that day - or, if it be necessary to rely on the *Colonial Boundaries Act* 1895, is deemed to have become the law of the Murray Islands on that day. Next, by the common law, the Crown acquired a radical or ultimate title to the Murray

appears not to regard this distinction as of great significance.[9]

Having made this distinction, the High Court's extensive discussion of the concept of Aboriginal title contrasts with the short shrift with which it treats the issue of acquisition of sovereignty. The principle followed by all judges in the *Mabo* case is that enunciated by Gibbs J in the *Seas and Submerged Land Case*:

> The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.[10]

Islands. The plaintiffs accept these propositions but challenge the final link in the chain, namely, that the Crown also acquired absolute beneficial ownership of the land in the Murray Islands when the Crown acquired sovereignty over them.

8 *Ibid* at 440:

> The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of State establishing a new British colony but were preserved and protected by the domestic law of the Colony after its establishment.

9 *Ibid* at 457: '[U]pon annexation the lands annexed became the property of the Crown and any rights in the land the plaintiffs have must be held under the Crown': consequently, in the absence of recognition by the Crown such rights do not exist.

10 *New South Wales* v *The Commonwealth* (1975) 135 CLR 337 at 388. The principle was reiterated in *Coe* v *The Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* (1979) 53 ALJR 403, per Gibbs J at 408 and Jacobs J at 410. Murphy J in the latter case also refused to entertain Coe's contention that 'the Aboriginal nation' retained sovereignty over Australia, although he regards the manner in which sovereignty was acquired and the consequences that flow from that acquisition, as being open to argument:

> The plaintiff is entitled to endeavour to prove that the concept of terra nullius had no application to Australia, that the lands were acquired by conquest, and to rely upon the legal consequences which follow. He may rely, in the alternative, on common law rights which would arise if there were peaceful settlement. Whether the territory is treated as having been acquired by conquest or peaceful settlement, the plaintiff is entitled to argue that the sovereignty acquired by the British Crown did not extinguish 'ownership rights' in the aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation (at 412).

The latter part of this statement at least would appear to prefigure the majority

Thus, according to Brennan J, the annexation of the Murray Islands to the Colony of Queensland was a prerogative act 'the validity of which is not justiciable in the municipal courts'.[11] Deane and Gaudron JJ argue that, because of the prerogative power of the British Crown under British law in 1788 to extend its sovereignty and jurisdiction to new territory,

> it must be accepted in this Court that the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a "settled" British Colony.[12]

Dawson J states that the annexation of the Murray Islands

> was an act of state by which the Crown in right of the Colony of Queensland exerted sovereignty over the islands ... [T]here can be no doubt that it was, and remains, legally effective.[13]

Toohey J accepts that the result of the Letters Patent and *The Queensland Coast Islands Act* 1879 (Qld), possibly combined with the *Colonial Boundaries Act* 1895 (Imp), was effectively to annex the Murray Islands to Queensland.[14]

Thus it would appear clear from the judgments that an exercise of Crown Prerogative by the British colonial power in 1788 remains valid and indeed non-justiciable in Australian courts over 200 years later. The same applies, of course, to all subsequent annexations by the Colonial Governors authorised by Letters Patent from the British Crown, including the annexation of the Murray Islands to the Colony of Queensland.

Brennan J in the *Mabo* case expresses amazement at the operation of the supposed doctrine of exclusive Crown ownership of all land in the Australian colonies in the following terms:

> According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional

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judgment in the *Mabo* case by some 13 years.

11 *Supra n 1* at 417. A sequence of cases is cited in support of this proposition: *Sobhuza II* v *Miller* [1926] AC 518 at 525; *The Fagernes* [1927] P 311; *Reg* v *Kent Justices; Ex parte Lye* [1967] 2 QB 153 at 176-7, 181-2; *Ffrost* v *Stevenson* (1937) 58 CLR 528 at 565-6; *A. Raptis and Son* v *South Australia* (1977) 138 CLR 346 at 360.

12 *Supra n 1* at 438.

13 *Ibid* at 457.

14 *Ibid* at 482-3.

> land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standards, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.[15]

It might be suggested that the operation of a doctrine which, from the moment Governor Phillip caused his Second Commission as Governor to be read and published on 7 February 1788,[16] and possibly even earlier,[17] dispossessed the unknowing Aboriginal peoples of Australia of the right to govern their land and made whatever proprietary rights they did continue to possess entirely subject to the whim of the Anglo-Australian common law, would also be open to question along many of the same lines.

The doctrine of 'Act of State'.

What, then, is the doctrine of 'act of State' by which, according to the High Court, Aboriginal people were deprived of their claims to sovereignty over their traditional lands?

It would appear from the judgments in the *Mabo* case that an act of State by which territory is acquired for the Crown is a non-justiciable exercise of Crown or Royal Prerogative.[18] The concepts of act of State and exercise of prerogative are not clearly distinguished in the judgments.[19] It seems necessary to go to the common law and to legal textbook writers to seek further elucidation of the foundations of the

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15 *Ibid* at 416.

16 *Ibid* at 438, per Deane and Gaudron JJ.

