

THE INHERENT RIGHT OF ABORIGINAL
SELF-GOVERNMENT IN AUSTRALIA

by

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ABSTRACT

The relationship between Aboriginal peoples and the rest of contemporary Australian society is bittersweet. While Australians have embraced some aspects of Aboriginal culture – especially in art and sport – governments and the courts cling stubbornly to colonial attitudes when it comes to matters of justice and civil and political rights. The failure to recognise and give effect to Aboriginal rights has contributed to a significant power imbalance between Aboriginal people and the wider Australian society. This imbalance is manifest in a lack of education, employment and healthcare options for Aboriginal people and in the overrepresentation of Aboriginal people in the criminal justice system.

One way to address this power imbalance is to recognise and protect a greater measure of Aboriginal self-government. However, the concept of self-government has an extremely low profile in Australia. It is not a matter of current government policy and the courts have only dealt with self-government as a peripheral aspect of native title.

I consider the question of whether there is a common law right of self-government in Australia. I look to Canadian aboriginal rights jurisprudence to inform the development and recognition of a common law doctrine of self-government in Australia.

As soon as one looks beyond the rhetoric of legal positivism and analyses the case law in its historical context, it becomes apparent that the inherent right of self-government existed as part of the colonial common law imported into Australia. Importantly, the inherent right of self-government continues to form part of Australian common law.

The inherent right of self-government must be recognised. This is crucial, not only to address the significant power imbalance that exists in Australia today, but also to maintain the conceptual integrity of the Australian legal system.

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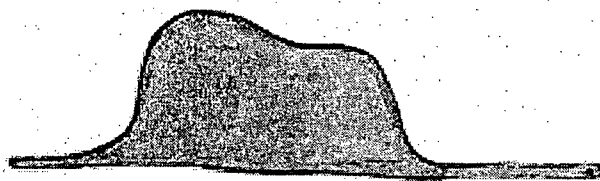
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Preface

THE LITTLE PRINCE

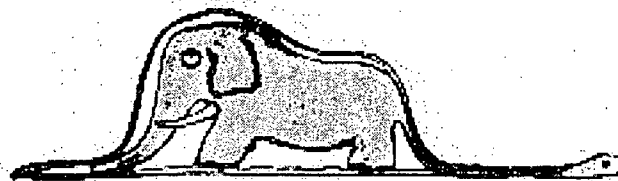
I would like to indulge myself, and my readers, in remembering the children's story "The Little Prince" by Antoine de Saint-Exupery.¹ For those who don't remember, or were unfortunate never to know, the Little Prince lived on Asteroid B-612. This is a very small planet, where you can see the sunset again and again, just by moving your chair. One day the Little Prince left his planet and visited his neighbours. He met some very interesting people and visited some very interesting planets and then he arrived on Earth. There he met an adult. It is this adult that I would like to remember. Well, actually, it is this adult, when he was still a child, that I would like to remember.

This child saw a magnificent picture in a book of a boa constrictor swallowing an animal. After pondering this, the child made "Drawing Number One". It looked like this:



¹ Antoine de Saint-Exupery, *The Little Prince*, trans. by Katherine Woods (New York: Harcourt, Brace & World, 1943).

When he showed it to the adults, expecting them to be frightened, he was disappointed. The adults couldn't understand why they should be frightened of a hat! The drawing was not of a hat, but of a boa constrictor digesting an elephant. The adults couldn't see that. The child made a second drawing that the adults could understand (because adults always need explanations). This time he made a drawing from the inside, which he called "Drawing Number Two". Drawing Number Two looked like this:



The adults advised the child to stop drawing and to devote time to geography and grammar. So he did. As a grown-up, he would show Drawing Number One to any adult who appeared clear-sighted, to try and find out if they were a "person of true understanding". They would always say, "that is a hat." This was because they were concerned with "matters of consequence".²

² *Ibid* at 12. If an adult was concerned with "matters of consequence", then the child (who is now an adult) would "never talk to that person about boa constrictors, or primeval forests, or stars. I would bring myself down to his level. I

One day, this little boy that was now an adult, was in the Desert of Sahara because his plane had broken down. It was there that he met the Little Prince. The Little Prince wanted him to draw a sheep, but he had never drawn a sheep. So he drew the boa constrictor from the outside, his Drawing Number One. The little Prince was very upset because he did "not want an elephant inside a boa constrictor. A boa constrictor is a very dangerous creature ... [w]hat I need is a sheep."³ Needless to say, the boy that was now a grown-up was astounded.

I have been wondering why the Little Prince could see that Drawing Number One was a boa constrictor swallowing an elephant from the outside, yet the adults could only see a hat. And why the adults needed to see Drawing Number Two in order to understand that it wasn't a hat, but a boa constrictor swallowing an elephant. I think the adults could not see because the adults were concerned with matters of consequence.

By the time children have grown up and become adults, they have developed a particular world-view. Once this world-view has been developed, it becomes the way in which adults understand the world. Often, it becomes very inflexible. A set process has developed whereby adults process information and understand events in a particular manner. If a person approaches an act or event in a manner that is

would talk to him about bridge, and golf, and politics, and neckties. And the grown-up would be greatly pleased to have met such a sensible man."

³ *Ibid.*

not compatible with the adult's world-view, then that approach is wrong. It is wrong because the adult cannot comprehend the event in that manner. It is not inherently wrong. It is wrong as a matter of interpretation. It is wrong as a matter of consequence.

In the fifteenth century, the intensity of the global movement of colonisation increased. European explorers sailed across the oceans in search of new lands. When these lands were "discovered", the "settlers" claimed ownership using legal doctrines of their own legal system. Australia and Canada were "discovered" in this manner. In both Australia and Canada, indigenous peoples had owned and occupied the land for many thousands of years under their own legal systems. When the settlers arrived and claimed ownership, a conflict arose. Two legal systems validated the occupation of the land by different nations but neither legal system comprehended the other legal system.

In some parts of Canada, treaties were negotiated. These treaties were a process of conciliation made with an intention to develop a relationship that sufficiently recognised the rights of both parties under both legal systems. In Australia and in large parts of Canada, including most of British Columbia, no treaties were negotiated. Instead, the British applied their laws without any recognition of indigenous law or conflict with indigenous law.

Where treaties were negotiated in Canada, there was at least some recognition of two legal systems. Even though it is unlikely that either the coloniser or the First Nation had a detailed understanding of the content or manner of the other's legal system, they both recognised that another legal system existed. Essentially, this is an understanding of Drawing Number One. Both parties were able to comprehend a concept foreign to their holistic legal systems. In contrast, where there were no treaties, the colonisers suffer from the same problem as the adults who could not see Drawing Number One without the help of Drawing Number Two. In Australia and British Columbia, the colonial legal system was incapable of seeing, let alone comprehending, indigenous legal systems.

The modern treaty process in British Columbia is an effort to make these adults, the "settlers" with imperialistic colonial ideologies, see and understand Drawing Number One. It is a process that requires a focus that is not centred on matters of consequence but provides room for the interaction of two legal systems.

In Australia, a similar process is occurring with native title. However, since the first recognition of common law native title by the High Court of Australia in *Mabo v Queensland ("Mabo (No. 2)")*⁴ in 1992, the Federal Government has severely restricted the breadth of native title by the implementation of and amendment to the

⁴ (1992) 175 CLR 1.

Native Title Act 1993 (Cth).⁵ This process of increasing restrictions on native title rights and interests is arguably a result of an inability of the Australian Government and legal system to see beyond matters of consequence. It is an attempt to move from Drawing Number One, the *Mabo (No. 2)* decision, back to Drawing Number Two, the position prior to *Mabo (No. 2)*. The drive behind this regression is an embedded view of the Australian legal system and its relationship with Aboriginal law. This world-view has become deeply ingrained in the Australian legal system and despite the watershed decision in *Mabo (No. 2)*, it seems difficult as a nation to maintain "true understanding".

Australian common law is premised upon the misconception that it is the only legal system operating in Australia. Without consideration of different cultural beliefs and laws, the English legal system was imposed on Aboriginal peoples and Australia was classified *terra nullius*, a land belonging to nobody. As a result of *terra nullius* and the doctrine of discovery, English common law entered Australia without any impediments as if it was a legal vacuum, a space where no law operated.

Self-government is a bridge between two legal systems, providing recognition of Aboriginal law through an Australian legal doctrine. The doctrine of inherent Aboriginal self-government requires the Australian legal system to see something it has previously been incapable of seeing: Aboriginal law. It requires the Australian

⁵ The *Native Title Act 1993 (Cth)* was amended by the *Native Title Amendment Act 1998 (Cth)*, which implemented Prime Minister John Howard's infamous '10 Point Plan'.

legal system to understand that Aboriginal law exists as an equal but different legal system. It does not require Australian law to understand the details of Aboriginal law. Rather, self-government provides recognition of Aboriginal law and Aboriginal decision-making, but does not detail the content. Aboriginal law determines the content of the right of self-government.

This is similar to the challenge of Drawing Number One, which required adults to see beyond the limitations of their world-view. It demanded that adults recognise a boa constrictor swallowing an elephant whilst leaving the content and the details to the imagination. Likewise, self-government requires Australian law to recognise Aboriginal law but allow space for the details to be provided by Aboriginal law. It means that Australian law must take a step back and not demand knowledge of the details. In order to do this, as required of the adults, Australian law must let go of the fiction that it is the only legal system. This challenge is not insurmountable, because on close analysis, the legal system itself doesn't even abide by this fiction!

Self-government is an opportunity for the Australian legal system to gain "true understanding" and attain a new level of critical self-awareness by letting go of certain "matters of consequence". What is needed is a change in the Australian world-view. The challenge is whether the Australian legal system is capable of the maturity and vision required to see Drawing Number One as the Little Prince did.

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Chapter One

INTRODUCTION

In 1989, the Aboriginal and Torres Strait Islander Commission ("ATSIC") was established to provide the opportunity for Indigenous people to be involved in the processes of government affecting their lives.¹ To achieve this, indigenous representatives were elected to constitute the highest-level indigenous body. This was a major government initiative recognising indigenous self-determination. In addition to handling government funding, ATSIC has been an advocate for indigenous rights both nationally and internationally. Although there have been problems, the current Federal Opposition has recognised that:

... for many Indigenous Australians, ATSIC represents the only form of self-determination available to them.²

On 15 April 2004, Prime Minister John Howard and Minister for Immigration and Multicultural and Indigenous Affairs Amanda Vanstone announced that the Government was moving to abolish ATSIC. It will not be replaced. Instead, services are to be mainstreamed into government departments and a purely advisory group of indigenous leaders will be appointed. On 27 May 2004, the first day of

¹ Established by the *Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)*.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 2004, 29375 (Bob McMullan, Shadow Minister for Finance and Small Business).

Reconciliation Week and the anniversary of the 1969 referendum granting formal recognition of Aboriginal people as citizens, the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Cth)* ("the Bill") was introduced into Parliament to abolish ATSIC. There have been protests and the Federal Opposition has called for a Senate inquiry. The Government, however, has indicated their intention to implement these changes regardless of protests, inquiries or Senate delays.³ The Bill is currently before the Senate.

The depth of the Federal Government's hostility towards indigenous rights was revealed in justifications given for abolishing ATSIC without replacement by either an elected body or a body established in consultation with indigenous people. Prime Minister John Howard, referring to ATSIC's "notorious ... culture of favouritism and nepotism"⁴ revealed that:

We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure ... I do believe that it has become too preoccupied with what might be loosely called symbolic and rights issues and too little concerned with delivering real outcomes.⁵

³ "Govt Presses Senate to Pass ATSIC Changes" ABC Newsonline, 27 May 2004 at <<http://www.abc.net.au/news>>. All electronic references are accurate as of 20 August 2004.

⁴ "Govt Moves to Sell ATSIC Decision" ABC Newsonline, 16 April 2004 at <<http://www.abc.net.au/news>>.

⁵ Karen Middleton & Charlie Wilson-Clark, "Problems Will Not Go Away, Says ATSIC", *The West Australian* (Perth), 16 April 2004 at 11.

Amanda Vanstone, in denying that the abolition of ATSIC deprives Aboriginal people of elected representation by referring to the fact that Aboriginal people vote in elections and are represented by their local member, made the additional point that:

When people say to me we have to have a separate system, I say 'there was a country once that we wouldn't play cricket with because they had a separate system,' we just wouldn't go and play cricket with them if you recall.⁶

The blatant association between ATSIC, an early attempt at recognising indigenous self-determination and the only attempt to accommodate indigenous peoples within a political situation that has historically excluded and marginalised their communities, and apartheid is a frightening revelation of the current political climate in Australia. Shadow Minister Bob McMullan aptly described this hostile climate when he declared that the Bill:

... gives effect to the Prime Minister's long held desire to dismantle every means available to Indigenous Australians to participate in decisions about their future.⁷

⁶ Kate Gauntlett & Charlie Wilson-Clark, "Apartheid Remark Attracts Ridicule", *The West Australian* (Perth), 17 April 2004 at 6.

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 June 2004, 29374 (Bob McMullan, Shadow Minister for Finance and Small Business).

In addition to this direct attack on self-determination, there is growing consensus that even native title, touted as the paramount recognition of Aboriginal rights, has failed. Any hope for increased autonomy generated by the High Court's decision in *Mabo v Queensland ("Mabo (No. 2)")*⁸ has been greatly diminished by the 1998 amendments to the *Native Title Act 1993 (Cth)* and the impact of the recent High Court decisions in *Western Australia v Ward ("Miriuwung Gajerrong")*⁹ and *Members of the Yorta Yorta Aboriginal Community v Victoria*.¹⁰

The *Native Title Act 1993 (Cth)* is deeply flawed and has been described by the Western Australian Deputy Premier as "a 400 page obstacle course".¹¹ More recently, in the High Court decision in *Miriuwung Gajerrong*, both McHugh and Callinan JJ were harshly critical of the current native title system. Justice McHugh wrote:

The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict ... It may be that the time has come to think of abandoning the

⁸ (1992) 175 CLR 1.

⁹ (2002) 191 ALR 1.

¹⁰ (2002) 194 ALR 538.

¹¹ Eric Ripper, Deputy Premier, Western Australia, "Funding Rethink Needed for Faster Native Title Progress" Press Release (27 September 2002) quoted in Mick Dodson, "Native Title on the Precipice: The Implications of the High Court's Judgment on the Ward Case" (Paper presented at the ANU Institute for Indigenous Australia, Canberra, 17 October 2002) at <ni.anu.edu.au/docs/dodson.pdf>.

present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits.¹²

In addition to High Court justices voicing their concerns about the illusory benefits of native title; elders, politicians, activists, farmers and academic commentators have all declared the native title system a failure.¹³ Noel Pearson stated:

The concept of native title that the High Court has adopted has not destroyed native title, but the doors have been slammed shut on its maturation as a legal institution.¹⁴

What has emerged is a political environment that associates self-determination with apartheid, which denies Aboriginal rights on the basis of a disturbingly twisted notion of equality and renders native title rights and interests obsolete. It is because of this hostile political environment that legal solutions beyond the parameters of native title, rather than political solutions must be considered as a more viable means of

¹² Above n 9 at 156. Justice Callinan, at 281, wrote: "I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols."

¹³ Prominent critics include Mick Dodson, Geoff Clark and Noel Pearson. Mick Dodson is member of the Yawuru people of the southern Kimberley, Western Australia. He was Australia's first Aboriginal and Torres Strait Islander social justice commissioner with the Human Rights and Equal Opportunity Commission and is the former director of the Northern Land Council. He is a prominent advocate on land rights and other issues affecting Aboriginal and Torres Strait Islander people, and has worked for the rights and interests of indigenous people worldwide through various roles with the United Nations. Geoff Clark was Chairman of ATSIC at the time it was disbanded. Noel Pearson is the former Executive Director of Cape York Land Council and currently involved with Cape York Partnerships. He was also involved in the drafting of the *Native Title Act 1993 (Cth)*. See Mick Dodson, "Native Title on the Precipice: The Implications of the High Court's Judgment on the Ward Case" (Paper presented at the ANU Institute for Indigenous Australia, Canberra, 17 October 2002) at <ni.anu.edu.au/docs/dodson.pdf>. See also Rick Farley, "Australia Day Address" Reprinted from the Age (23 January 2003) at <<http://www.kooriweb.org/foley/news/story32.html>>.