17 Isaacs J. in *Williams* v *Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 asserted that when the first Governor of New South Wales received his Commission in 1786 'the whole of the lands of Australia were already in law the property of the King of England'. See commentary on this proposition in Sir K Roberts-Wray, *Commonwealth and Colonial Law*, London, Stevens and Sons, 1966, at 631: see also H Reynolds, *The Law of the Land*, Penguin, 1987, at 7-14.

18 See, for example, *supra n 1* per Brennan J at 417.

19 See, for example, Deane and Gaudron JJ *supra n 1* at 438: 'The assertion by the Crown of an exercise of that prerogative to establish a new Colony by "settlement" was an act of State whose primary operation lay not in the municipal arena but in international politics or law'.

doctrine.

Lord Denning MR in *Nissan* v *Attorney-General* sets out a relatively full definition of act of State under the English common law. His definition has three limbs:

1. When British troops act as the servants or agents of a foreign power, they are protected in British courts by the defence of an act of State.

2. When the British Government acquires property or territory by treaty, annexation or conquest, it cannot be made liable for the consequences. The acquisition is not cognisable in the municipal courts.

3. When British troops take or destroy the property of a foreigner in a territory outside Her Majesty's dominions, the foreigner cannot sue for damages in the English courts.[20]

That the doctrine of act of State also forms part of Australian law is made clear in Gibbs J's judgment in *The Seas and Submerged Lands Case* and the cases cited therein,[21] as well as in *Coe* v *The Commonwealth*[22] and in the *Mabo* case itself. Gibbs J in *The Seas and Submerged Lands Case*, like the judges in the *Mabo* case, considers act of State to be an example of the exercise of Crown prerogative:

> The prerogatives of the Crown to acquire new territory or extend its sovereignty or jurisdiction are, in my opinion, available to the Crown in right of the Commonwealth.[23]

It might be argued that there are distinctions between the doctrine of act of State and the exercise of Crown Prerogative. One such distinction is adverted to by Danckwerts LJ in *Nissan* v *Attorney-General*, who points out that the defence of act of State may only be raised by the Crown in relation to acts which affect foreigners: there can be no act of State raised against anyone who owes allegiance to the Crown.[24] Another distinction is pointed out by H V Evatt:

> It is generally accepted that the plea of "Act of State" can be availed of by a subject as well as by a responsible Minister or

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20 *Nissan* v *Attorney-General* [1967] 2 All ER 1238 per Lord Denning MR at 1242.

21 *Supra n 10*, per Gibbs J at 388.

22 *Supra n 10*.

23 *Ibid* at 388.

24 *Supra n 20*, at 1246.

> the Executive Government of a Dominion as a body. The essential nature of Prerogative, as has already been pointed out, is that it confers rights on the Crown which are not and cannot be available to subjects.[25]

Thus, although Evatt concedes that the point is not entirely clear, it appears that there are some acts of State - those performed by a subject or individual - which are not exercises of Prerogative.

This point is not however relevant to the various acts of State by which Australia was annexed to the British Crown. This is because (subject perhaps to arguments about whether Cook and/or Phillip exceeded their instructions[26]) the acts were duly authorised by Commissions or letters Patent, and hence acts of the Crown. In any case it is submitted that the principles underlying the Royal Prerogative, and which are discussed in Dr Evatt's thesis[27] are similar to those underlying the doctrine of act of State.

Evatt's introductory chapter points out the controversy surrounding the justice or otherwise of the continued existence of the Royal Prerogative. He outlines

> Hallam's view that Prerogatives are not for the good of the public but represent the powers seized by the Norman kings by superior force for their own advantage in a regime which resembled the scramble of wild beasts for prey.[28]

Other writers, and in particular Chitty, have argued that '(t)he Prerogatives are vested in the King ... for the benefit of his subjects and His Majesty is under and not above the laws'.[29] Although Evatt claims to be concerned only with the task 'of ascertaining what the legal principles *are*, not what they *ought to be*',[30] it seems clear from the definition of Prerogative for which Evatt argues that he believes that Prerogatives are (and in fact should be) for the benefit of the Royal subjects. He rejects the statement in Blackstone's definition of 'Prerogative' that prerogative

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25 Evatt, HV, *The Royal Prerogative*, Law Book Company, Sydney, 1987, at 117.

26 See, for example, McRae *et al*, *Aboriginal Legal Issues*, Law Book Company, Sydney, 1991, at 10 and 82.

27 *Supra n 25*. Evatt was awarded his Doctorate for the thesis in 1924 but the thesis was not actually published until 1987.

28 *Ibid* at 9, quoting in part Hallam 156 LTJ at 218.

29 *Ibid* at 10, quoting in part Chitty, *The Royal Prerogatives*, 1820 at 4-5.

30 *Ibid* at 10.

powers are 'out of the ordinary course of the common law',[31] and prefers the more democratic, although not necessarily the more recent, view that the Prerogative 'is in the strictest sense a part of the common law'.[32] In particular, Prerogative law is the product of historical and political struggle, which means that it is not always systematised and logical and that it 'allow(s) for somewhat considerable application of judicial legislation and of doctrines of public policy'.[33] From this it follows that, as considerations of public policy vary, so must the law: Prerogative law is 'founded on broad principles of common sense applicable to the every day conditions of civilised life'.[34]

Thus it seems clear that the courts can determine the existence and extent of a prerogative power,[35] and also, more recently, the manner of its exercise including whether it was exercised in good faith.[36] This does not, at present, apply to all prerogative powers: recent High Court dicta suggest, for example, that matters of war and the armed services are unsuitable for judicial review.[37] It is of course arguable that the annexation of Australia in 1788 was a prerogative matter of war. The important point however is that it is open to the Court to consider this issue by reference to broad 'policy' grounds. As the Court's perceptions of 'public policy' change these and other similar exercises of Prerogative might be considered by the Court to be appropriate subjects for judicial review.

Thus, it is submitted, the High Court might consider the exercises of Prerogative by which Australia was acquired for the British Crown to be judicially reviewable on broad public policy grounds. The statement that prerogative law must be consonant with common sense and civilised life, quoted above, recalls passages in Brennan J's judgment in the *Mabo* case such as that '(i)f a postulated rule of the common law expressed in earlier cases seriously offends ... contemporary values, the question arises whether the rule should be maintained and applied'.[38] This public policy

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31 *Ibid* at 11.

32 *Ibid* at 12.

33 *Ibid* at 15.

34 *Ibid* at 16, quoting *R* v *Grills* (1910) 11 CLR 400 at 412.

35 See Zines, L, 'Commentary', a preface to Evatt, *ibid* at C25.

36 *Ibid* at C26.

37 *R* v *Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, per Mason J at 219-220.

38 *Supra n 1* at 417.

statement, it is submitted, could be applied as easily to the annexation of Australia to the British Crown as it could be to the doctrine of terra nullius.

2. The *Mabo* case and International Law.

Whether the English annexation of Australia in 1788 is, and was, legal in international law has been thoroughly explored elsewhere.[39] In this section I wish merely to note briefly the arguments that the annexation was not in conformity with international law in 1788, and would not be legal today. Such arguments have little superficial relevance to a municipal court sitting in a case such as *Mabo*. However the High Court has itself indicated what it considers to be the increasing applicability of principles of international law to Australian decisions, and I wish to suggest some directions in which this tendency might lead.

First, there is some dispute over the validity of the annexation of Australia under the international law of 1788. It has been argued that under that law a declaration of sovereignty by a colonising nation was only valid if the factual assumptions on which it was based were correct. The English declaration of sovereignty in 1788 was arguably made in the mistaken belief that the interior of the Australian continent was 'either wholly desolate, or at least more thinly inhabited than the places which have been visited'.[40] As the whole country was in fact occupied, this factual assumption was wrong and consequently the declaration of sovereignty was invalid. This argument, put by Henry Reynolds in *The Law of the Land*, appears both legally and factually open to question: factually in that it assumes that the colonisers of 1788 did believe that the continent was virtually uninhabited, and legally in that it assumes that the international law of 1788 required a declaration of sovereignty to be supported by any particular valid factual assumption at all. A deeper analysis of this issue would, however, require a historical scrutiny of the sources of international law in 1788 which it is beyond the scope of this paper to pursue.

Even if it is accepted that the English declaration of sovereignty was not made on any mistaken factual assumption, the validity of that declaration is still open to question. Arguably a colonising power was not entitled under the international law of 1788 to declare sovereignty over a

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39 See, for example, McRae *et al*, *supra n 26*, Chapter 3, and books and articles referred to therein.

40 Reynolds, *The Law of the Land*, Ringwood, Penguin, 1987, at 31-33.

large, and inhabited, part of an entire continent. This argument, which is also forwarded by Reynolds, finds some support in a major source of international law of the period: De Vattel's *The Law of Nations*, published in 1760. According to De Vattel the 'erratic nations' of the pre-colonial New World were not entitled to

> exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in these immense regions cannot be accounted a true and legal possession.[41]

However this did not mean that colonising powers were legally entitled to appropriate all the land they could wrest from 'primitive' peoples. According to Reynolds, De Vattel concluded that settlers were entitled merely to 'possess a part' or settle in land sufficient to meet their own needs, provided always that the natives were not 'reduced to want land'.[42] Cook's instructions, which were that he was to take possession (only?) if he were to 'find the country uninhabited'[43] would appear to support Reynold's interpretation of De Vattel.

If the proposition that England's declaration of sovereignty was unlawful under the international law of 1788 is at least arguable, the idea that such a declaration would be unlawful under modern international law is almost unquestionable. Conquest is no longer a legal basis for acquisition of territory except in the case of a just war.[44] Similarly, occupation and settlement is no longer an acceptable basis for acquisition of territory, being in conflict with the advisory opinion in the *Western Sahara Case*.[45]

What relevance do these questions of international law have to municipal decisions such as the *Mabo* case? It lies partly in the theoretical notion that Australia's sovereignty is subject to the overall sovereignty of public international law. The definition of sovereignty in public international law is said to be 'the basic international legal status of a state that is not subject, within its territorial jurisdiction, to ... foreign

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41 Extracted in McRae *et al*, *supra n 26* at 77.

42 *Supra n 40* at 18.