¹⁴ Noel Pearson, 'Native Title's Day in the Sun is Over' *The Age* (Sydney), 28 August 2002.

readdressing the significant power imbalance that currently exists in Australia between indigenous peoples and the wider Australian society.¹⁵

THE INHERENT RIGHT OF ABORIGINAL SELF-GOVERNMENT

The question I consider in this thesis is whether or not there is a common law right of self-government in Australia. Before I examine this question, it is important to clarify terminology. Self-determination, self-management and self-government, although often used interchangeably, are distinct concepts.

Self-determination is a fundamental human right.¹⁶ As can be seen in numerous international documents, including the *United Nations Draft Declaration on the Rights of Indigenous Peoples* ("Draft Declaration"), self-government is a necessary component of self-determination.¹⁷

Article 3: Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their

¹⁵ A power imbalance manifest in a lack of education, employment and healthcare options for Aboriginal people and in the overrepresentation of Aboriginal people in the criminal justice system.

¹⁶ Australia, *Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: AGPS, 1991); See also Loretta Kelly, 'Reconciliation and the Implications for a Sovereign Aboriginal Nation' (1993) 3(61) *Aboriginal Law Bulletin* 10 at 11; Professor Daes, 'The Position of Indigenous People in National Constitutions Conference Report' (paper presented at the Council for Aboriginal Reconciliation Constitutional Centenary Foundation, Canberra, June 1993).

¹⁷ The Draft Declaration is not binding even after its adoption by the General Assembly. Article 3 of the Draft Declaration reflects article 1(1) of the *International Covenant on Civil and Political Rights* and article 1(1) of the *International Covenant on Economic, Social and Cultural Rights* adopted by the United Nations General Assembly in 1966 and entered into force in 1976. Other relevant articles of the Draft Declaration are 19 and 20. See also articles 4, 9, 21, 26 and 42.

political status and freely pursue their economic, social and cultural development.

Article 31: Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions. [Emphasis added].

As can be seen from Article 31 of the *Draft Declaration*, self-government is a fundamental aspect of the broader concept of self-determination.

I do not explore the right of self-determination in this thesis. In Australia, after the ratification of international treaties, enabling legislation must be passed before any international legal rights are incorporated into the domestic legal system. Given the current political climate and the necessity for political will in order to implement enabling legislation, the international arena does not provide a viable option for the implementation of self-government in Australia. Instead, I focus on the common law right of self-government. Importantly, the relationship between self-determination and self-government indicates that the recognition of the common law right of self-government is consistent with international human rights standards.

Self-management is a term often used in Australia to suggest that self-determination is being recognised. The latest manifestation of self-management is the current policy of "practical reconciliation". Self-management is a delegated right to make decisions related to economic management and government expenditure. The Minister of Aboriginal Affairs emphasised that:

Aboriginal people must understand that self-management means spending public money responsibly in ways which are accountable not only to the Aboriginal community as a whole, but to the public at large.¹⁸

Although self-government and self-management both involve the repossession of decision-making control by Aboriginal communities, the fundamental point of difference is that self-government is an inherent right whereas self-management is a delegated right. An inherent right stems from Aboriginal law rather than a right that is delegated by Parliament or the sovereign Crown.

Two important consequences flow from the inherent nature of self-government. First, it recognises that Aboriginal law is fundamental in shaping the content and manner in which a right of self-government is exercised. This means that Aboriginal communities have the ability to make decisions, unimpeded by government regulation. In contrast, delegated rights, like self-management, are rights derived

¹⁸ Christine Fletcher, *Aboriginal Politics: Intergovernmental Relations* (Carlton: Melbourne University Press, 1992) at 10.

from the sovereign Crown. These rights have been granted and therefore may also be withdrawn.

The second important consequence of the inherent nature of self-government is that it acknowledges historical wrongs suffered by Aboriginal peoples, revalues Aboriginal culture and empowers marginalised Aboriginal communities in their move towards self-determination.

Therefore, although structurally, self-government and the current self-management discourse may appear similar, the effect on the current power imbalance is not comparable. An inherent right directly addresses historical wrongs and the underlying basis of the current power imbalance. A delegated right does not address these issues.

From these definitions, it can be seen that self-government is distinct from both self-determination and self-management. Self-government addresses the fact that there is more than one complete legal system operating within Australia: the Australian legal system and Aboriginal legal systems. Because these legal systems all operate in the same geographical space, they necessarily overlap. Self-government is essentially the channel of communication between two legal systems. It is the legal mechanism by which the Australian legal system recognises the existence and operation of Aboriginal legal systems. The inherent right of self-government acknowledges that Aboriginal peoples are entitled to control matters important to

their nations without intrusive interference.¹⁹ It involves the fair and reasonable transition from government limitations imposed on Aboriginal communities and individuals to a modern, community based form of government.²⁰ However, the formal legal position is that only one legal system operates in Australia. The doctrine of self-government requires the Australian legal system to see something it has previously been incapable of seeing: Aboriginal law.

METHODOLOGY

In this thesis, I argue that the recognition of an inherent Aboriginal right of self-government is of crucial importance to Australia. I consider the potential for establishing an Aboriginal right of self-government as part of Australian common law. Since self-government has not been considered in depth in Australia, in developing this argument, I consider legal developments in Canada.²¹

Although Australia has a different legislative and constitutional structure to Canada, has never signed treaties with indigenous peoples and does not have a

¹⁹ Canada, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol. 5 (Ottawa, Canadian Communication Group, 1996) at 1 - 2; Judy Pearsall & Bill Trumble (eds) *The Oxford English Reference Dictionary*, 2nd ed; (Oxford: Oxford University Press, 1996).

²⁰ Bill Henderson, "A Brief Introduction to Aboriginal Law in Canada" (1996) at <<http://www.bloorstreet.com/200block/brintro.htm>>.

²¹ In this thesis, I use the term "Aboriginal" to refer to Aboriginal and Torres Strait Islander peoples in Australia. In contrast, I use the term "aboriginal" to refer to the aboriginal peoples of Canada, including First Nations, Inuit and Métis.

constitutional provision comparable to section 35(1) of the *Constitution Act 1982*,²² as in Canada, Aboriginal peoples have occupied the land as sovereign self-governing peoples prior to the assertion of sovereignty by the British Crown, customary law has been recognised by the Australian legal system and common law native title is substantially similar to the Canadian concept of aboriginal title.²³ Moreover, in interpreting section 35(1) and determining the content of Aboriginal rights, Canadian courts must have regard to the common law. Aboriginal rights and title are common law rights that were given constitutional status in 1982. Therefore, section 35 jurisprudence that interprets common law rights that have developed from colonial common law is relevant to the interpretation of Australian common law rights that have also developed from British colonial common law. So, despite constitutional and legislative differences, Australia can look to Canada for the judicial reasoning on the source and continued existence of the right of self-government under the common law that the two countries share.

In Chapter 2, I consider the problems that have appeared to prevent the recognition of self-government in Australia. This includes a lack of treaty making and the rejection of absolute Aboriginal sovereignty by the High Court. I consider the concept of sovereignty and distinguish between absolute sovereignty that exists in opposition to Australian sovereignty and modified sovereignty that is not incompatible with Australian sovereignty. Using the concept of modified sovereignty as the basis under

²² Section 35(1) states, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

²³ See Kent, McNeil *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

which self-government continues to exist in Australia, I analyse a series of High Court cases, and conclude that Aboriginal self-government, as opposed to absolute sovereignty, has not been considered, let alone rejected, by Australian courts.

In Chapter 3, I consider the colonial origins of the common law doctrine of self-government. I examine the articulation of this doctrine by Marshall CJ in *Worcester v. Georgia*²⁴ and consider its differing treatment in Australia and Canada. I conclude that self-government did form part of the colonial common law at the time it was imported into Australia.

In Chapter 4, I analyse the revolutionary High Court decision in *Mabo (No. 2)* and the subsequent native title discourse. I challenge the manufactured division that has been drawn between land rights and sovereignty. I refer to two instances within native title jurisprudence that indicate the recognition of instances of self-government as a necessary component of native title. These instances illustrate that the recognition of common law self-government will not fracture the skeleton of the Australian legal system.²⁵

In Chapter 5, I consider the myth that Australia is not a legally pluralistic society. By referring to a series of Supreme Court of New South Wales decisions decided in the early colonial period, I indicate that at the time of colonisation, British law did

²⁴ 31 U.S. (6 Pet.) 515 (1832).

²⁵ This is a reference to Justice Brennan's infamous quote in *Mabo (No. 2)*.

recognise the existence of Aboriginal law. This recognition, which has continued throughout the development of the common law, amounts to a recognition of legal pluralism. I argue that the recognition of self-government is necessary to address this legal plurality.

Finally, in Chapter 6, I conclude that the Australian common law can, and should, recognise the existence of an inherent right of Aboriginal self-government.

Chapter Two

ABORIGINAL SOVEREIGNTY

Prior to the British colonisation of Australia, Aboriginal peoples exercised sovereign authority over their lands and populations. Despite the impact of colonisation and the assertion of British sovereignty over Australia, Aboriginal peoples retain modified sovereignty within Australia. Aboriginal peoples remain entitled to exercise jurisdiction over their lands and people as an exercise of the inherent right of self-government.

This is true despite the fact that over the last thirty years, questions of the continuing existence of Aboriginal sovereignty have come before Australian courts on a number of occasions. On all of these occasions, the Court denied the continuing existence of Aboriginal sovereignty. The two major cases rejecting Aboriginal sovereignty were brought before the High Court by Aboriginal plaintiffs, both of the Wiradjuri nation and in fact, brother and sister. The first major case, brought by Paul Coe, was rejected by the High Court in *Coe v Commonwealth* (1979) ("*Coe (No. 1)*").¹ The second major case, brought by Isabelle Coe after the landmark decision in *Mabo*

¹ (1979) 24 ALR 118.

(No. 2),² was also rejected by the High Court in *Coe v Commonwealth* (1993) ("Coe (No. 2)").³

In fact, in these cases the Court rejected ambitious claims of overarching Aboriginal sovereignty, interpreting Aboriginal sovereignty as necessarily adverse to that of the Crown.⁴ The term sovereignty, however, is complex and has multiple meanings. The High Court's rejection of Aboriginal sovereignty relied on a notion of sovereignty that required the existence of a separate state recognisable by international law. But there are concepts of sovereignty that do not require an independent state recognisable by international law. Aboriginal sovereignty should be properly conceived as modified sovereignty that is not in opposition to the Australian state. Such a notion of Aboriginal sovereignty, which continues in a modified form after colonial contact, is a source of the common law right of self-government that continues to exist today. By distinguishing between absolute sovereignty and modified sovereignty, it becomes apparent that these High Court cases rejected absolute sovereignty but did not consider, let alone reject, the continuing existence of modified Aboriginal sovereignty.

ABORIGINAL SOVEREIGNTY PRIOR TO COLONIAL CONTACT

² *Mabo v Queensland* (1992) 175 CLR 1.

³ (1993) 118 ALR 193.

⁴ See Jacobs J in *Coe (No. 1)* above n 1 at 133 and Mason CJ in *Coe (No. 2)* above n 3 at 200.

Prior to the arrival of the British in Australia, Aboriginal peoples were sovereign, self-governing nations. They owned and occupied the land and governed their societies according to unique systems of Aboriginal customary law. However, as Henry Reynolds asks, were Aboriginal tribes sovereign under the law of nations in 1770?⁵

Relying on Christian Wolff's "The Law of Nations", one of the definitive works on international law in the mid-eighteenth century, Reynolds argues that Wolff's work directly contradicts many of the assumptions underpinning the legal basis and justification for the British annexation of Australia.⁶ Conceding that colonial judges may not have been aware of Wolff's work, Reynolds considers the work of Wolff's student, Emmerich de Vattel, who was known to the colonial judiciary.⁷ Reynolds points out that Vattel's work is internally inconsistent. He criticises judicial reliance on this logically problematic work to justify the colonisation of Australia.⁸ Reynolds observes that Vattel is:

... more frequently cited than any other writer because he is more accessible, and because his doctrines are so loosely expressed that it is easy to find in his book detached passages in favour of either side of the question.⁹

⁵ Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney: Allen & Unwin, 1996) at 39. ("Reynolds: *Aboriginal Sovereignty*").

⁶ *Ibid* at 52.

⁷ *Ibid*. This can be seen in Burton J's judgment in *R v Murrell* (1836) 1 Legge 72. Reynolds argues that Justice Burton's casenotes show that he was "totally dependent on Vattel whose book may have been the only work of international law available to him". The work was Emmerich de Vattel, *The Law of Nations of the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (vol. 3, 1758 ed) book 1.

⁸ *Ibid*.

⁹ *Ibid* referring to R. Wildman, *Institutes of International Law*, (London, 1849).

Reynolds notes that commentators often insist that questions that challenge the validity and justice of colonisation must be considered in light of the legal rules at the time, on the assumption that these legal rules support the colonisers. But, as Reynolds argues, international law did not in fact support the colonisers. Reynolds concludes that:

... had the law been applied with more impartiality it would have been possible to accord to the Aborigines both land ownership and sovereignty. The individual tribes, although very small, occupied discrete territories, which they had defended against interlopers. They had existed for a long time and they were civil societies in which law was normally obeyed and transgression was punished. They had sovereignty according to the law of the time and performed what later writers assumed to be the fundamental roles of government, which Salmond in his classical study *Jurisprudence* defined as war and the administration of justice - defence against external enemies on the one hand and on the other, the 'maintenance of peaceable and orderly relations within the community itself'.¹⁰

Australian courts have recently indicated support for Henry Reynold's position that Aboriginal people were sovereign prior to British colonisation. Australian courts have

¹⁰ *Ibid* at 55.

accepted Aboriginal people as the first occupants of the land.¹¹ Courts have also accepted that prior to colonisation Aboriginal people were governed by laws. In *Milirrpum v Nabalco*,¹² Blackburn J recognised that the Yolgnu were governed by a system of law.¹³ Further, in *R v Walker*,¹⁴ the New South Wales Court of Criminal Appeal admitted as a matter of historical fact that before and after 1770, the Nunekeel people occupied Stradbroke Island and had a system of government and laws.¹⁵ Finally, the High Court appears to have accepted prior Aboriginal sovereignty in *Mabo (No. 2)*, where Brennan J stated:

The *Pacific Islanders Protection Acts of 1872 and 1875* (Imp.) were enacted to stamp out blackbirding and to confer on a High Commissioner's Court jurisdiction over British subjects in the islands of the Western Pacific.

However, the 1875 Act expressly disavowed "any claim or title whatsoever to dominion or sovereignty over any such islands or places" and any intention "to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion".

[Emphasis added].¹⁶

¹¹ *Mabo (No. 2)* above n 2.

¹² *Milirrpum v Nabalco* (1971) 17 FLR 141.

¹³ *Ibid* at 268.

¹⁴ *R v Walker* [1989] 2 Qd. R 79

¹⁵ *Ibid* at 80. The High Court in *Walker v New South Wales* (1994) 182 CLR 45 did not question this finding.

¹⁶ Above n 2 at 19.

Australian courts have accepted that Aboriginal people were the first occupants, had a system of government and laws and exercised "sovereignty or dominion" over Australia. It is not contentious that Aboriginal people were living on the land now known as Australia, governed by law, before British colonisation. They owned and occupied the land and governed their societies according to unique systems of Aboriginal customary law. Therefore, prior to the British occupation of Australia, Aboriginal peoples were sovereign, self-governing peoples. The question then becomes, what exactly was the impact of colonisation on Aboriginal sovereignty?

THE IMPACT OF COLONISATION ON ABORIGINAL SOVEREIGNTY

There are essentially three schools of thought regarding the impact that British colonisation and the assertion of Crown sovereignty had on the sovereignty of Aboriginal people in Australia. The three positions variously assert that colonisation did not affect Aboriginal sovereignty, colonisation impacted and modified Aboriginal sovereignty and colonisation extinguished Aboriginal sovereignty.

The first school of thought advocates that Aboriginal sovereignty remains wholly intact despite colonisation in Australia. This argument is based on a challenge to the legal fiction of *terra nullius*, applied explicitly in Australia and purportedly rejected in 1992 in the High Court decision of *Mabo (No. 2)*.¹⁷ If the doctrine of discovery and

¹⁷ *Terra nullius* means "land belong to no-one" or "empty land". This doctrine was applied retrospectively to Australia to justify the classification of Australia as a "settlement" under the doctrine of discovery and the subsequent usurpation of

terra nullius were not applied correctly, then the assertion of Crown sovereignty is questionable. However, despite the merits of this position, the series of High Court decisions, beginning with *Coe (No. 1)*, explicitly reject notions of Aboriginal sovereignty that challenge Crown sovereignty.

The second school of thought is based upon a concept of modified sovereignty. It is also referred to as "shared", "merged" or "diminished" sovereignty. This position recognises that Aboriginal sovereignty continues to exist and remains in a modified form despite the assertion of Crown sovereignty. This is the position taken by the Canadian Royal Commission on Aboriginal Peoples ("RCAP").¹⁸ It is also consistent with Aboriginal voices that have long asserted Aboriginal sovereignty. It is on this basis that a right of self-government exists. This is the position I take in developing the argument for the common law recognition of an inherent right of self-government.

In developing this position, I respond to a third school of thought that denies the continued existence of Aboriginal sovereignty. This was the position consistently taken by government in Canada and remains the position of government in

sovereignty. For a challenge to the standard interpretation of *Mabo (No. 2)* as constituting a rejection of *terra nullius*, see David Ritter, "The Rejection of *Terra Nullius* in *Mabo*: A Critical Analysis" (1996) 18 Sydney L Rev 5. See also *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12.

¹⁸ See Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2:2 (Ottawa: Canada Communication Group, 1996) ("Restructuring the Relationship"); Canada, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communication Group, 1993) ("Partners in Confederation"). See also the concept of diminished sovereignty and domestic dependent nations articulated by Marshall CJ in *Johnson v McIntosh* 21 U.S. (8 Wheat) 543 (1823), *Cherokee Nation v Georgia* 30 U.S. (5 Pet.) 1 (1831) and *Worcester v Georgia* 31 U.S. (6 Pet.) 515 (1832). These cases are collectively referred to as the "Marshall trilogy".

Australia.¹⁹ It is also the position often, but mistakenly, attributed to the High Court of Australia. Proponents of this position argue that the assertion of Crown sovereignty completely extinguished Aboriginal sovereignty. However, if this did not completely extinguish Aboriginal sovereignty, the *Commonwealth Constitution*²⁰ exhaustively divided all governmental powers and therefore there is no constitutional space for Aboriginal sovereignty or Aboriginal self-government. These are ill-founded, unsubstantiated assertions that I consider and reject in this chapter.

The fundamental difference between these three schools of thought, apart from the obvious discrepancies regarding the impact of colonisation on Aboriginal sovereignty, is differing interpretations of the term "sovereignty". In order to clearly delineate these positions, the concept of sovereignty must be examined. Two prominent and contemporary sovereignty scholars, F.H. Hinsley and Hideaki Shinoda, provide an introductory understanding of the complexity and dynamic nature of sovereignty.²¹

SOVEREIGNTY: MYRIAD MEANINGS

¹⁹ For a good summary of these arguments, made by the then Leader of the Opposition and the current Premier of British Columbia, and their rejection, see *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 351 - 355.

²⁰ *Commonwealth of Australian Constitution Act 1900* ("Commonwealth Constitution").

²¹ The texts I consider are F.H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986) and Hideaki Shinoda, *Re-Examining Sovereignty* (London: MacMillan Press, 2000). See also Hans Kelsen "Sovereignty and International Law" in W.J. Stankiewicz, *In Defense of Sovereignty* (London: Oxford University Press, 1969) at 115 and K.W.B. Middleton, "Sovereignty in Theory and Practice" in W.J. Stankiewicz, *In Defense of Sovereignty* (London: Oxford University Press, 1969) at 132.

*Sovereignty is the most glittering and controversial notion in the history, doctrine and practice of public international law. Its meaning has oscillated throughout the history of law and of the state since medieval times.*²²

Scholars debate the origin of the concept of sovereignty.²³ However, as F.H. Hinsley notes, the semantic difficulties associated with the term are exacerbated by the tendency to assume that when an ancient term is still in use, its meaning has not changed over time.²⁴ Hinsley suggests that:

The term sovereignty originally and for a long time expressed the idea that there is a final and absolute authority in the political community.²⁵

Hideaki Shinoda argues that the notion of sovereignty appeared in Europe in order to represent the privileged status of kings and that it was much later that sovereignty was discussed in connection with states. Shinoda sees the term "sovereignty" as emanating from the decline of the sense of Christendom. He explains that in the Middle Ages, "sovereign" was used not in its modern sense, but to mean "superior" and that any superior was sovereign.²⁶ In England, the English word "souerein" or

²² Steinberger, "Sovereignty" in *Encyclopedia for Public International Law*, vol. 4 (Elsevier: North-Holland, 2000) at 500.

²³ See F.H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986) at 22 for a discussion on the disagreement as to whether it originated in classical Greece or Western Europe in the 13th century.

²⁴ *Ibid* at 22.

²⁵ *Ibid* at 1. For elaboration, see *ibid* at 26.

²⁶ Hideaki Shinoda, *Re-Examining Sovereignty* (London: MacMillan Press, 2000) at 9 referring to Bertrand de Jounveney into the Political Good, *Sovereignty: An Inquiry into the Political Good*, trans. By J.F. Huntingdon (Cambridge: Cambridge University Press, 1957) at 171.

"soverayne", which had derived from "super", acquired the letter "g" by association with "reigning".²⁷ Despite debates as to the exact origin of the word or its particular meaning at any given time, Shinoda, in contrast to Hinsley, argues that:

Before the sixteenth century the idea of sovereignty was not established as a principle of the political community, and of international society. Only in the process of modernity did people *consciously* understand it as such. It was in this process that the idea of state sovereignty took shape in people's minds and constituted their thoughts and behaviours.²⁸

Other scholars refer to Aristotle's concept of the supreme power as an early definition of sovereignty. Aristotle used the term to identify the supreme authority within a community.²⁹ This definition does not associate sovereignty with the state. It is also consistent with its popular contemporary definition referring to the status under which a people have effective political control over the matters that concern them.³⁰ Using this broader definition, sovereignty is the authority to govern a community, which may be absolute or limited.

Despite the variety of definitions and the debate regarding the origins of the term, sovereignty is predominantly associated with the state and international legal norms.

²⁷ *Ibid* at 9 referring to Walter W. Skeat, *An Etymological Dictionary of the English Language*, new ed. (Oxford, Clarendon Press, 1924) at 584.

²⁸ *Ibid* at 10 - 11.

²⁹ Above n 22 at 503.

³⁰ Garth Nettheim, "Sovereignty and Aboriginal Peoples" (1991) 2:53 *Aboriginal Law Bulletin* 4 at 5.

This association, an association the High Court relied on, must be critically examined in order to understand why this is often considered to be the only definition of sovereignty.

International Law, Sovereignty and the State

The *Peace of Westphalia* in 1648 is often referred to as the beginning of the traditional international system. An important concept in this state-centric system is sovereignty. Sovereignty, as it has been interpreted from the *Peace of Westphalia*, is capable of existence only within societies in which there is a state, where a state is a body that is recognisable by international law as an international legal actor.

Shinoda distinguishes between "sovereignty" and "state sovereignty", recognising there are multiple notions of sovereignty. He argues, "the study of sovereignty is the study of an idea".³¹ Shinoda defines state sovereignty as a notion in contemporary international law of a juristic person that includes a government, permanent population, defined territory and the capacity to enter relations with other states.³²

Hinsley, however, limits the notion of sovereignty to state sovereignty:

The concept of sovereignty will not be found in societies in which there is no state.³³

³¹ Above n 26 at 3.

³² *Ibid* at 7. Shinoda's definition of state reflects Article 1 of the *Montevideo Convention on Rights and Duties of States*, 26 December 1933.

³³ Above n 23 at 22.

Hinsley takes a conventional approach to sovereignty. He regards the notion of state as an advanced form of society. It is only at the point where a society advances to a state that the idea of sovereignty emerges. This concept of sovereignty depends on whether the state overcomes the resistance of "customary society". Hinsley relies on the assumption that there is an evolutionary transition from a stateless society to a society ruled by a state and that the state only occurs in "advanced communities".³⁴

He declares that there is an:

... absence of any notion of sovereignty in the primitive stages of political societies.³⁵

In describing the difference between primitive and advanced communities, he refers to Aboriginal Australia:

... even the Australian aborigines whose various clans meet together from time to time in religious assemblies which have some power to regulate disputes between the groups ... may be regarded as being a recognizable if impermanent government system, and thus a recognizable if minimal version of the state.³⁶

³⁴ *Ibid* at 3.

³⁵ *Ibid* at 2.

³⁶ *Ibid* at 5.

Despite conceding that Australian Aboriginal societies may be considered as a state, he denies that sovereignty could exist in such a primitive society or primitive state where the state has not overcome the resistance of customary society. Hinsley argues that the difference between primitive and advanced societies is as qualitatively decisive as the difference between a man and a cockroach.

To argue that the stateless society and the society ruled by the state are essentially similar in respect of their political institutions is no more helpful in the field of political science than would be a statement in the field of natural science that a man and a cockroach are essentially in the same family because they both have legs and need to eat.³⁷

Hinsley's argument is based on Eurocentric historical determinism and social Darwinism. Shinoda responds to Hinsley, arguing that sovereignty does not rely on the evolution of primitive society.³⁸ He rejects the interpretation that African stateless societies are merely premature forms of modern European states.³⁹ Shinoda rejects this assumption as archaic and argues that European domination is a product of politics and power. I agree with Shinoda. Hinsley's distinction between primitive and advanced communities is unacceptable in contemporary society where social Darwinism has been adamantly rejected.

³⁷ *Ibid* at 7. For the full argument, see *ibid* at 4 - 7.

³⁸ Above n 26 at 3 referring to above n 23 at 1 - 26.

³⁹ *Ibid* at 4

Contemporary Notions of Sovereignty

It is perplexing that sovereignty and state are conceived as interconnected, inseparable notions given the divergent historical understandings of the term "sovereignty". Although there is a strong history of relationship between these two terms, the contemporary understanding is often more in line with its ancient usage, particularly the definition expounded by Aristotle, than with its use in the Westphalian legal system. There have been two recent challenges to this notion of state sovereignty: globalisation and indigenous rights movements.

First, the increasing interconnectedness of the world and decreasing border controls have resulted in scholars questioning whether the notion of sovereignty remains useful in an ever-increasingly globalised world.⁴⁰ As international bodies, such as the United Nations and the European Union, increase in power, a tension develops between state sovereignty and the ultimate decision-makers. States become bound by international regulations and at times are forced to comply with international legal norms. If sovereignty means that the state is the ultimate decision-maker, then globalisation has placed a limit on sovereignty.

Secondly, Aristotle's broader definition of sovereignty that does not rely on a state is consistent with the manner in which Aboriginal people in Australia often use the term

⁴⁰ Dianne Otta, "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" [1995] 21 *Syracuse Journal of International Law & Commerce* 65. More generally, see Report of the Commission on Global Governance, *Our Global Neighbourhood* (Oxford: Oxford University Press, 1995).

sovereignty. Aboriginal people, including elders, leaders and activists, often refer to their sovereignty or describe themselves as sovereign peoples.⁴¹ For example, Larissa Behrendt, at the Indigenous Bar Association conference in Ottawa in 2000, stated:

It is perhaps because we have never been acknowledged as a sovereign people that the notion of sovereignty has become so important to us. We use the term "sovereignty" in a way that has made the word our own, an expression of the very particular, quite unique way in which we see our future. In answer to the question "What do you want?" many Indigenous people will reply "First we have to have our sovereignty recognised".⁴²

Despite the complexities of this sovereignty debate, three deductions may be drawn. First, sovereignty is a complex, dynamic term that has been associated with different meanings over centuries. Secondly, there is a tendency to associate sovereignty with the state, as occurs in international law. Finally, sovereignty is not limited, historically or contemporarily, to notions of the state.

⁴¹ This is particularly evident in Michael Mansell's statements. See Michael Mansell, "They Can Keep Their Justice - We'll Keep Our Country: the APG View" (paper presented to the Aboriginal Justice Issues conference in Cairns, June 1992) [unpublished] at 9. The APG is the Aboriginal Provisional Government. See also Michael Mansell, "The Bicentenary and Aboriginal Sovereignty" (1988) *Law Institute Journal* 1206; Noel Pearson, "Reconciliation To Be or Not To Be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation?" (1993) 3:61 *Aboriginal Law Bulletin* 14; Geoff Clark, "Launch of ATSIC Treaty Documents" (lecture presented at Parliament House in Melbourne, 8 May 2001) [unpublished] at 12.

⁴² Larissa Behrendt, "Slicing the Circle: Treaty, Native Title, Aboriginal Sovereignty and the Compartmentalizing of Indigenous Rights in Australia" (Paper presented to the Indigenous Bar Association Conference in Ottawa, 2000) [unpublished] at 4. See also Australia, Senate Standing Committee on Constitutional and Legal Affairs: *Two Hundred Years Later...Report on the Feasibility of a Compact or 'Makaratta' between the Commonwealth and Aboriginal People*. Parliamentary Paper No. 107/1983. (Canberra: Australian Government Publishing Services, 1983).

Moving Beyond the Realm of State Sovereignty

In order to clearly distinguish absolute state sovereignty from continuing but modified Aboriginal sovereignty, I consider the notion of modified sovereignty that was comprehensively articulated by the Royal Commission on Aboriginal Peoples ("RCAP").⁴³ RCAP summarised the argument for the recognition of self-government.

At the time of European contact, aboriginal peoples were sovereign and independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures. This right continued to exist, in the absence of clear and plain legislation to the contrary. Although in many cases the right was curtailed and tightly regulated, it was never completely extinguished. [Emphasis added].⁴⁴

Justice Binnie adopted RCAP's argument that aboriginal sovereignty continues to exist beyond colonisation in a modified form, providing the foundation of the inherent

⁴³ See *Restructuring the Relationship* above n 18 and *Partners in Confederation* above n 18. *Restructuring the Relationship* formed part of RCAP's final report. *Partners in Confederation*, a discussion paper, dealt with the original status of Aboriginal peoples and the effect of the *Constitution Act 1982*. In describing the original status of Aboriginal people, reference was made to the recognition of Aboriginal law by the courts, particularly the 1867 decision of *Connolly v Woolrich* (1867) 11 LCJ 197, the signing of treaties and the *Royal Proclamation of 1763*. RCAP then considered whether self-government was an Aboriginal right under section 35(1) of the *Constitution Act 1982*.

⁴⁴ *Restructuring the Relationship* above n 18 at 202.

right of self-government, in the Supreme Court of Canada decision in *Minister of National Revenue v Grand Chief Michael Mitchell also known as Kanentakeron* (2001).⁴⁵ Binnie J, writing for himself and Major J, introduced the concept of "shared sovereignty" between aboriginal people and the federal and provincial governments in his dissenting judgment. Although RCAP refers to merged sovereignty and Binnie J to shared sovereignty, I use the term modified sovereignty to include both of these terms.

Grand Chief Michael Mitchell is a Mohawk of Akwesasne. Akwesasne lies at the "jurisdictional epicentre of the St. Lawrence River and straddles the Canada-United States border, as well as provincial and state borders."⁴⁶ Grand Chief Mitchell crossed the international border between the United States and Canada with goods purchased in the United States. He declared the goods but asserted that aboriginal and treaty rights exempted him from paying duty. Mitchell was served with a claim for unpaid duty and sought declaratory relief. The Federal Court, at first instance, held that he had an aboriginal right to cross the border freely without having to pay customs duties on goods destined for personal and community use and noncommercial trade with other First Nations. The Federal Court of Appeal affirmed an aboriginal right to bring goods into Canada duty-free, subject to limitations based on evidence of the traditional range of Mohawk trading. The Supreme Court of

⁴⁵ *Minister of National Revenue v Grand Chief Michael Mitchell also known as Kanentakeron* [2001] 1 S.C.R. 911.

⁴⁶ *Ibid* at 915.

Canada held that the aboriginal right had not been established and that Mitchell must pay duty.