43 See McRae *et al*, *supra n 26* at 82.

44 Sanders, *The Re-Emergence of Indigenous Questions in International Law*, (1983), at 26-27.

45 (1975) ICJR 3; see also McRae *et al*, *supra n 26* at 59.

law other than public international law'.[46]

In more practical terms the relevance lies in the great attention and respect to it paid by the judges in the *Mabo* case. Brennan J, writing in support of his decision to reject the old doctrine of terra nullius, writes:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[47]

It is argued that the common law doctrine of act of State, at least in relation to the declaration of sovereignty in 1788, entrenches an unjust discrimination in the enjoyment of civil and political rights. Specifically it infringes upon the right to self-determination, a right which appears as the first article of the United Nations Charter and of both International Covenants on Human Rights.[48]

The other majority judges may be argued to have given at least implicit support for Brennan J's words in their consideration of the question of whether Aboriginal interests in land could be described as proprietary. Deane and Gaudron JJ accept that traditional interests of the native inhabitants are to be respected by British law 'even though those interests are of a kind unknown to English law. That approach is supported by other authority and by compelling considerations of justice'.[49] Toohey J concludes that 'requirements that aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of

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46 Steinberger, *Sovereignty*, (1987) at 408, 414.

47 *Supra n 1*, per Brennan J at 422.

48 See Barsh, 'Indigenous Peoples and the Right to Self-Determination in International Law', in Hocking, *International Law and Aboriginal Human Rights*, Law Book Company, Sydney, 1988 at 70.

49 *Supra n 1* at.441.

traditional title'.[50] These conclusions are, it is submitted, the result of a concern that Anglo-Australian law not be 'discriminatory' in a broad and international law sense, in the kinds of proprietary or other interests it chooses to recognise.

Thus it is submitted that international law furnishes further compelling reasons for an Australian court to reject the declarations of sovereignty by the British Crown in, and after, 1788.

3. The *Mabo* case and Legal Philosophy

In this section of the paper it is argued that the events of 1788 (and all subsequent annexations of land in Australia to the British Crown) constituted what is, in common speech and in legal philosophy, a revolution. Judges, originally appointed by the British Crown, have in other common law countries adjudicated upon the validity or otherwise of such actions and have formulated principles which they purport to use in arriving at their decisions. It is thus argued that an Australian Court has the authority to adjudicate upon the validity of the acquisition in 1788 by a foreign power (England) of land in what subsequently became Australia.

The Shorter Oxford Dictionary gives a two-part definition of the meaning of a political revolution. It is

> (first) a complete overthrow of the established government in any country or state by those who were previously subject to it; (and secondly) a forcible substitution of a new ruler or form of government.

The first part of this definition describes what is probably the more commonly understood sense of the term. It refers to the citizens of a country rising up and overthrowing the government of that country: as occurred in the French Revolution of 1789, or the American Revolution of 1776.

The second part of the definition is far broader. The 'forcible substitution of a new ruler' may come either from within or from outside. When William I conquered Anglo-Saxon England in 1066, the forcible substitution of a new ruler occurred, notwithstanding that the change was externally imposed rather than the result of the actions of Anglo-Saxon Britons. Similarly, on this second part of the definition, a revolution occurred in the all-Aboriginal Australia of 1788 even though the

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50 *Ibid* at 486.

overthrow came not from within but from a foreign power.

This conclusion is borne out by the legal philosopher Hans Kelsen. According to Kelsen

> [a] revolution in the broader sense of the word (that includes a coup d'etat) is every not legitimate change of this constitution or its replacement by another constitution. From the point of view of legal science it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government or by the members of that government themselves, whether by a mass movement of the population or by a small group of individuals. Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then.[51]

Kelsen makes some interesting comments about what is necessary in order for an effective revolution to take place. These comments have been often used (and misused) in judicial decisions on the matter. For Kelsen, a revolution is a change in the Grundnorm or basic norm of a society: '[a]s the new constitution becomes valid, so simultaneously changes the basic norm'.[52] In order to understand this assertion, Kelsen's theory of norms must briefly be sketched.

The norm is Kelsen's basic theoretical construct. A norm, according to Kelsen, provides that something ought to be or ought to happen. A norm is not the same as a command, because a command is a subjective act of will: a command implies that some real person actually wills that the command be obeyed. Such a real person or body is difficult to locate in a modern democracy or probably any society - hence the almost insuperable problems faced by Austin's command theory of law. Rather a norm is objective, at most a 'depsychologised command',[53] without any implication that obedience to it is actually willed by anybody.

If a norm is not actually willed, from where does it derive its validity? Kelsen's answer is that it is valid when authorised by a higher norm,

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51 Kelsen, H, *The Pure Theory of Law*, University of California Press, 1967 at 208-211.

52 *Ibid.*

53 Kelsen, *General Theory of Law and State* at 35: see also Dias, *Jurisprudence*, 5th edition, Butterworths, 1985 at 361.

'which confers a power to create it and may also specify conditions for its exercise'.[54] That higher norm is itself authorised by one still higher, so that a pyramid-like structure of norms is created. At the head of this pyramid there is 'some initial, fundamental ought on which the validity of all the others ultimately rests'.[55] This fundamental or basic norm, the Grundnorm, is 'presupposed in juristic thinking':[56] necessarily so, for if it were created by some higher authority, one would have to ask the source of competence of that higher authority, and the search for the basic or fundamental 'ought' of the legal system would go on.

However at the very point where Kelsen's theory appears to detach itself most completely from empirical reality, it must admit a necessary connection with reality. The Grundnorm or basic norm for any given constitutional system is the statement that 'one ought to behave as the constitution prescribes',[57] (and by extension for a system of Aboriginal law the statement that 'one ought to act as custom prescribes'). However this presupposition cannot be correct for any given legal system, according to Kelsen, if the constitution to which the Grundnorm refers is not in fact obeyed. Thus

> [t]he basic norm refers only to a constitution which is actually established by legislative act or custom, and is effective. A constitution is "effective" if the norms created in conformity with it are by and large applied and obeyed.[58]

Kelsen therefore admits a necessary connection between validity (which he defines as an 'ought', based on a presupposition and distinct from empirical reality) and effectiveness (which is necessarily based on empirical reality). Specifically, he would appear to be suggesting an empirical test for whether a successful revolution has occurred: when the old system of norms is no longer effective (that is, by and large obeyed) and when a new effective Grundnorm has taken its place, then revolution has occurred.

This interpretation of Kelsen's theory has received some judicial

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54 Dias, *ibid.*

55 *Ibid.*

56 Kelsen, H (1965) 17 *Stan LR* 1130 at 1141.

57 Kelsen, *supra n 51* at 201.

58 Davies, H and D Holdcroft, *Jurisprudence: Texts and Commentary*, Butterworths, London, 1991 at 135.

support in 'revolutionary' situations. In *The State* v *Dosso*[59] in the Supreme Court of Pakistan, Muhammad Munir CJ decided upon the validity of a declaration of Martial Law and an annulment of the previous Pakistan Republic Constitution. He argued that '[f]or the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective',[60] and consequently that the declaration and annulment were legally valid. Similarly in *Uganda* v *Commissioner for Prisons; Ex parte Matovu*[61] the High Court of Uganda decided that an extra-Constitutional seizure of power by the previous Prime Minister was valid because it was effective and was 'firmly established throughout the country',[62] again citing its interpretation of Kelsen's theory in support.[63]

From a legal philosophical point of view, it is submitted that Australian courts in considering the declaration of sovereignty in 1788 have implicitly adopted an interpretation of Kelsen's theory similar to that applied in *Dosso* and *Uganda* v *Commissioner for Prisons*. That is, they have decided that the overturning of the sovereignty of the numerous systems of Aboriginal law existing in Australia in 1788 was legally valid because it was effective. Courts, on this interpretation, need go no further in their inquiries than this: they may rely on the act of State doctrine which is the legitimising fiction of the conquering power, because that conquering power has been 'by and large' effective in imposing its system of law upon the previous legal systems. Concepts of justice or morality enter no more into this interpretation of Kelsen's theory than they do into the act of State doctrine itself.

However the interpretation of Kelsen's theory adopted in *Dosso* and *Ex parte Matovu* is clearly misguided. To illustrate this we must go back to the theoretical basis of Kelsen's theory.

Kelsen's object is to arrive at a pure 'science' of law, a theory which 'attempts to answer the question what and how the law *is*, not how it ought to be'.[64] He wishes to derive a series of statements that distinguish the legal from the non-legal. The science of law is concerned to *describe* the law: to determine, from the outside, what the law is. The science of

59 PLD 1958 SC 533

60 *Ibid*, quoted in *Mitchell and Ors* v *DPP and Anor* (1986) LRC (Const) 164 at 173.

61 (1966) EALR 514

62 *Ibid* at 539.

63 *Ibid* at 535-537.

64 Kelsen, *supra n 51* at 1; and see Davies and Holdcroft, *supra n 59* at 109.

law formulates statements 'that, according to a legal order, something ought to be done or not be done': these statements 'do not impose obligations or confer rights upon anybody; they may be true or false'.[65]

The role of the science of law thus contrasts radically with the role of a legal authority such as a court. The norms enacted by the legal authority *do* impose obligations and confer rights, and these norms

> are neither true nor false, but only valid or invalid; just as facts are neither true nor false, but only existent or non-existent, and only *statements about facts* can be true or false.[66]

Thus while legal authority *prescribes*, legal science *describes*: a textbook commentary on the law describes what the court or other legal authority has prescribed.

This implies that the 'science of law' as outlined by Kelsen has nothing strictly to say about the process of adjudication or the prescription of legal norms. Kelsen is not concerned to 'criticise' legal decisions or analyse the process of decision-making.

> Whether the judge ought so to "legislate" (i.e create a particular norm) is a question of legal politics. He (sic) has the authority, but how he exercises it is beyond science to lay down.[67]

Thus when Kelsen links validity with efficacy, and lays down his by and large test for the validity of the norms created by a revolutionary government, it is important to remember that he is doing so from outside, from the point of view of a legal scientist. From this point of view the by and large test is unquestionable. If the rules laid down by particular judges, or by a usurper, are not by and large effective, then as a matter of brute political power those judges and usurpers will be replaced and the legal scientist will no longer be able to say that their laws are valid. The judge's function, however, is different. It is to prescribe or lay down legal norms: how he or she does so, and what political, moral or other influences he or she takes into account, are avowedly beyond the realm of Kelsen's theory.