Only Justice Binnie considered the issue of aboriginal sovereignty. He noted that Mitchell did not dispute Canadian sovereignty but sought Mohawk autonomy within the broader framework of Canadian sovereignty. He classified the claim as not a claim for freedom of movement, but rather an aspiration to live as if the international boundary did not exist.⁴⁷ He stated:

If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled. The constitutional objective is reconciliation not mutual isolation. What is significant is that the Royal Commission itself sees aboriginal people as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.⁴⁸

⁴⁷ *Ibid* at 915 - 916.

⁴⁸ *Ibid* at 916.

In summary, modified Aboriginal sovereignty recognises that Aboriginal people were sovereign people prior to colonisation, but that colonisation has had a modifying and diminishing impact on Aboriginal sovereignty and the ability to exercise unlimited jurisdiction. Modified Aboriginal sovereignty recognises that Aboriginal people retain and exercise governmental and jurisdictional powers. Therefore, in the context of Australia, modified Aboriginal sovereignty is simply the idea that Aboriginal people retain at least some sovereignty over their traditional land.⁴⁹

In this thesis, I use the term absolute sovereignty to describe sovereignty that requires a state and is grounded in the Westphalian international legal system.⁵⁰ This is distinguishable from modified sovereignty that exists independent of a state recognisable by international law.

SOVEREIGNTY CONSIDERED BY AUSTRALIAN COURTS

The High Court of Australia has rejected claims of absolute Aboriginal sovereignty in several cases: *Coe (No. 1)*,⁵¹ *Wacando v Commonwealth* (1981),⁵² *Coe (No. 2)* and *Walker v New South Wales* (1994).⁵³

⁴⁹ Stephen Gray, "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*" (1993) 2 Griffith Law Review 39 at 63.

⁵⁰ Unless otherwise indicated, absolute state sovereignty or Westphalian sovereignty are merely alternate expressions for absolute sovereignty.

⁵¹ In fact, the question of Aboriginal sovereignty came before the courts for the first time in the modern era in *R v Wedge* [1976] 1 NSWLR 581. In defending a murder charge, the defence argued that the court had no jurisdiction to hear the case. The New South Wales Supreme Court held that the Aboriginal people of Australia were not a sovereign people and were subject to New South Wales' law. Prior to this decision, in the 1830's, the New South Wales Supreme Court

The accepted interpretation of these cases, that the High Court rejected the existence of Aboriginal sovereignty in any form whatsoever in these cases, must be challenged. By considering the nature of the question before the Court, identifying the underlying assumptions on which the High Court relies and critically examining subsequent interpretations, it becomes apparent that these cases reject absolute Aboriginal sovereignty. These cases do not reject modified Aboriginal sovereignty, which provides the foundation for the recognition of a common law inherent right of Aboriginal self-government.

Coe v Commonwealth (No.1) (1979)

Paul Coe, a prominent Aboriginal lawyer and activist,⁵⁴ issued a writ out of the High Court of Australia against the Australian and British Governments. Coe sought declarations and relief, purportedly on behalf of "the Aboriginal people of Australia", for the occupation, settlement and continued dealing in Australian lands by the Australian and British Governments. In particular, he sought a declaration that all land occupied and used by Aboriginal people remains "at the absolute command of

considered the existence of Aboriginal sovereignty in a trilogy of cases that considered the applicability of British criminal law to intra-Aboriginal disputes. For further details, see Chapter 5.

⁵² (1981) 148 CLR 1.

⁵³ (1994) 182 CLR 45.

⁵⁴ Paul Coe was formerly the Chairman of the Aboriginal Legal Service (NSW) and has always been very politically active. In January 1972, Paul Coe, Gary Foley and Dennis Walker announced the formation of the Black Panther Party of Australia. Coe was also involved in the establishment of the tent embassy. See David Hollingsworth, *Race and Racism in Australia* (Katoomba: Social Sciences Press, 1998) at 175.

the Aboriginal people free from interference" and that all legislation allowing for land transfers or mining be declared invalid. Coe also sought an injunction to prevent the Government from mining, as well as compensation to "the Aboriginal nation" for the deprivation of proprietary and religious rights and for interference with their culture, religion, customs, language and way of life.⁵⁵

Coe applied for leave to amend the statement of claim. The proposed amendments asserted Aboriginal sovereignty and invoked section 116 of the *Commonwealth Constitution*.⁵⁶ "On behalf of the Aboriginal community and nation of Australia",⁵⁷ Coe claimed Britain had wrongfully claimed sovereignty, possession and occupation over Australia. An alternative statement of claim alleged that the proclamations by Captain James Cook in 1770 and Captain Arthur Phillip in 1788 amounted to claims of conquest and that therefore the radical title vested in the Crown was subject to the rights and interests of "the Aboriginal nation". The first defendant, Australia, filed an appearance and the second defendant, Great Britain, applied to have the statement of claim struck out.

This claim was brought under the original jurisdiction of the High Court. As a result, the statement of claim was considered at first instance by a single High Court judge. This decision was appealed. The question before the Court, at first instance and on

⁵⁵ Above n 1 at 120 - 127. See the prayer for relief in the statement of claim that is set out in full in Justice Gibb's judgment. On appeal, the parties consented to treat the proposed amended statement of claim as if it were a duly delivered statement of claim. As a result, the application to strike was treated as if it related to a duly delivered statement of claim.

⁵⁶ Section 116 of the *Commonwealth Constitution* is the freedom of religion provision.

⁵⁷ Above n 1 at 120, from paragraph 1A of the proposed amended statement of claim.

appeal, was whether the statement of claim contained a cause of action and if so, whether leave should be granted to amend the statement of claim. The High Court expressed substantive issues in the context of these procedural issues.

Sitting alone at first instance, Mason J dismissed the application for leave to amend the statement of claim. On appeal, the High Court divided 2 to 2. Gibbs and Aickin JJ held that the appeal should be dismissed and denied leave to amend whilst Jacobs and Murphy JJ granted leave to amend. Pursuant to section 23(2)(a) of the *Judiciary Act 1903 (Cth)*, Mason J's decision at first instance, refusing leave to amend the plaintiff's statement of claim, was affirmed.⁵⁸

There were two key points of departure between the majority and the minority. First, Gibbs and Aickin JJ (who, with Mason J, the judge at first instance, constituted the majority) considered it settled law that Britain acquired the Australian colonies by settlement, and not conquest, under the doctrine of discovery, as expressed by the Privy Council in *Cooper v Stuart*.⁵⁹ Jacobs and Murphy JJ on the other hand held that the position in *Cooper v Stuart* was open for question.⁶⁰ Secondly, Gibbs and Aickin JJ held that the amended statement of claim was "repetitious, confused and obscure and in some respects inconsistent within itself".⁶¹ They held that the greater

⁵⁸ Section 23(2)(a) requires that where the Court is equally divided in opinion, that the decision appealed from shall be affirmed. However, the court report incorrectly cited section 23(2)(b) as the relevant provision. Section 23(2)(b) applies to cases other than those on appeal and requires that the opinion of the chief justice or the senior justice prevails.

⁵⁹ (1889) 14 App Cas 286 at 291.

⁶⁰ They held that the claim to proprietary and possessory rights to land recognised by the common law was sufficiently pleaded. *Cooper v Stuart* was ultimately overruled in *Mabo (No. 2)*.

⁶¹ Above n 1 at 118.

part of the amended statement of claim was embarrassing and did not disclose a cause of action. Jacobs and Murphy JJ held that there was no discretion to strike out the whole of a statement of claim if it disclosed a cause of action.⁶²

Despite these differences, all four judges agreed that the challenge to the assertion of Crown sovereignty was non-justiciable in the High Court of Australia. Gibbs and Aickin JJ held that the annexation of the east coast of Australia by Captain Cook in 1770 and subsequent acts that consolidated the Australian continent as a dominion of the Crown "were acts of state the validity of which could not be challenged".⁶³

Likewise, Jacobs J rejected the challenge to the assertion of British sovereignty over Australia because "sovereignty alleged to be possessed by the Aboriginal nation"⁶⁴ was "formulated as a claim based on a sovereignty adverse to the Crown."⁶⁵ Jacobs J held that the validity of the Crown's claim of sovereignty and sovereign possessions were "not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged."⁶⁶ Although Murphy J agreed generally with Jacobs J, he did not deal specifically with the sovereignty claim.⁶⁷ However, Murphy J was of the opinion that

⁶² *Ibid.*

⁶³ *Ibid* at 128 per Gibbs J referring to *New South Wales v Commonwealth* (1975) 135 CLR 377 at 388 ("the Seas and Submerged Lands Case") where Gibbs J stated that, "[t]he 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." Therefore, submissions recognising the operation of Aboriginal legal systems in Australia, which challenge the authority and legitimacy of the Australian legal system and its status as the sole legal system in Australia, have been considered non-justiciable.

⁶⁴ *Ibid* at 132.

⁶⁵ *Ibid* at 133.

⁶⁶ *Ibid* at 132.

⁶⁷ *Ibid* at 138.

the plaintiff could argue that the acquisition of sovereignty did not extinguish Aboriginal ownership rights.

Justice Gibbs wrote the leading judgment in *Coe (No. 1)*. In denying leave to amend the statement of claim, he denied the existence and applicability of common law concepts of domestic dependent nations, self-government and Aboriginal sovereignty. Chief Justice Marshall, in the famous trilogy of *Johnson v McIntosh*,⁶⁸ *Worcester v Georgia*⁶⁹ and *Cherokee Nation v Georgia*,⁷⁰ expressed these concepts in the context of the British colonisation of the United States. In rejecting Coe's claim to absolute sovereignty, Gibbs J, referred to and distinguished Marshall CJ's judgment in *Cherokee Nation v Georgia*. Gibbs J, in the following key passage, wrote:

If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an Aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an Aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the Aboriginal people of Australia as a domestic

⁶⁸ *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543.

⁶⁹ *Worcester v Georgia* (1832) 31 US (6 Pet) 515.

⁷⁰ *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1.

dependent nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: *Cherokee Nation v. State of Georgia* (1831), 5 Pet 1, at p 17. However the history of the relationships between the white settlers and the Aboriginal people has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ, at p. 16, of the Cherokee Nation, that the Aboriginal people of Australia are organised as a "distinct political society separated from others", or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain. [All emphasis added].⁷¹

This captures the crux of Gibbs J's rejection of absolute Aboriginal sovereignty and also encapsulates the High Court's rejection of absolute Aboriginal sovereignty in this series of cases. This passage has been quoted with approval by the High Court in *Coe (No. 2)* and *Walker v New South Wales*. The problematic assumptions that

⁷¹ Above n 1 at 128 - 129.

form the foundation of the rejection of Aboriginal sovereignty, assumptions that are both explicitly and implicitly captured by this passage, resonate throughout the High Court decisions. These assumptions include:

1. History in the United States is different from history in Australia and that as a result of this difference in history, Aboriginal peoples in Australia cannot be recognised as sovereign, self-governing Aboriginal nations.
2. Aboriginal sovereignty necessarily challenges the legal foundation of the Commonwealth of Australia.
3. Aboriginal sovereignty necessarily limits parliamentary power.
4. The *Commonwealth Constitution* exhaustively divides all law-making powers between the federal government and state governments.
5. Legislative, executive and judicial arms of government are a necessary requirement of sovereignty.
6. Aboriginal people do not have legislative, executive and judicial organs to exercise sovereignty.

7. An Aboriginal nation maintaining any form of sovereignty is "impossible".

Two challenges must be brought to this decision. The first challenge concerns the nature of the question presented to the Court, which was a claim of overarching sovereignty over Australia on behalf of a single Aboriginal nation. The second challenge concerns the validity of the assumptions upon which this decision is built. However, as these assumptions tend to flow through these sovereignty decisions, I merely raise this issue and return to discuss it in full after examining this series of cases.

The High Court in *Coe (No. 1)* was faced with a claim for absolute Westphalian state sovereignty, for a single Aboriginal nation of Australia that fundamentally challenged the legitimacy of the Australian state. This was categorically rejected. This is not surprising. Such a claim has never been accepted anywhere else in the Commonwealth. It is wrong to think that this rejection necessarily excludes sovereignty that is not absolute Westphalian sovereignty, exists at a community and not a national level and does not fundamentally challenge the legitimacy of the Australian state. The rejection of absolute sovereignty of a single fictitious nation is not a rejection of modified sovereignty of many different Aboriginal nations. Modified sovereignty, existing at a community level that co-exists with Australian sovereignty, was not considered by the High Court in *Coe (No. 1)*.

Further, the assertion that Coe made, that there is only one Aboriginal nation in Australia, must be challenged. Paul Coe asserted that Aboriginal people existed and continue to exist as a single sovereign nation. This is a fundamental flaw in the statement of claim. Justice Gibbs questioned whether there is a "body of persons properly described as "the Aboriginal community and nation of Australia""⁷² and if so, whether Coe is entitled to sue on its behalf. Indeed, how could Coe have standing to sue on behalf of the Aboriginal nation of Australia? Gibbs J questioned standing based on the grounds:

... that there is no Aboriginal nation, if by that expression is meant a people organised as a separate State or exercising any degree of sovereignty."⁷³

[Emphasis added].

The plaintiff's claim and Gibbs J's rejection, are both based on the notion that any form of sovereignty necessarily entails state separatism. But this is a very limited interpretation of sovereignty and not the only, let alone the most appropriate, interpretation of Aboriginal sovereignty. He does not consider modified sovereignty as a notion distinct from absolute sovereignty.

Coe lacked standing, not because no sovereign Aboriginal nation can exist in Australia without challenging Australian sovereignty, but rather, because there is not

⁷² *Ibid* at 131.

⁷³ *Ibid*.

a single Aboriginal nation of Australia, and certainly not one that has absolute state sovereignty.

There were over 200 Aboriginal languages in Australia and approximately 500 nations at the time of colonial contact. Despite quibbles of anthropological terminology (from "band" to "language group" to "nation" to "moiety" to "mob"), it is ahistorical and incorrect to associate sovereignty in Aboriginal Australia with an ability to make laws nationally. There is no single national Aboriginal legal system in Australia. There are many Aboriginal legal systems. Each legal system and set of laws governs only specific Aboriginal peoples, those that are members of a particular Aboriginal community or Aboriginal nation. This is where sovereignty lies.

For example, Koori law in Victoria does not influence Bardi law in the Kimberleys. Bardi will respect Koori law when they are in Koori country, and Koori will respect Bardi law when they are in Bardi country, but Bardi are not bound or governed by Koori law at any other time. Bardi are governed by Bardi law. Sovereignty, and in this instance, Aboriginal sovereignty, is the ability to make laws that govern a community. In Aboriginal societies in Australia, this occurs at the local community level, not nationally. Despite over 200 years of colonisation and government policies of assimilation, Aboriginal peoples have distinct cultures, languages and law. It is historically, culturally and contemporarily incorrect to talk of one Aboriginal nation of Australia.

Wacando v Commonwealth (1981)

Several years after the decision in *Coe (No. 1)*, the High Court handed down its decision in *Wacando v Commonwealth*. Carlemo Wacando, a traditional owner of parts of Darnley Island, intended to develop beche-de-mer fishing and to explore and exploit petroleum.⁷⁴ The Queensland and Federal Governments argued they were entitled to prevent Wacando's actions unless he had a permit, leave or licence from the Government. Wacando argued that the *Letters Patent of 1878* were invalid and ineffective and that as a result, Darnley Island was not part of Queensland or Australia.

Chief Justice Gibbs, writing the leading judgment, held that Darnley Island had been part of Queensland since 1st August 1879 and remained part of Queensland.⁷⁵

Mason, Aickin, Wilson and Brennan JJ, in brief but separate judgments, agreed with Gibbs CJ's decision.⁷⁶

This case focused on the effect of certain imperial instruments that declared Darnley Island part of Australia. It was not a challenge to the legitimacy, legality or justice of

⁷⁴ Beche-de-mer, also known as trepang, is a sea cucumber. Wacando intended to fish in the seabed surrounding Darnley Island and between Darnley Island and other islands that are more than 60 miles from the Queensland mainland coast.

⁷⁵ Above n 52 at 19.