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65 Kelsen, *supra n 51*, quoted in Davies and Holdcroft, *supra n 59* at 116.

66 *Ibid.*

67 Harris, JW, *Legal Philosophies*, Butterworths, London, 1980 at 61.

What factors, then, *should* judges take into account in adjudicating upon the validity of a revolutionary change? The short answer would appear to be, whatever they believe is appropriate. Judges in such a situation are taking part in a political struggle: their words will add legitimacy to the new government which is struggling for control, or conversely add to the strength of the calls for the return of the old regime. Of course it is imperative that judges not admit to the fact that their statements are political and not legal, for otherwise such statements would lose all their ideological force.

What is the source of authority for a judge in a revolutionary situation to make such pronouncements? The short answer would appear to be, whatever the judge chooses. The judge's choice is political and not legal: it is not dictated by the law, but by the judge's political need to give the greatest possible ideological force to his or her pronouncements. Dias argues as follows:

> Of immediate concern is the crucial point, established by the *Grundnorm* case, that in the midst of a revolution "laws" can emanate from an "unlawful" source, or, to put it in another way, some at least of the decrees of an unlawful authority may become "laws" for immediate purposes without that authority itself being lawful ... where the existing *Grundnorm* has been overthrown and a new one has not yet been accepted, then in such a situation the judges can and must continue to apply something as "laws" in order to avoid breakdown. To do this they are compelled to supply their own criterion of validity, whatever that may be. If, then, they apply decrees of the regime in power, even whilst holding it to be unlawful, this is because *they* choose to do so, not for any other reason.[68]

The *Grundnorm* case referred to by Dias is *Madzimbamuto* v *Lardner-Burke*,[69] in which Rhodesian judges appointed under the 1961 colonial Constitution adjudicated upon the validity of Ian Smith's Unilateral Declaration of Independence (UDI) of 1965. The UDI

68 Dias, R, 'Legal Politics: Norms Behind the *Grundnorm*', (1968) *Cambridge LJ* 233 at 238.

69 Court of first instance: Judgment No. GD/CIV/23/66, of 9 September 1966. See the lengthy discussion of this case in Dias, *ibid*, and in other articles the latest of which was Harris, JW, 'When and Why Does the Grundnorm Change?', (1971) *Cambridge LJ* 103.

abolished the old Constitution and replaced it with a new Constitution under which appeal to the Privy Council was abolished.[70] The judges, however, were not sacked and were ultimately allowed to sit in 'judgment' on the changes.

I do not wish to add to the already lengthy academic discussion of this case. The main point is that all judges insisted that they had the authority to adjudicate upon the validity of the new regime, either under the 1961 Constitution (which was clearly no longer effective),[71] under the new Constitution (which did not appoint them and which had submitted the question of its own validity to them for decision),[72] or through some extra-legal and unconstitutional source of authority.[73] Interestingly, the judge, MacDonald JA, who takes the most 'realistic' viewpoint, that the 1965 revolution was successful and therefore legal, comes in for the heaviest criticism from Dias in the following terms:

> To make effectiveness the only criterion of its legality is to abandon judicial independence. The difference between so-called "totalitarian" and "free" societies is that in the former the judges are required always to give effect to governmental interests, whereas in the latter they are free to weigh governmental interests against others according to yardsticks independent of government.[74]

In the most recent revolution case, *Mitchell and Others* v *Director of Public Prosecutions and Another*,[75] the judges showed a similar concern to uphold judicial independence. In this case the judges were appointed under a Constitution of 1974, which had been superseded by a military coup in 1979, the 1979 military government having been in turn replaced after the American invasion in 1983. The question was whether certain People's Laws established under the 1979 regime, the validity of which had been restored by the Governor after the US invasion, were in fact valid.

Under the 1974 Constitution the People's Laws could not have been

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70 Dias, *supra n 69* at 234.

71 See the judgments of Jarvis and Fieldsend AJA, discussed in Dias, *ibid* at 241.

72 See the judgment of MacDonald JA, discussed by Dias, *ibid* at 243.

73 See the judgments of Beadle CJ, discussed by Dias, *ibid* at 240-1, and Quenet JP, discussed by Dias, *ibid* at 242.

74 Dias, *ibid* at 243-244.

75 Court of Appeal, Grenada, reported in (1986) LRC (Const) 40.

valid, and the proclamation of the Governor restoring their validity was itself unconstitutional. On the other hand if the approach taken in *Dosso* and *Uganda* v *Commissioner of Prisons* were to be followed the People's Laws would have been legally valid from 1979 until the US invasion in which they would have lost validity, and then would have had their validity restored by the Governor's proclamation: all of these consequences following from the so-called 'principle of efficacy'.

Haynes P, however, follows neither of these approaches. He asserts that for a revolutionary regime to become legal or *de jure* four factors must be satisfied. These are as follows:

> (a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.[76]

Clearly Haynes P regards it as being for the Court to decide whether these four rather nebulous conditions are satisfied. He does not discuss the issue of the source of the Court's authority to determine the issue. This source could not be the 1974 Constitution under which the judge was appointed, nor could it be any law passed by the revolutionary or counter-revolutionary regime. The only logical answer is that he regards the Court's authority as resting on some extra-legal, and unconstitutional, source: a source, in short, which is political and not legal. This is consistent with the reasoning of the majority in *Madzimbamuto*, and with Dias' concept of 'judicial independence'.

Haynes P concludes that the 1979 regime did not achieve municipal legality. However he then invokes the doctrine of 'necessity' to validate the Governor's proclamation. He lays down five conditions for the satisfaction of this doctrine,[77] and asserts once again that it is for the

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76 *Ibid* at 71-72.

77 *Ibid* at 88-89. The five factors were:

> i/ an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;

Court to decide whether necessity exists. Once again Haynes P does not discuss the source of the Court's authority to consider this question, but it can only be 'extra-legal'.

Application to the Declarations of Sovereignty in Australia

Clearly, then, judges in their prescriptive role do rely on extra-constitutional considerations - considerations beyond the legal and into the realm of politics and morality - in determining the validity of purported laws. Logic and legal philosophy struggle to define exactly such extra-constitutional factors, and it is beyond the scope of this paper to explore them in detail. Notions of the Rule of Law and judicial independence perhaps shed some light on the question. So too, perhaps, does Dworkin's theory, in which judges are supposed to enforce the rights of minorities, even where this is contrary to the will of the majority as expressed in Parliament.[78] Yet the judges' ability to play this 'independent' role is ultimately subject to the will of Parliament which appoints and fires them.

The important point for present purposes is that judges do in fact adjudicate on the validity of revolutionary actions, and have formulated 'principles' which they have used in arriving at their decisions. Australian judges, it is submitted, have similar authority to adjudicate on the validity of the declaration of sovereignty by England in 1788, and to do so on the basis of broad principles such as those formulated by Haynes P in *Mitchell's case*.[79]

It might be objected that the judges in *Madzimbamuto* and in *Mitchell's case* were appointed by the old regime and were effectively allowed to remain in power to adjudicate on the validity of the new regime. Australian judges, on the other hand, are appointed by the new regime and hence owe unquestionable allegiance to it: they are not in the position of a putative Aboriginal judge deciding whether the English takeover amounted to a valid revolution.

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ii/ there must be no other course of action reasonably available;
iii/ any such action must be reasonably necessary in the interest of peace, order and good government: but it must do no more than is necessary or legislate beyond that;
iv/ it must not impair the just rights of citizens under the Constitution;
v/ it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

78 Dworkin, R, *Taking Rights Seriously*, London, Duckworth, 1977 at 92-95.

79 *Supra n 75*.

Whether this objection is valid depends on one's interpretation of the constitutional position in Australia today. Putting aside for the moment the contentions of Parts One and Two of this paper, it is arguable that an English act of State binds an English court, and an Australian act of State binds an Australian court. The arguments in Parts One and Two aside, an Australian court could not adjudicate on the validity of an invasion by Australia of, say, New Zealand. On the other hand an Australian court is not bound by a French act of State: were the French to declare that they hold sovereignty over half of Western Australia by virtue of William Dampier's landing there in 1688, no Australian court would entertain the notion for a moment. The question therefore arises whether an Australian court is bound by an English act of State.

The short answer, a constitutional lawyer might reply, is that Australian courts are bound to the English hierarchy. Australian judges are appointed by, and swear allegiance to, the Crown. Australia is not yet a republic; we have not yet severed our colonial ties with England, and consequently Australian judges are no more free than would be English judges to dispute an act of State of the British Crown.

The answer to this objection is that the constitutional development in Australia from 1901 to the present day is such as to render the Australian State legally free from the authority of the British Crown. The sequence of events is familiar to any constitutional lawyer: Federation, the Statute of Westminster, the abolition of appeals to the Privy Council, the Australia Acts, and even the decision in the *Mabo* case itself. These developments, it is submitted, are such as to amount to a change in the Grundnorm of the Australian State.

The Grundnorm of the Australian State is no longer British law as it was in the nineteenth century. It is unnecessary to pinpoint exactly when this change of Grundnorm occurred: there is nothing in Kelsen's theory to suggest that a change in the Grundnorm of a society cannot occur over a period of time. The Grundnorm of the Australian State now rests in Australian law. Consequently the High Court has the authority to adjudicate on the validity of the English act of State in 1788, just as it would an act of State of the French or any other foreign nation.

In support of this argument are the statements of the High Court in the *Mabo* case itself. The Court is increasingly spelling out its independence from English law. As Brennan J writes in relation to the former terra nullius doctrine:

> It is not immaterial to the resolution of the present problem that, since the *Australia Act* 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent. Increasingly since 1968 the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation.[80]

Therefore, it is submitted, the Australian High Court is free to determine the validity and extent of the English declaration of sovereignty over Australia with respect to broad and extra-legal principles such as those set out by Haynes P in *Mitchell's case* - or indeed, any other principles it might choose to enunciate.