⁷⁶ *Ibid* at 27 per Mason J, *ibid* at 28 per Aickin J and *ibid* at 28 per Wilson J. Wilson J agrees with Gibbs CJ but has one reservation that there is no legal efficacy of the *Letters Patent of 1878*. Brennan J, *ibid* at 30, also agrees with Gibbs CJ.

the legal doctrine authorising the extension of sovereignty over Darnley Island.⁷⁷

However, Murphy J wrote an interesting judgment that demonstrates the assumptions underlying the High Court's rejection of absolute Aboriginal sovereignty.

In the *Treaty of Tordesillas* (1494) the Portuguese and Spanish claimed to divide between them the non-European world ... Under this disposition the Eastern half of Australia and Darnley Island apparently belonged to Spain. The arrogance of the European powers continued into and throughout the nineteenth century and the British were no exception. Around the world land was claimed under the false pretence that it was unoccupied or *terra nullius*⁷⁸ ... Islands off the Australian mainland were annexed or abandoned without reference to the inhabitants. The cavalier way in which the British authorities dealt with the affairs of the Australian colonies is evidenced by gross inconsistencies and ludicrous errors of geographical description in important State documents referred to in the hearing.⁷⁹

The eighteenth century pretensions of the British authorities to make law for other peoples aroused resistance by the American colonies which culminated

⁷⁷ *Ibid* at 11. Gibbs CJ noted that the plaintiff did not challenge the correctness of the statement of Diplock L.J in *Post Office v. Estuary Radio Ltd.* (1968) 2 QB 740 at 753, which he had cited with approval in the *Seas and Submerged Lands* Case above n 61 at 388:

It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required.

⁷⁸ Importantly, he refers to *Coe* (No. 1).

⁷⁹ Above n 50 at 27.

in the War of Independence. Although these pretensions (like those of the Stuart Kings) have been progressively modified and now seem unacceptable to many, they provide the basis of the assumptions on which this case was argued ... On these assumptions however, it follows that the application of the *Colonial Boundaries Act 1895 (Imp.)* disposes of the plaintiff's claim that Darnley Island is not part of Queensland. [Emphasis added].⁸⁰

Murphy J's articulate judgment indicates clear dissatisfaction with the manner of acquisition of sovereignty in Australia. He notes the ludicrous pretensions relied upon to maintain the fiction of *terra nullius* and Australia as a settled colony. The interesting aspect of Murphy J's decision is his explicit discussion of the assumptions upon which the acquisition of Australia was legally justified. These assumptions, according to Murphy J, do not align with contemporary standards. More fundamentally, these are merely assumptions. It is these assumptions that were relied upon to justify colonisation. It is similar assumptions that underpin the apparent rejection of the existence of Aboriginal sovereignty in contemporary Australian society.

⁸⁰ *Ibid* at 28.

Coe v Commonwealth (No. 2) (1993)

After the landmark decision in *Mabo (No. 2)*, recognising native title and rejecting jurisprudence arising from *Cooper v Stuart*, the question of Aboriginal sovereignty was again brought before the High Court.

On behalf of the Wiradjuri, Isabelle Coe, the sister of Paul Coe (the plaintiff in *Coe (No. 1)*),⁸¹ sought a declaration under the original jurisdiction of the High Court that the Wiradjuri are the owners of lands of a large part of southern and central New South Wales.⁸² In the alternative, Coe argued that the "Wiradjuri are a domestic dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please."⁸³ The assertion of the Wiradjuri as a domestic dependent nation was premised on the recognition of the Wiradjuri as a sovereign nation of people.⁸⁴

The defendants, the Commonwealth of Australia and the State of New South Wales, applied to strike out certain paragraphs or alternatively to dismiss, stay or strike out

⁸¹ Paul Coe, Chairman of the Aboriginal Legal Service, acts for the plaintiff in these proceedings.

⁸² Above n 3 at 194 for a description of the lands.

⁸³ *Ibid* at 195. The "sovereignty claim" is set out at *ibid* at 195 - 196.

⁸⁴ *Ibid*.

the statement of claim.⁸⁵ Mason CJ, sitting alone at first instance, heard the applications.⁸⁶

Coe, relying on Murphy and Jacob JJ's decision in *Coe (No. 1)*, argued that *Coe (No. 1)* must be read in light of *Mabo (No. 2)*. However, Mason CJ restricted the reinterpretation of *Coe (No. 1)*, stating, "Coe lends no support whatsoever to a subsisting Aboriginal claim to sovereignty".⁸⁷ Chief Justice Mason stated that:

Mabo (No. 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo (No.2)* denied that the Crown's acquisition of sovereignty over Australia could be challenged in the municipal courts of this country ... *Mabo (No. 2)* recognized that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown. [Emphasis added].⁸⁸

⁸⁵ Commonwealth of Australia sought an order pursuant to O 20 r 29 or O 26 r 18 of the *High Court Rules 1952* (Cth),

⁸⁶ Interestingly, it was Mason CJ's decision at first instance in *Coe (No. 1)*, which was ultimately upheld.

⁸⁷ Above n 3 at 199.

⁸⁸ *Ibid* at 200.

Chief Justice Mason collapsed all notions of sovereignty into one notion of absolute state sovereignty. However, sovereignty is far more complex than this. Chief Justice Mason does not provide room for this complexity in his analysis:

The allegation ... that the Wiradjuri are a dependent domestic nation, entitled to self-government and full rights over their tribal lands, is but another way of putting the sovereignty claim. The allegation has no basis in domestic law. Likewise, the claim ... that the Wiradjuri are a free and independent people is but another aspect of the sovereignty claim, having no independent legal significance. [Emphasis added].⁸⁹

Chief Justice Mason's reasoning is flawed. As a result of folding all sovereignty and self-government arguments into one closed notion of absolute Westphalian state sovereignty, Mason CJ appears to reject the possibility of Wiradjuri sovereignty existing in any form whatsoever.

Interestingly, Mason CJ held that the claim was brought for an improper purpose. In addition to evidence that the predominant purpose was to aid a political campaign

⁸⁹ *Ibid* at 200.

foreign to the litigation, the fact that the core of the claim was sovereignty and therefore untenable constituted further evidence of an improper purpose.⁹⁰

In the result, the High Court rejected the sovereignty claim that the Commonwealth lacked legislative competence to impair Wiradjuri rights. Mason CJ, sitting alone at first instance, rejected the argument that after *Mabo (No. 2)*, the Crown's acquisition of sovereignty over Australia could be challenged in domestic courts. He also affirmed Gibbs J's statement in *Coe (No. 1)* that the notion of domestic dependent nations is not applicable in Australia.

Walker v New South Wales (1994)

Walker was charged with six offences under the *Crimes Act 1900 (NSW)*.⁹¹ In his defence, Walker challenged the ability of the New South Wales Parliament to enact the provisions under which he had been charged and asserted that the common law is only valid in its application to Aboriginal people to the extent it has been accepted by Aboriginal people. New South Wales applied for the action to be dismissed or

⁹⁰ *Ibid* at 206 - 207, relying on *Williams v Spautz* (1992) 174 CLR 509. The alleged campaign was to contribute to the political settlement of claims made by Aboriginal people in Australia, including the Wiradjuri. In particular, the alleged intention was to indicate that Aboriginal people have rational claims and that the farming community should start negotiating with the Wiradjuri for the payment of royalties for the occupation of Wiradjuri land. This was per John McDonnell's affidavit, which deposes statements by Paul Coe. The plaintiff, Isabelle Coe did not contest the making of these statements.

⁹¹ Walker is a well-respected Aboriginal elder and activist and was charged under section 33A of the *Crimes Act 1900 (NSW)* for malicious discharge of loaded arms with intent to do grievous bodily harm or to resist arrest and section 58 of the *Crimes Act 1900 (NSW)* for assault with intent to commit a felony or assault of an officer in the execution of his duty. The incident occurred whilst Walker was defending a sacred site. In response to the final sentencing decision, a "Free Denis Walker" campaign was instigated.

stayed, arguing that the statement of claim did not plead a reasonable cause of action.⁹²

Walker denied this was a claim for sovereignty. The question raised was whether, after *Mabo (No. 2)*, earlier cases that determined Aboriginal law did not exist, that were based on *terra nullius*, maintained precedential weight. The plaintiff argued that Aboriginal criminal law is recognised by the common law and continues as Aboriginal land tenure laws were held to continue in *Mabo (No. 2)*. The plaintiff asserted that courts had never finally determined whether Aboriginal criminal law is still applicable and argued that "the criminal law that was imported to New South Wales on colonization was only the law that affected the colonists."⁹³

Chief Justice Mason, sitting alone at first instance, referred to *Coe (No. 1)* and held that the pleadings were couched in terms of legislative incapacity and therefore untenable.⁹⁴ In considering whether the previous jurisprudence was still applicable, Mason CJ again stated that:

There is nothing in the recent decision in *Mabo v. Queensland (No. 2)* ... to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to

⁹² O 26 r 18 *High Court Rules 1952 (Cth)*.

⁹³ Above n 53 at 46.

⁹⁴ *Ibid* at 48.

Aboriginal people is in any way subject to their acceptance, adoption, request or consent. Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, *Mabo (No.2)* rejected that suggestion.⁹⁵

Mason CJ considered *Mabo (No. 2)* to be "entirely at odds" with any notion of Aboriginal sovereignty. Further, Mason CJ reasoned that a construction that results in different criminal sanctions for different persons for the same conduct offends both the principle of equality and section 10 of the *Racial Discrimination Act (1975) (Cth)*.⁹⁶

Mason CJ held that the statement of claim did not disclose a reasonable cause of action "in so far as it is based on the proposition that the legislatures lacked power to legislate over Aboriginal peoples."⁹⁷ As in the previous decisions rejecting the existence of Aboriginal sovereignty, this case collapsed all notions of Aboriginal sovereignty into one Westphalian notion of sovereignty that interconnects notions of sovereignty with the state.

REJECTION OF ABSOLUTE NOT MODIFIED SOVEREIGNTY

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 49. Section 10 of the *Racial Discrimination Act 1975 (Cth)* is the equality rights provision.

⁹⁷ *Ibid* at 50. Even though it was a request for the action to be dismissed or alternatively stayed, the statement of claim was struck out for no reasonable cause of action.

These High Court cases, particularly *Coe (No. 1)* and *Coe (No. 2)*, at first glance pose a formidable hurdle to the assertion of Aboriginal sovereignty in Australia today. This is the argument often raised to deny the right of self-government and the continuing existence of Aboriginal sovereignty in any form whatsoever. However, properly considered, these cases do not exclude the possibility of the assertion and recognition of Aboriginal self-government where the underlying Aboriginal sovereignty is not in opposition to Crown sovereignty. It is this form of modified Aboriginal sovereignty that supports the argument for the recognition of Aboriginal self-government.

In order to indicate the limited extent the rejection of absolute Aboriginal sovereignty in these cases pose for the recognition of common law self-government, I examine the nature of the questions that were put before the Court, the assumptions the Court relied on in its response and the expansive interpretations commentators have given to these cases.

Flawed Questions

The questions brought before the Court arguing for the recognition of Aboriginal sovereignty all failed to clearly distinguish between absolute sovereignty and modified sovereignty.

For instance, in *Coe (No. 1)*, the High Court was faced with a claim for absolute Westphalian state sovereignty for an ahistorical single Aboriginal nation of Australia. In addition, Coe attempted to make a claim of modified sovereignty on behalf of the single Aboriginal nation of Australia. Relying on Marshall CJ's decision in *Cherokee Nation v Georgia*,⁹⁸ Coe failed to establish the relevance of this United States jurisprudence and failed to clearly distinguish the concept of domestic dependent nations, a concept encapsulated by modified sovereignty, from absolute Westphalian state sovereignty. The question before the Court thus collapsed all notions of sovereignty into one notion of absolute sovereignty.

When the question of Aboriginal sovereignty was raised post-*Mabo (No. 2)*, after the recognition of inherent Aboriginal rights to land, the plaintiffs again failed to distinguish between absolute and modified sovereignty. Isabelle Coe, in *Coe (No. 2)*, made a claim for absolute sovereignty and in the alternative, a claim for recognition as a domestic dependent nation. Although the claim appears to be for modified sovereignty, it was not clearly articulated to distinguish it from the claim of absolute sovereignty. This is evident in Mason CJ's response where he stated that *Mabo (No. 2)* is "equally at odds" with any other form of "limited" sovereignty.

Because these cases were not properly advanced or properly argued, the Court seems to have considered Aboriginal sovereignty as either absolute sovereignty or

⁹⁸ Although the concept of domestic dependent nations was discussed, the issue of self-government was not considered to the same extent as in the final decision of the Marshall trilogy, *Worcester v Georgia*.

no sovereignty. The plaintiffs did not advance and the Court did not consider the proper construction of colonial law that there is a mid-point between these two positions. Therefore, the Court was not confronted with the question of an individual Aboriginal nation with laws distinct to itself or modified sovereignty and self-government that is consistent with the existence of the Australian state. As a result, because these issues have never been considered in Australia, they have never been rejected.

A further interesting aspect of the nature of the questions brought in these cases is that all of these cases, except for *Walker v New South Wales*, were brought under the original jurisdiction of the High Court.⁹⁹ This means that the statement of claim was filed in the High Court and a single judge acted as a trial judge at first instance. This is quite a different situation to most High Court cases that form part of the appellate jurisdiction of the High Court and have been considered by a trial court, an appellate court and granted special leave to appeal before being considered by the High Court.

There are two fundamental differences that must be recognised. First, cases brought under the original jurisdiction deal with both questions of law and questions of fact.

⁹⁹ Both the *Commonwealth Constitution* and the *Judiciary Act 1903 (Cth)* have vested the High Court with original jurisdiction. Section 75 of the *Commonwealth Constitution* vested the High Court with original jurisdiction in five areas, including matters where the Commonwealth, States or other countries are parties to the litigation. In addition, section 30 of the *Judiciary Act 1903 (Cth)* also confers original jurisdiction on the High Court in matters arising under the *Commonwealth Constitution* or its interpretation. The High Court also has exclusive jurisdiction where its jurisdiction is exclusive of the jurisdiction of state courts. Section 38 of the *Judiciary Act 1903 (Cth)* confers exclusive jurisdiction on the High Court in matters involving states or the Commonwealth.

However, cases brought under the appellate jurisdiction are limited to questions of law. Therefore, in these cases, High Court judges were acting as judges at first instance.¹⁰⁰ Secondly, in considering cases brought under the appellate jurisdiction, the High Court has the benefit of the reasons of judgment of the lower courts. There are no previous decisions in cases brought under the original jurisdiction. As a result, the problems that may arise with a statement of claim that has not been subject to the normal disputation at trial may, and did, arise in these circumstances.

Therefore, although these are all High Court decisions, it is important to recognise that they were brought under the original jurisdiction. Accounting for the fact that the High Court's original jurisdiction only extends to matters that go to the core of the Australian constitutional and legal framework, it is important to recognise the procedural nature of these cases. A first instance decision, made prior to trial of the issues, must not be extrapolated into a rejection of Aboriginal sovereignty in all forms whatsoever.

Flawed Assumptions Underpinning the Court's Response

Earlier in this chapter, I outlined seven assumptions that underpin these High Court decisions.¹⁰¹

¹⁰⁰ The question before the Court is not whether the issues raised have been made out on a balance of probabilities but rather, whether the statement of claim raises a cause of action and is not vexatious, embarrassing or scandalous; See O 26 r 18 and O 20 r 29 *High Court Rules 1952 (Cth)*.

¹⁰¹ See page 39.

Assumption number one is not maintainable. The rejection of the Marshall jurisprudence because there is a "difference" between the treatment of indigenous peoples in Australia and the treatment of indigenous peoples in the United States is based on a flawed understanding of the United States jurisprudence. In Chapter 3, I elaborate this point. Despite the apparent rejection in *Coe (No. 1)* and *Coe (No. 2)*, the Marshall trilogy formed part of the colonial common law that was imported to Australia at colonisation.

The crux of assumptions number two to seven is a reliance on one particular notion of sovereignty. Given the nature of the questions presented to the Court, this is not surprising. The High Court collapsed all notions of sovereignty, including Aboriginal sovereignty that does not exist in opposition to Crown sovereignty, into one notion of absolute state sovereignty. The synthesis of these complex notions of sovereignty under the banner of absolute sovereignty denied the Court the opportunity to consider the possibility of the continuing existence of modified Aboriginal sovereignty. This extrapolation of the concept of sovereignty is without jurisprudential basis and with respect, the High Court is incorrect in denying the existence of all forms of Aboriginal sovereignty and self-government on this ground. As a result, I reject all six assumptions that rely on this collapsed notion of sovereignty.

First, Aboriginal sovereignty, where it is modified sovereignty, does not necessarily challenge the legal foundation of the Commonwealth of Australia. Second, Aboriginal sovereignty does not necessarily limit Parliamentary power. Aboriginal and Parliamentary power can co-exist. Third, the division of powers in the *Commonwealth Constitution* do not preclude the existence of Aboriginal sovereignty. Aboriginal sovereignty has a different source than Crown sovereignty and therefore does not rely on the division of powers in the *Commonwealth Constitution*, powers that emanate from Crown sovereignty. Fourth, legislative, executive and judicial arms are not a necessary requirement of government. This is an erroneous ethnocentric assumption. Fifth, whether or not Aboriginal people have these three arms of government is irrelevant to whether or not they are sovereign peoples. Again, this is an ethnocentric perception of government. Finally, an Aboriginal nation maintaining sovereignty is not impossible. Aboriginal sovereignty continues to exist in a modified form.

The High Court's assumptions, all relying on one understanding of sovereignty as absolute sovereignty, are invalid. As a result, the inferences the High Court has drawn from these assumptions are questionable.

Conflated Commentary

Unfortunately, commentators have generally given expansive interpretations to this series of High Court cases by exaggerating the scope of the rejection of sovereignty. As a result, the myth that Aboriginal sovereignty has been rejected in any form whatsoever has been perpetuated. This has then been used to deny the right of self-government. Peter Grose aptly summarises the general position.¹⁰²

In one sentence the summary of the issue of indigenous sovereignty in Australian municipal courts is that it is a non-justiciable issue.¹⁰³

As a result of this position, these cases are generally relied on to distinguish Australia from Canada, New Zealand and the United States, where self-government has been recognised to varying degrees. Andrew Lokan writes:

It appears unlikely that any broad and general right to self-government, of the kind recognised in the United States by Marshall CJ in the early decades of the 19th century, will be recognised as part of the common law of Australia. *Mabo's* emphatic statements about the establishment of Crown sovereignty,

¹⁰² See Otta, above n 40 at 102. She concludes that "[i]n the terms of contemporary international and domestic legal discourse, indigenous sovereignty is an impossibility." See also H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues* (Sydney: Law Book Company, 1991) at 70. Garth Nettheim, "International Law and Sovereignty" in Christine Fletcher (ed.), *Aboriginal Self-Determination in Australia* (Canberra: Aboriginal Studies Press, 1994) 70 at 73.

¹⁰³ Peter Grose, "The Indigenous Sovereignty Question and the Australian Response" (1996) 3:1 *Australian Journal of Human Rights* 40 at 43. Although he disagrees with these decisions, he suggests that political routes are the best option and sees the legal question as moot at 61 - 68.

coupled with the holdings in the two *Coe v Commonwealth* cases, appear to leave little or no room for a claim of this nature.¹⁰⁴

With respect, this interpretation of *Coe (No. 1)* and *Coe (No. 2)* is incorrect. The High Court in *Coe (No. 1)* was faced with a claim for absolute Westphalian state sovereignty, for a single Aboriginal nation of Australia that fundamentally challenged the legitimacy of the Australian state. This was categorically rejected by the High Court. It is wrong to think that this rejection necessarily excludes sovereignty that is not absolute Westphalian sovereignty, exists at a community level and does not fundamentally challenge the legitimacy of the Australian state.

CONCLUSION

Pre-contact Aboriginal sovereignty gave Aboriginal peoples exclusive jurisdiction over their land and affairs. The colonisation of Australia and the establishment of colonial government have necessarily modified Aboriginal sovereignty. However, Aboriginal sovereignty cannot be understood by reference only to international law concepts. Instead, a pluralistic notion of sovereignty should be applied consistent with the coming together of communities, legal systems and different forms of government.¹⁰⁵

¹⁰⁴ Andrew Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 Melbourne University Law Review 65 at 116.

¹⁰⁵ Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's Law Journal 173 at 185. Macklem argues that recognising the right of self-government is driven by the desire to recognise incidents

Once the assertion of absolute sovereignty is jettisoned, the assertion of modified sovereignty does not result in the incapacity of Parliament. Australian judicial decisions do not deny that Aboriginal people are entitled to common law rights, including the common law right of self-government.¹⁰⁶ Therefore, although the High Court has rejected the existence of absolute sovereignty on several occasions, this is not fatal to the recognition of a common law right of Aboriginal self-government. Aboriginal sovereignty continues to exist and, although modified, supports the common law right of self-government.

of inherent Aboriginal sovereignty in light of the existence of the state. See also S.E. Merry, "Resistance and the Cultural Power of Law" (1995) 29 Law and Society Review 11 at 23, who argues that using this definition of modified Aboriginal sovereignty, it promotes a "legally plural notion of law in which state law is only one of many levels".

¹⁰⁶ Above n 3 at 200.

Chapter Three

SELF-GOVERNMENT & THE COLONIAL COMMON LAW

In 1832, the United States Supreme Court decided *Worcester v Georgia*.¹ This seminal decision is foundational to Aboriginal rights jurisprudence, not only in the United States but throughout much of the former British Empire. Chief Justice Marshall wrote the leading judgment in *Worcester v Georgia* and in two preceding Aboriginal rights cases: *Johnson v McIntosh*² and *Cherokee Nation v Georgia*.³ These cases are collectively referred to as the "Marshall trilogy".⁴ In these cases, Marshall CJ treated land and sovereignty as the two vital elements of Aboriginal rights.⁵ I focus on the final decision in the trilogy as it contains the clearest and most comprehensive consideration of self-government.⁶

¹ 31 U.S. (6 Pet.) 515 (1832).

² 21 U.S. (8 Wheat) 543 (1823).

³ 30 U.S. (5 Pet.) 1 (1831).

⁴ See Howard Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978) 27 Buffalo Law Review 637. Chief Justice John Marshall was the fourth Chief Justice of the United States Supreme Court. He took the oath of office on 4 Feb 1801 and served until his death on 6 July 1835. See J.E. Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996) at 1, 20, 283, and 285; Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 University of British Columbia Law Review 1.

⁵ *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 (Written argument of the Nisga'a Tribal Council at 27).

⁶ Howard Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978) 27 Buffalo Law Review 637 at 660 argues that *Worcester v Georgia* provides the clearest, most complete articulation of Aboriginal rights and should be seen as the culmination of an evolving doctrine. Berman also notes that this is the only case in the trilogy decided on substantive merits involving a "live issue" of Aboriginal rights. Therefore, although *Coe (No. 1)* and *Coe (No. 2)* dealt with the second case, *Cherokee Nation v Georgia*, I suggest that this case was not the final or most articulate statement on self-government.

Worcester v Georgia reviews the history of British dealings with Aboriginal peoples in America and articulates certain principles implicit in those dealings. Chief Justice Marshall's judgment, akin to Lord Mansfield's celebrated decision in *Campbell v Hall*,⁷ provides "structure and coherence to an untidy, diffuse body of customary law based on official practice."⁸ *Worcester v Georgia* encapsulates the common law legal doctrine of inherent Aboriginal self-government, a doctrine originating in British imperial law.

The concise statement of the inherent right of self-government in *Worcester v Georgia* has been adopted in Canada but not in Australia. The adoption of this doctrine in Canada is indicative of its nature as a colonial common law doctrine. It is the imperial colonial origins of this doctrine that provide the basis for its application in Australia. Therefore, one must ask, if *Worcester v Georgia* coherently states British colonial common law, why has it not been adopted in Australia? In order to answer this question, I first examine the decision in *Worcester v Georgia* before considering the Canadian and Australian response.

WORCESTER V GEORGIA & THE RIGHT OF SELF-GOVERNMENT

⁷ (1774) 1 Cowp. 204; 98 E.R. 1045.

⁸ Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 739.

In 1829, Georgia passed legislation that added Cherokee territory to Georgia's counties, extended Georgia's laws over that territory and annulled all Cherokee laws.⁹ The following year, Georgia passed further legislation that prevented the exercise of power under pretext of authority from the Cherokee Nation and prevented white persons from residing within Cherokee territory.¹⁰ In September 1831, Samuel A. Worcester, a New England missionary, was charged with "residing within the limits of the Cherokee nation without a license."¹¹ He received four years imprisonment. Worcester appealed to the Supreme Court.

Worcester was a preacher and argued that he was residing in Cherokee territory with permission of the Cherokee Nation and the United States. He submitted that the alleged crime was not within the court's jurisdiction. Worcester pointed to treaties signed between the United States and the Cherokee Nation, arguing that these recognised the Cherokee as a sovereign nation, authorised to govern themselves and therefore not subject to Georgia's laws. Worcester argued that Georgia's acts were repugnant to both the United States constitution and the treaties and as a result were unconstitutional and void.¹²

On 3 March 1832, Chief Justice Marshall delivered the Supreme Court's decision. In considering the validity of the treaties and Georgia's legislation, Marshall CJ

⁹ For full text (including the lower court decisions) see *Worcester v Georgia* 1832 U.S. LEXIS 489 at 9.

¹⁰ *Ibid* at 1.

¹¹ Above n 1 at 537. Elizur Butler, James Trott, Samuel Mays, Surry Eaton, Austin Copeland and Edward Losure were also charged with the same offence.

¹² *Ibid* at 538 – 540.

grappled with the implications of the United States occupation of Indian land, attempting to reconcile United States sovereignty with Indian rights.¹³

Chief Justice Marshall considered the doctrine of discovery and confirmed the pre-existing sovereignty of Indian nations:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.¹⁴

The doctrine of discovery has often been misinterpreted to justify the extinguishment of aboriginal rights, title and sovereignty.¹⁵ However, the Chief Justice articulated the doctrine of discovery such that it regulates the relationship between European nations and merely restricts Indian nations ability to treat with the "discovering" nation, if Indian nations choose to treat. The doctrine of discovery does not impose any other restrictions on aboriginal peoples.

¹³ There were two preliminary issues in *Worcester v Georgia*. The first issue was whether the Supreme Court had jurisdiction. Marshall CJ determined there was jurisdiction, as the validity of treaties, and at a minimum their construction, was called into question. The second issue was whether the record was properly before the court. There was a question whether the clerk's signature, rather than the judge's signature was sufficient; *ibid* at 537. Marshall CJ and M'Lean J, *ibid* at 563, 568 and 573, held that there was no deficiency. Baldwin J dissented on this ground, arguing that the record was not properly returned upon the writ of error as the record ought to have been returned by the state court, not by the clerk of the state court. As to the merits of the case, Baldwin J stated that his opinion remained the same as was expressed in *Cherokee Nation v State of Georgia*.

¹⁴ *Ibid* at 542 – 543.

¹⁵ See *Mabo v Queensland* (1992) 175 CLR 1 ("*Mabo* (No. 2)") and *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

Marshall CJ considered numerous treaties, including the *Treaty of Holston*.¹⁶ He interpreted the *Treaty of Holston* as explicitly recognising the national character of the Cherokee, Cherokee lands and their right of self-government and also imposing on the United States a duty of protection. This relationship of protection was consistent with the roles of the United States and Georgia since Confederation. Chief Justice Marshall concluded that the United States had the sole right to deal with First Nations.

After recognising pre-existing sovereignty and occupation, Marshall CJ articulated the concept of self-government. In an oft-quoted passage, Marshall CJ stated:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others."¹⁷

¹⁶ Above n 1 at 556. This treaty was frequently renewed.

¹⁷ *Ibid* at 559.

In addition to elaborating on the doctrine of discovery, this passage recognises indigenous peoples as "nations". Importantly, the term is used in its general international sense recognising, at a minimum, a measure of self-government. In addition, referring to Vattel and the Law of Nations, Marshall CJ noted that although a weak state, in order to provide for its safety, may place itself under the protection of a more powerful state, the weaker state does not cease being sovereign or lose its right of self-government.¹⁸ Therefore, conceiving of the Cherokee as a nation under the protection of the United States was consistent with international legal practice and meant the Cherokee retained their inherent right of self-government.

Marshall CJ's view was not unanimous. M'Lean J, in a notable concurrence, recognised Cherokee self-government but reasoned that, "the exercise of the power of self-government by the Indians within a state, is undoubtedly contemplated to be temporary."¹⁹ His rationale was that a time might come where "a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government" and that in that case, the local law, by necessity, must be extended over the Indian nation.²⁰ This hegemonic reasoning, based on the "dying race theory", relies on the inferiority and subsequent frailty of Indian nations.

¹⁸ *Ibid* at 561.

¹⁹ *Ibid* at 593. See also Timothy Joseph Preso, "A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court and the Indian Commerce Clause" (1994) 19 Am. Indian L. Rev. 443 at 456.

²⁰ *Ibid*. *Worcester v Georgia* has had a chequered experience in its interpretation in United States law, with the United States Supreme Court oscillating between an expansive and restrictive definition of Aboriginal self-government. See Timothy Joseph Preso, "A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court and the Indian Commerce Clause" (1994) 19 Am. Indian L. Rev. 443 at 456 – 459.

Despite this Darwinist construction of Indian nations, M'Lean J recognised the inherent right of Aboriginal self-government:

At no time has the sovereignty of the country been recognized as existing in the Indians, but they have always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession. [Emphasis added].²¹

M'Lean J's conception of self-government is grounded in a recognition of prior occupation and prior sovereignty, which is consistent with aboriginal rights jurisprudence in Canada and Australia. Importantly, he distinguishes between absolute state sovereignty and modified or limited sovereignty.²²

In the result, the Supreme Court declared Georgia's legislation void and the judgment a nullity because it was repugnant to the constitution, laws and treaties of the United States.

²¹ Above n 1 at 580.

²² This distinction and its implications were developed in full in Chapter 2.

WORCESTER V GEORGIA IN CANADA AND AUSTRALIA?

Worcester v Georgia encapsulates the common law legal doctrine of inherent Aboriginal self-government, which originates in British imperial law. Since both Canada and Australia were colonised by Britain and founded on British colonial common law, this doctrine is applicable in both Canada and Australia. I consider first the Canadian and then the Australian judicial treatment of this case.

Canada: A Selective Embracing

The inherent right of Aboriginal self-government is recognised in Canada however, this is primarily through government policy.²³ Although the courts have commented on the issue, indicating there may be a common law right constitutionally protected by section 35(1) of the *Constitution Act 1982*, the issue has not been conclusively decided by the Supreme Court of Canada.²⁴ Courts have, however, recognised principles emanating from *Worcester v Georgia* as principles of British colonial common law applicable in Canada. The most recent and comprehensive

²³ The federal government's policy, "Aboriginal Self-Government: The Government of Canada's Approach to the implementation of the Inherent Right of the Negotiation of Aboriginal Self-Government" (1995) includes the statement that:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institution, and with respect to their social relationships.

²⁴ As mentioned in Chapter 1, in interpreting section 35(1) and determining the content of Aboriginal rights, courts must have regard to the common law.

consideration of the relevance of *Worcester v Georgia* and the inherent right of self-government was a first instance decision by the Supreme Court of British Columbia in *Campbell v British Columbia*.²⁵

The first significant statement on the applicability of *Worcester v Georgia* was in *Connelly v Woolrich* (1867),²⁶ a case decided just nine days after Canadian Confederation. Monk J reviewed the Marshall trilogy and concluded that the assertion of British sovereignty did not affect the pre-existing customary law of the Cree Nation. Monk J wrote:

Will it be contended that the territorial rights, political organization such as it was, or the law and usages of the Indian tribes, were abrogated -- that they ceased to exist when these two European nations began to trade with the Aboriginal occupants? In my opinion, it is beyond controversy that they did not -- that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better than to cite the decision of a learned and august tribunal - the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, Chief Justice Marshall ... said ... [Monk J set out in length passages I have already cited] Though speaking more particularly of Indian lands and territories, yet the

²⁵ *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

²⁶ (1867) 11 L.C.J 197.

opinion of the Court as to the maintenance of the laws of the Aborigines is manifest throughout. The principles laid down in this judgment, admit of no doubt.