To follow this broad approach would be for the Australian High Court to do no more than courts in the United States have been doing since the decision of Marshall CJ in *Johnson* v *McIntosh*[81] in 1823. Indian tribes have since this time been recognised as 'domestic dependent nations' and as 'distinct political communities'.[82] According to Marshall CJ 'relations between the Indian tribes and their European discoverers initially were governed by the doctrine of "equality among nations" '.[83] This doctrine was contrary to the assertions of sovereignty and to the doctrines of Prerogative and act of State by which the European nations governed their relations with the Indian tribes. Thus although 'the United States succeeded to the land claims of the European nations',[84] they were not bound by European or English jurisprudence and did in fact develop a distinctive United States jurisprudence governing the sovereignty issue. Australian courts should, consistently with the dictum of Brennan J quoted above, treat themselves as free to do the same.[85]

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80 *Supra n 1* at 416.

81 21 US (8 Wheat) 543 (1823).

82 See McCoy, RG 'The Doctrine of Tribal Sovereignty: Accommodating Tribal, State and Federal Interests', (1978) 13 *Harvard Civil Rights-Civil Liberties Law Review* 357 at 359, quoting Marshall CJ in *Cherokee Nation* v *Georgia* 30 US (5 Pet) 1 (1831) and in *Worcester* v *Georgia* 31 U.S (6 Pet) 515 (1832).

83 McCoy, *ibid* at 361.

84 *Ibid* at 362.

85 The suggestion that Australian courts take guidance from Marshall CJ's judgments

4. Synthesis and Practical Implications.

If it is accepted that the act of State doctrine is open to question by Australian courts, then, theoretically at least, the whole basis for the legitimacy of the Australian State is open to question. Not only might the Crown not necessarily own all Crown land (as was accepted in *Mabo*), but it might not even be sovereign over all such land!

In practice the implications need not necessarily be as radical as they first appear. A court might choose to conclude that Anglo-Australian sovereignty exists over at least part of Australia because the criterion of 'efficacy' is satisfied: that is, efficacious rule has been established. Or alternatively, it might conclude that the Australian State is democratic and non-oppressive to the extent that it is *de jure* within the criteria specified by Haynes P in *Mitchell's case*.

On the other hand the way would be laid open for a declaration that

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in the United States is given short shrift by Gibbs J in *Coe* v *The Commonwealth*, *supra n 10* at 408. Gibbs J argues that 'the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States'. In particular he points out that the 'Aboriginal nation', in contrast to the Cherokee Nation, is not a 'distinct political society separated from others', and that Aboriginal people 'have no legislative, executive or judicial organs by which sovereignty might be exercised'.

The first of Gibbs J's arguments, it is submitted, is valid at least on the facts alleged by the plaintiff in *Coe* v *The Commonwealth*. The plaintiff's statement of claim stated, at paragraph 1A:. 'The Plaintiff sues on behalf of the Aboriginal community and nation of Australia and for the benefit of that community which is a community of more than seven persons' (at 404).

The suggestion that there was one Aboriginal nation in 1770, 1788 or at any other relevant time is clearly contrary to history and current reality: see, for example, Bird G, *The Process of Law in Australia*, Law Book Company, 1989, Chapter One. However the absence of one unified Aboriginal nation is no bar to the recognition of some degree of sovereignty for the various discrete Aboriginal 'nations' or clans. There is of course no one Indian nation in the United States either.

Gibbs J's second argument is, with respect, ethnocentric and unfounded. He cites no basis for his assumption that the existence of 'legislative, executive or judicial organs' is a pre-requisite to the existence of sovereignty. Nor is there any basis for the view that Aboriginal clans, at least in northern Australia, do not have institutions which perform equivalent functions to the legislative, executive and judicial organs of the Westminster system. If Gibbs J's argument is correct, it follows that Aboriginal clans did not have sovereignty over any part of Australia even *before* the coming of Europeans.

Aboriginal people retain at least some sovereignty over at least some of their traditional land. Such a declaration might be no more far-reaching than that favoured in the United States - that the indigenous groups have the status of 'domestic dependent nations'[86] under the overall sovereignty of the dominant group. Or it might lead to a declaration of full sovereignty to the extent that Aboriginal communities could enter into treaties with the Australian Government on equal terms.

The precise practical implications of a decision that the act of State doctrine does not necessarily establish non-Aboriginal sovereignty over the entire Australian continent are complex and unpredictable. They would depend most obviously on the Court's determination of the extent to which continuing Aboriginal sovereignty exists. One possibility is that those Aboriginal communities, particularly in the north of the continent, which have been relatively less affected by non-Aboriginal annexation would benefit most. It is more difficult, though by no means impossible, to see how Aboriginal individuals and groups in the highly populated southern and eastern parts of the country could be held still to retain sovereignty over their traditional lands. A process of dialogue and compromise between various interest groups would need to be entered into, just as is now occurring over the question of Aboriginal native title. In any case the difficulty of predicting all the practical implications is no reason for the High Court not to reconsider the sovereignty issue. A declaration by the High Court of at least some degree of continuing sovereignty is far more likely than the limited property rights accorded by the decision in the *Mabo* case to advance the aspirations to self-determination of Aboriginal people.

86 *Worcester* v *State of Georgia* 31 US 530; [6 Pet 515] (1832) per Marshall CJ.