... I have no hesitation in saying that, adopting these views of the question under consideration ... the Indian political and territorial rights, laws and usages remained in full force - both at Athabaska and in the Hudson Bay region, previous to the *Charter of 1670* and even after that date, as will appear hereafter.²⁷

Monk J, conceding that the Athabaska district was within the Hudson Bay territories, concluded that although the common law prevailed, it had a very restricted application:

... only among, and in favour of, and against those "who belonged to the Company or were living under them". It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. That Charter did introduce the English law, but did not, at the same

²⁷ *Ibid* at 205-207. Story J concurred in this decision.

time, make it applicable generally or indiscriminately - it did not abrogate the Indian laws and usages. [Emphasis added].²⁸

Monk J articulated two principles in this judgment. First, that the principles of self-government articulated by Marshall CJ in *Worcester v Georgia* are principles of British common law. They are therefore applicable in Canada and throughout the British Empire. Secondly, that although the focus of the Marshall trilogy was land, the principles relating to the continuing existence and recognition of Aboriginal law "is manifest throughout".²⁹

Justice Strong's judgment in the Supreme Court of Canada's decision in *St. Catherines Milling & Lumber Co. v R* ("*St. Catherines Milling*")³⁰ in 1887 also recognised the common law nature of the principles enunciated in *Worcester v Georgia*. This decision was appealed and affirmed by the Privy Council.³¹ Although aboriginal self-government was not directly considered, the Court discussed aboriginal title in a manner that has implications for the recognition of self-government.

²⁸ *Ibid* at 213-214.

²⁹ *Ibid* at 214.

³⁰ (1887) 13 SCR 577 at 610 - 613. See also Ritchie CJ at 600, Fournier J at 638 who concurred with Ritchie CJ and Gwynne J at 650. Henry J at 639 dismissed the appeal and did not refer to United States case law.

³¹ *St. Catherines Milling & Lumber Co. v. R.* (1888) 10 App. Cas. 13. The Privy Council did not consider the applicability of United States case law in Canada but handed down its decision on the basis of the *Royal Proclamation of 1763*.

St. Catherines Milling involved a dispute over the ownership of trees. The land in question had been surrendered under the *North West Treaty No. 3*. The Privy Council held that section 109 of the *Constitution Act 1867* transferred all lands, mines and minerals to the provinces. However, this transfer was subject to "an interest other than that of the Province in the same".³² The Privy Council held that aboriginal title was such an interest and therefore encumbered the provincial title. As a result, once lands were surrendered by treaty to the federal Crown, the lands became the property of the province. Consequently, the federal timber license was invalid as the federal government's interest in the land and the trees had ceased when the land was surrendered.³³

In the Supreme Court of Canada, Strong J recognised the origin of the doctrine of aboriginal rights, which includes self-government, as the common law, rather than the *Royal Proclamation of 1763*.³⁴ Strong J also referred to the concept of "domestic, dependent nation", implicitly recognising the inherent right of aboriginal self-government. The crucial aspect of Justice Strong's judgment is his recognition that:

... the survival of pre-existing aboriginal rights and the continued legal validity of essential aspects of aboriginal internal self-government were principles of

³² *Ibid* at 32. See also Shin Imai, "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 *Queen's Law Journal* 1.

³³ *Ibid* at 34.

³⁴ Above n 30 at 610.

British common law and were to be applied in Canadian territories as they had been in what were now American territories.³⁵

Several years later, the Supreme Court of Canada in *Province of Ontario v Dominion of Canada* (1895)³⁶ adopted the passage from *Worcester v Georgia* that recognised Indian nations as "distinct, independent, political communities".

The question of self-government lay dormant until 1969, when the Nishga Tribal Council³⁷ sought a declaration that aboriginal title had never been lawfully extinguished in their traditional territory in north-western British Columbia. In the Supreme Court of Canada decision of *Calder v British Columbia* (1973),³⁸ the Court split 3 to 3 on the substantive issue. Judson J, writing for Matland and Ritchie JJ, reflected on the Marshall decisions, reaffirmed *St. Catherine's Milling* and held that aboriginal title had been extinguished.³⁹ Hall J, writing for Spence J and Laskin CJ held that there was a "wealth of jurisprudence" affirming the common law recognition of aboriginal rights to the possession and enjoyment of lands. Hall J also referred to the Marshall decisions and considered *Johnson v McIntosh* "the outstanding judicial pronouncement on the subject of Indian rights and self-government".⁴⁰ Hall J held

³⁵ *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (Written Argument, Plaintiff at 97).

³⁶ (1895) 25 S.C.R. 434 at 449.

³⁷ Now the Nisga'a Lisims Government.

³⁸ [1973] SCR 313. There was no judicial consideration of aboriginal land questions before this time, primarily due to legal restrictions prohibiting First Nations access to courts,

³⁹ *Ibid* at 320.

⁴⁰ *Ibid* at 346. *Calder* concerned the question of land, therefore making *Johnson v McIntosh*, not *Worcester v Georgia*, the most applicable case. However, as the reasoning in *Worcester v Georgia*, relies heavily on *Johnson v McIntosh*, Hall J's

that aboriginal title had not been extinguished. The 3 to 3 split was resolved by Pigeon J who, although not commenting on the substantive issues, held that the declaration could not be granted because a fiat had not been obtained. Despite the ultimate decision, it is significant that all six justices who dealt with the substantive issues agreed that *Worcester v Georgia* was persuasive in Canadian jurisprudence and that aboriginal title had existed in British Columbia as a matter of common law.

After *Calder* and the introduction of the *Constitution Act 1982*, the Supreme Court of Canada in *Guerin v Canada*⁴¹ referred to *Worcester v Georgia* in recognising that aboriginal rights arise from prior occupation and reaffirming the inherent nature of aboriginal rights.

In 1990, in *R v Sioui*⁴² Lamer J, as he then was, writing for a unanimous court, held that Great Britain had "nation-to-nation relations" with indigenous nations. He referred to British and French efforts to secure military alliance during the Seven Year's War as evidence of their regard of First Nations as "independent nations".⁴³ Lamer J quoted Marshall CJ in *Worcester v Georgia* in support of this position:

judgment also implicitly builds on concepts articulated in *Worcester v Georgia*. At times, Hall J seems to have used the two cases interchangeably, particularly when discussing the doctrine of discovery.

⁴¹ [1984] 2 S.C.R. 335 at 377 per Dickson J.

⁴² [1990] 1 S.C.R. 1025. The question before the Court was whether an undertaking by a British general to the Hurons in 1760 was a treaty under s 88 of the *Indian Act*, R.S.C., 1985, c. I-5. See also *Campbell v British Columbia (Attorney General)* (2000) 189 D.L.R. (4th) 333 (Written argument of the Nisga'a Tribal Council at 17 - 19).

⁴³ *Ibid* at 1053, "[t]he Indian nations were regarded in their relations with the European nations which occupied North America as independent nations".

... such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war: of governing themselves, under her protection: and she made treaties with them, the obligation of which she acknowledged. [Emphasis added].⁴⁴

As Monk J in *Connelly v Woolrich* had noted, Lamer J recognised that aboriginal rights encompass rights to both land and self-government:

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible. [Emphasis added].⁴⁵

Lamer J concluded by distinguishing between absolute and modified sovereignty and recognising the basis of the inherent right of self-government:

⁴⁴ *Ibid* at 1053 - 1043, quoting above n 1 at 548 - 549.

⁴⁵ *Ibid* at 1055.

Relations with the Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.⁴⁶

Several years later in *R v Van der Peet*,⁴⁷ Lamer CJ grappled with an issue similar to that before Marshall CJ in *Worcester v Georgia*. In determining the purposes behind section 35(1), Lamer CJ referred to Marshall CJ's decisions, finding the "relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings".⁴⁸ Chief Justice Lamer held that section 35(1) recognised that distinctive aboriginal societies occupied North America prior to European settlement and that section 35(1) attempted to reconcile aboriginal prior occupation with Crown sovereignty.⁴⁹ Importantly, the broad definition of what activities constituted an aboriginal right opened the door for claims that section 35(1) included a right of self-government.⁵⁰

The question of self-government was explicitly considered in *R v Pamajewon*.⁵¹

Shawanaga and Eagle Lake First Nations members, convicted of violating gambling prohibitions, argued they were exercising a right of self-government protected by s

⁴⁶ At 1038.

⁴⁷ [1996] 2 S.C.R. 507.

⁴⁸ *Ibid* at 541.

⁴⁹ *Ibid* at 538 – 539, 547 – 548. Lamer CJ, at 544, also adopted the "distinct political communities" from *Worcester v Georgia*, above n 1 at 599.

⁵⁰ Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 U.B.C. L. Rev. 1.

⁵¹ [1996] 2 S.C.R. 821.

35(1). This argument was rejected. The Supreme Court of Canada indicated that although a claim to self-government could be advanced, it must not be in excessively general terms.⁵² This was reiterated in *Delgamuukw v British Columbia* ("*Delgamuukw*").⁵³

In *Delgamuukw*, the Gitksan and Wet'suwet'en claimed a general right to govern people residing within their traditional lands and to determine whether provincial laws applied. This was a claim for "ownership and jurisdiction",⁵⁴ a broader claim than inherent self-government.⁵⁵ The jurisdiction claim extended beyond Gitksan and Wet'suwet'en members to all people within the lands claimed. The Court of Appeal dismissed the claim for jurisdiction on the basis that the *Constitution Act 1867* exhaustively divided legislative power between the federal and provincial governments and as a result no constitutional space remained for aboriginal jurisdiction.⁵⁶ This decision was appealed, however when this case came before the Supreme Court of Canada, the issues relating to aboriginal title were the principal focus of the arguments before the Court, particularly the oral arguments. However,

⁵² *Ibid* at 832, 835 per Lamer CJ; at 837 per L'Heureux-Dubé J.

⁵³ [1997] S.C.R. 1010. The initial statement of claim asserted a right to lands and jurisdiction. However, at the Supreme Court of Canada, the claim had been reduced to land only.

⁵⁴ *Delgamuukw v British Columbia* [1997] S.C.R. 1010 (Statement of Claim). The statement of claim included a claim for jurisdiction to govern themselves, their territory, maintain institutions and to confirm ownership and jurisdiction, at para. 56, 56(A), 57, 58, 59, 60 - 63. There was also an application for a declaration that Provincial jurisdiction over the Territory (a defined area) is "subject to the Plaintiff's right to ownership and jurisdiction". See also *Delgamuukw v British Columbia* [1997] S.C.R. 1010 (Opening Statement of the plaintiff at 21). This was essentially a claim for absolute sovereignty.

⁵⁵ The claim was modified and at the Court of Appeal, counsel distinguished between absolute sovereignty and modified sovereignty (although not in these precise terms).

⁵⁶ *Delgamuukw v British Columbia* (1993) 104 D.L.R. (4th) 470 at 520 per Macfarlane J.

the Supreme Court of Canada did comment and expressly left open the question of whether self-government is a right protected by section 35(1). Lamer CJ wrote:

In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment *Pamajewon*. There, I held that the rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1). [Emphasis added].⁵⁷

As a result, Lamer CJ concluded that, "the issue of self-government will fall to be determined at trial".⁵⁸ Therefore, after *Delgamuukw*, the question of whether the

⁵⁷ Above n 52 at 1114 - 1115.

⁵⁸ *Ibid* at 1115.

common law right of self-government was constitutionally protected under section 35(1) was still open for question. However, the Court did reiterate the limitation expressed in *R v Pamajewon* that a claim of self-government must not be made in excessively general terms.

Finally, in 2001, the Supreme Court of British Columbia considered the validity of the self-government provisions in the Nisga'a Treaty in *Campbell v British Columbia*. Williamson J acknowledged that a limited form of self-government, which the Nisga'a maintained after the assertion of sovereignty, was modified in the Nisga'a treaty and protected by section 35(1).⁵⁹

In reaching this decision, Campbell J stated that:

Any discussion of the recognition by courts of the survival of a limited right of self-government in aboriginal peoples in North America must start with three celebrated decisions of the long serving Chief Justice of the United States, John Marshall, all decided in the first third of the 19th century.⁶⁰

Williamson J relied on Marshall CJ's cases, particularly in their consideration of British imperial policy.⁶¹ He referred to *Johnson v McIntosh* as recognising that the exertion of British sovereignty had not extinguished, but only diminished, the

⁵⁹ Above n 25 at 376. See also s 24 of the *Nisga'a Treaty*, where "modification" not "extinguishment" was used.

⁶⁰ *Ibid* at 356.

⁶¹ *Ibid*.

inherent aboriginal right to self-government."⁶² Relying on Marshall CJ's judgments, including *Worcester v Georgia*, Williamson J. found support for an aboriginal right to self-government, recognised by section 35(1) and constitutionally enforceable against the federal government.

In considering the common law doctrine of an inherent right of aboriginal self-government, Canadian courts have consistently looked to Marshall CJ's jurisprudence, including his judgment in *Worcester v Georgia*. Although it has not been ultimately decided whether section 35(1) includes an inherent right of self-government, it is clear that such a right exists. Canadian courts have recognised the source of this inherent right as prior occupation and prior sovereignty, a recognition largely embracing notions articulated in *Worcester v Georgia*.⁶³ These decisions have recognised that the nature of the principles pronounced by Marshall CJ in *Worcester v Georgia* were principles that had ripened into a British common law doctrine of self-government. As a result of this nature as a common law doctrine, *Worcester v Georgia* has been recognised as forming part of Canadian common law.

Australia: Denial or Merely a Misunderstanding?

⁶² *Ibid* at 357.

⁶³ Above n 50.

In Australia, there is no comparable self-government discourse. Despite the seemingly inseparable relationship between indigenous communal land title and recognition of self-government and decision-making powers, discussion of self-government and indigenous sovereignty has effectively been silenced in legal discourse.⁶⁴

The first judicial consideration of Aboriginal rights and title was by the Federal Court in 1971 in *Milirrpum v Nabalco*.⁶⁵ Blackburn J relied on Lord Watson's judgment in *Cooper v Stuart*⁶⁶ in maintaining the legal fiction that Australia was *terra nullius* and a settled colony under the doctrine of discovery. Despite embracing this broadened notion of the doctrine of discovery,⁶⁷ Blackburn J rejected the operation of United States case law in Australia.⁶⁸ *Worcester v Georgia* was restricted to its facts, the validity of Georgia's legislation, and deemed not relevant.⁶⁹ This was despite the recognition that Marshall CJ "surveyed the history of colonization on the North American continent".⁷⁰ Blackburn J concluded that native title was abrogated by the doctrine of *terra nullius*.⁷¹

⁶⁴ See Michael Mansell, "The Bicentenary and Aboriginal Sovereignty" (1988) *Law Institute Journal* 1206 at 1207. See also Larissa Behrendt, "Slicing the Circle: Treaty, Native Title, Aboriginal Sovereignty and the Compartmentalizing of Indigenous Rights in Australia" (Paper presented to the Indigenous Bar Association Conference in Ottawa, 2000) [unpublished] in a section titled, "The S-Word" at 4; Dianne Otto, "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" [1995] 21 *Syracuse J. Int'l L. & Com.* 65.

⁶⁵ *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) FLR 141. Similar to Canada, Aboriginal people were denied access to the courts for numerous reasons, including a perceived inability to take the oath and therefore give evidence.

⁶⁶ *Cooper v Stuart* (1889) App Cas 286.

⁶⁷ *Mabo v Queensland* (1992) 175 CLR 1 ("*Mabo* (No. 2)") per Brennan J.

⁶⁸ Above n 65 at 218.

⁶⁹ *Ibid* at 216.

⁷⁰ *Ibid* at 215.

⁷¹ *Ibid* at 262.

The question of absolute Aboriginal sovereignty was raised in *Coe v Commonwealth* (1979) ("Coe (No. 1)").⁷² The High Court rejected this absolute sovereignty claim on the basis that the validity of the Crown's sovereignty cannot be challenged.⁷³ Gibbs J rejected the adoption of Marshall CJ's judgment in *Cherokee Nation v Georgia*, the second decision in the Marshall trilogy, on the basis that the history of the colonial relationship in the United States was "different" from Australia.

In 1992, the High Court of Australia recognised native title in *Mabo (No. 2)*. With inherently conflicting reasoning, Dawson J distinguished United States cases, including *Worcester v Georgia*, on the basis that First Nations were regarded as "domestic dependent nations", retaining a certain degree of sovereignty but still recognised that native title owes much to the celebrated judgment of Marshall CJ in *Johnson v. McIntosh*.⁷⁴ In *Wik Peoples v Queensland*,⁷⁵ Kirby J also distinguished United States jurisprudence because of the recognition of aboriginal peoples as nations with inherent powers of a limited sovereignty that had never been extinguished. Kirby J stated that this is not the relationship that indigenous people of Australia enjoy with the Australian legal system. In *Coe (No. 2)*,⁷⁶ Mason CJ affirmed Gibbs J

⁷² (1979) 24 A.L.R. 118. This case and its associated problems were considered in detail in Chapter 2.

⁷³ *Ibid* at 132 per Jacobs J, at 138 per Murphy J, at 138 per Gibbs J and at 128 per Aitkin J concurring with Gibbs J.

⁷⁴ Above n 67 at 135 per Dawson J.

⁷⁵ *Wik Peoples v Queensland* (1996) 141 A.L.R. 129.

⁷⁶ *Coe v Commonwealth* (1993) 118 A.L.R. 193 ("Coe (No. 2)"). This was referring to Marshall CJ's decision in *Cherokee Nation v Georgia*.

statement in *Coe (No. 1)* that the notion of domestic dependent nation is not applicable in Australia.

Australian courts have consistently rejected notions of Aboriginal sovereignty and the applicability of Marshall CJ's jurisprudence, including *Worcester v Georgia*.

WHY DOES CANADA ACCEPT WHILE AUSTRALIA REJECT *WORCESTER V GEORGIA*?

Justice Chapman in the New Zealand Supreme Court decision in *R v Symonds*,⁷⁷ classified the Marshall trilogy as clearly based on:

the principles of the common law as applied and adopted from the earliest times by the colonial laws.⁷⁸

This is further recognition of the imperial colonial origins, as articulated in *Worcester v Georgia* that underscores the doctrine of Aboriginal self-government. As a result, *Worcester v Georgia* is relevant in both Canada and Australia. The question then

⁷⁷ (1847) [1840 - 1932] NZPCC 387.

⁷⁸ *Ibid* at 392. He was actually referring to *Cherokee Nation v Georgia*, however, from the preceding paragraphs, this statement clearly extrapolates to *Johnson v McIntosh* and *Worcester v Georgia*. See also the Privy Council decision in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 A.C. 399 (P.C.), where the Privy Council held that the common law could affirm and give effect to rights held under Aboriginal law.

becomes, why has this doctrine been received with such different responses in Canada and Australia?

Australia has not embraced the doctrine of self-government because of a flawed understanding of the decision in *Worcester v Georgia* and the doctrine of self-government. The principal reason Australian courts have given for rejecting this jurisprudence is that Australia is "different" from the United States. But isn't Canada also "different" from the United States?

The "difference" that Australian courts have relied on in rejecting the Marshall trilogy can be seen in Gibbs J's judgment in *Coe (No. 1)* where he states that:

... it is not possible to say, as was said by Marshall CJ ... that the Aboriginal people of Australia are organised as a "distinct political society separated from others", or they have been uniformly treated as a state. [Emphasis added].⁷⁹

The "difference" referred to seems to be merely that treaties have not been signed in Australia but have been signed in the United States. However, the lack of treaties is a matter of historical fact and does not infer that Australia is not legally required to recognise Aboriginal sovereignty and Aboriginal self-government. If the "difference"

⁷⁹ Above n 72 at 128 - 129. The reference is to Marshall CJ in *Cherokee Nation v Georgia* above n 3 at 16.

is a social Darwinist indication of the evolutionary scale, on which Aboriginal Australians are often placed at the bottom, this is unacceptable.

However, the rejection of this jurisprudence in Australia is not because of a "difference" between the treatment of indigenous peoples in the United States and the treatment of indigenous peoples in Australia. Rather, the rejection of this jurisprudence is based on a mistaken interpretation of *Worcester v Georgia*, the Marshall trilogy and the doctrine of self-government. The real false assumption that Australian courts relied on in interpreting and rejecting the Marshall jurisprudence is that it recognises absolute Aboriginal sovereignty that exists in opposition to Crown sovereignty.

Therefore, rather than relying on an assumption of difference between Australia and the United States in rejecting *Worcester v Georgia*, Australian courts (and plaintiffs) have construed the Marshall trilogy in such a manner so that "domestic dependent nations" is equivalent to absolute Westphalian state sovereignty that exists in opposition to Crown sovereignty.⁸⁰ The Court interpreted the Marshall trilogy in this way for two reasons. First, because that was the manner it was presented to the Court in the statement of claim and secondly, because of an embedded notion (or the acceptance of the plaintiff's embedded notion) that every claim to sovereignty must be a claim to separate and absolute state sovereignty. This is the flawed assumption upon which this jurisprudence was rejected. With respect, Australian

⁸⁰ These terms are explained in detail in Chapter 2.

courts failed to comprehend the distinction between absolute state sovereignty, a notion recognised in international law and identified with the Peace of Westphalia, and modified sovereignty, which does not challenge the Crown sovereignty and in fact exists harmoniously with Crown sovereignty.

Therefore, the divergent interpretation of *Worcester v Georgia* in Canada and Australia is not because Canadian law is somehow more "similar" to United States law, but rather, because of a flawed understanding of the case in Australia.

Australian courts have failed to comprehend that *Worcester v Georgia* is a statement of British colonial common law and not merely American law.

CONCLUSION

Worcester v Georgia is an historic case, recognising an inherent aboriginal right of self-government. When Chief Justice Marshall handed down the United States Supreme Court decision in 1832, this pre-existing right of self-government had ripened into a rule of common law applicable to British colonies.⁸¹ Inherent self-government has been considered by several Canadian courts and accepted by a Canadian court. In contrast, Australian courts and governments have vehemently rejected the notion that Aboriginal sovereignty and self-government exist and have sought to distinguish the situation in the United States. The explanation of

⁸¹ Above n 35 at 89.

"difference", used by the High Court of Australia in *Coe (No. 1)*, does not hold up under scrutiny, given the imperial colonial common law notions underpinning Marshall CJ's judgment. The challenge Australian courts now face is recognising the previously flawed interpretation of this case and moving beyond this interpretation in order to reconsider and recognise the applicability in Australia of *Worcester v Georgia* and its consideration of self-government as a statement of British common law.

Chapter Four

NATIVE TITLE & SELF-GOVERNMENT

In 1992, a revolutionary High Court decision altered the way in which Aboriginal land rights were understood. In *Mabo (No. 2)*,¹ for the first time there was judicial recognition of native title, an Aboriginal right to land. Although this decision instigated a wide variety of discussions, I explore the relationship between native title and self-government. By analysing native title in this manner, one realises that self-government is recognised as an aspect of native title and already operates within the Australian legal system.

In this chapter, I outline the decision in *Mabo (No. 2)* before considering two arguments that challenge the contemporary acceptance of a manufactured separation between land and sovereignty.

By considering native title and its inter-relationship with self-government, it becomes apparent that self-government can be, and is, recognised by the Australian legal system. In *Mabo (No. 2)*, Brennan J wrote:

In discharging the duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and

¹ (1992) 175 CLR 1.

human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.²

Importantly, the recognition of self-government, as was the case with the recognition of native title, does not fracture the skeleton of the Australian legal system.

THE LAND RIGHTS MOVEMENT IN AUSTRALIA

There has been a long history of protest demanding Aboriginal land rights in Australia.³ The modern land rights movement began with the Gurindji's Wave Hill walk-off in the 1960's,⁴ saw the Yolgnu's unsuccessful struggle to prevent bauxite mining on their traditional land,⁵ the establishment and maintenance of the

² *Ibid* at 29.

³ See Henry Reynold's work for a history of early protest, in particular *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Ringwood: Penguin, 1982). For the lead-up to the modern land rights movement, see David Hollingsworth, *Race and Racism in Australia* (Katoomba: Social Sciences Press, 1998) at 168.

⁴ The first formal protest for land was the walk-off at Wave Hill cattle station by the Gurindji people. In August 1966 the Gurindji people went on strike demanding wages and the return of their traditional lands. Although their demand was rejected, the Gurindji camped on their land, breaking Australian law. Support was found throughout the northern Territory and across Australia and eventually the Gurindji won title to part of their land. In an important symbolic gesture, Prime Minister Gough Whitlam poured earth through the hands of Vincent Lingiari, a Gurindji elder and a principal activist in the Wave Hill walkoff. See Yunupingu, Galarrwuy, *Our Land is Our Life: Land Rights- Past, Present and Future*. (St Lucia: University of Queensland Press, 1997) at 5.

⁵ In the 1960's, the Federal Government decided to establish a bauxite mine in Arnhem land, traditional Yolgnu territory. In response the Yolgnu people sent a petition to the House of Representatives demanding their land rights be respected. The petition was on bark, with a border of paintings illustrating the importance of the land, and in the centre a written explanation of the paintings. It was a protest that involved both traditional and non-traditional ways of expressing the importance of the land. The bark petition provoked legal action and a government inquiry. Despite this, the mine went ahead. Justice Blackburn, of the Northern Territory Supreme Court, had to decide whether the Yolgnu had any legal right to their land. In *Milirrpum v Nabalco* (1971) 17 FLR 141, he decided that the common law of Australia was not "cognisant of native title" and that the Yolgnu had "a more cogent feeling of obligation to the land than ownership of it". The decision of *Milirrpum v Nabalco* was strongly criticised and even the High Court of Australia had reservations. Despite the negative result of *Milirrpum v Nabalco*, where native title was not recognised, some positive actions did follow as there was a growing awareness of Aboriginal rights. The Whitlam Labor Government appointed the Woodward Royal Commission, which recommended a statutory land rights scheme. This scheme was enacted, and after some

Aboriginal tent embassy,⁶ and culminated in the High Court's decision in *Mabo (No. 2)*. High hopes followed this decision and it was considered by many to be the culmination of 30 years of activism in the modern land rights movement. However, this has not proved to be the case. Conservative legislation and increasingly conservative interpretations of native title principles has meant that most developments since *Mabo (No. 2)* have eroded, rather than developed indigenous rights.

THE *MABO* DECISIONS

In May 1982, three Murray (Mer) Islanders, Eddie Mabo, David Passi and James Rice, instituted proceedings against the State of Queensland on behalf of the Meriam people. They argued that the Meriam people had occupied the islands since time immemorial in established communities with unique social and political organization. As a result, they argued that they had native title rights. In response, Queensland denied that the Meriam people had any native title rights at all.

unfavourable amendments by the Fraser Liberal Government due to the pressure from mining and pastoral industry groups, it was passed as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Other states followed the Northern Territory and enacted similar legislation. Despite the watering down of the Northern Territory legislation by the Fraser Government, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) has been very important. It was the first legislative recognition of an Aboriginal right to land. It has allowed Aboriginal people legal recognition of what they have always known, that the land is theirs. By 1996 more than 50% of the Northern Territory had been handed back.

⁶ The tent embassy was set up in 1972 in response to Prime Minister William McMahon's Australia Day speech. A number of Aboriginal people, including Paul Coe, Gary Foley and Dennis Walker (founders of the Black Panther Party of Australia) set up a beach umbrella (which was later replaced by tents) opposite Parliament house in Canberra. It was called the Aboriginal Embassy because, as Gary Foley stated, "Aborigines were treated like aliens in their own land." The tent embassy gained huge support across Australia for Aboriginal land rights and remains today. Gary Foley, quoted in David Hollingsworth, *Race and Racism in Australia* (Katoomba: Social Sciences Press, 1998) at 175.

However, just to be sure, the Queensland Government enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) ("Queensland Act"). The Queensland Act:

... retrospectively abolished all such rights and interests as the Murray Islanders may have owned and enjoyed before its enactment.⁷

In 1988, in *Mabo v Queensland* ("*Mabo (No. 1)*"),⁸ the High Court held that if the Queensland Act were sufficiently "clear and plain" it would extinguish native title. However, the majority held that the Queensland Act was invalid because it contravened section's 9 and 10 of the *Racial Discrimination Act (1975) (Cth)*.⁹ The question of whether the Meriam people had native title rights over their lands was still undecided.

On 3 June 1992 the High Court handed down its decision in *Mabo (No. 2)*. For the first time in Australia there was recognition of native title as a common law right. The High Court held that native title is a legal right to land, recognised by the common

⁷ Above n 1 at 196 per Mason CJ quoting Queensland counsel. See also at 210 where Brennan, Toohey and Gaudron JJ also quoted Queensland counsel:

It has the effect that those rights which might otherwise have survived annexation in 1879 are deemed not to have survived and, for the purposes of 1985, never to have survived.

⁸ (1988) 166 CLR 186.

⁹ Section 10 of the *Racial Discrimination Act* provides for rights to equality before the law. Brennan, Deane, Toohey and Gaudron JJ held that the Queensland Act was inconsistent with section 10(1) of the *Racial Discrimination Act*. Wilson and Dawson JJ dissented on this issue and Mason CJ did not comment. In regards to section 9 of the *Racial Discrimination Act*, Mason CJ, Wilson and Dawson JJ held that the Queensland Act was not inconsistent. Section 9 of the *Racial Discrimination Act* is the provision that declares racial discrimination to be unlawful. The High Court split on this issue. The remaining judges did not comment on section 9.

law upon the colonisation of Australia, that continues until extinguished by the government by clear and plain intention. The High Court declared that:

... the Meriam people are entitled as against the whole world to possession.¹⁰

The High Court's recognition of native title was not the creation of a new right previously foreign to the common law, but an acknowledgment of the reception of native title into the common law. As Garth Nettheim comments:

The *Mabo* decision was revolutionary to the extent that it correctly applied the common law after years of misapplication.¹¹

The judgement did not confine itself to Murray (Mer) Island. The High Court declared the common law for all Australia.¹²

This complex decision considered the impact of colonisation on indigenous land rights, the doctrine of *terra nullius*, and the existence and limitations of native title rights and interests. Before considering the implications of this case for self-government, it is necessary to consider a peculiar aspect of this decision that

¹⁰ Above n 1 at 2. See also Brennan J at 76 and Toohey J at 217.

¹¹ Garth Nettheim, Gary Meyers & Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Canberra: Aboriginal Studies Press, 2002) at 238. For a more in depth discussion of this concept of law, see Ronald Dworkin, *Law's Empire* (Cambridge: Balknap Press, 1986) Cf. H.L.A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).

¹² Above n 1 at 2. See also Mason CJ and McHugh J at 15. See also Lisa Strelein, "Aboriginal Land Rights in Australia" (Native Title Research Unit at Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) [unpublished] at <http://www.firstpeoples.org/land_rights/australia/land_rights_in_australia.htm>.

distinguished land rights from sovereignty. This distinction forms the basis for understanding both the current and potential relationship between native title and self-government in Australia.

In *Mabo (No. 2)*, the High Court explicitly distinguished between questions of land rights and questions of sovereignty. Although this is partially a result of the particular question before the Court, a question of land rights, the High Court did expressly draw this distinction. The clearest expression of this distinction is by Justice Brennan.

Justice Brennan distinguished between the Crown's title to a colony and the Crown's ownership of land in a colony.¹³ He noted that sovereignty vested in the Crown is of two kinds, either "the power of government" or "title to the country".¹⁴ The distinction is that the former is only capable of belonging to a sovereign whereas the latter can belong to anyone. Further:

The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law.¹⁵

¹³ *Ibid* at 43-45.

¹⁴ *Ibid* at 44.

¹⁵ *Ibid*.

As a result of this distinction, the High Court was able to recognise native title without considering the question of the continuing existence of modified Aboriginal sovereignty or Aboriginal self-government.¹⁶

Therefore, self-government and native title are considered to be two distinct concepts. Although I agree that the inherent right of self-government is a separate right, I argue that these two rights inter-relate and that in fact, the recognition of native title necessarily involves recognition and exercise of aspects of the inherent right of self-government.

In summary, native title has been recognised as a common law right in Australia. However, in recognising native title, the Court has drawn an artificial distinction between questions of land rights and questions of sovereignty. Despite this distinction and the overwhelming trend to restrict the rights and interests that flow from native title, there are two aspects of native title, as it exists today, that provide intriguing insights into the operation of and prospects for self-government in Australia.

¹⁶ Canadian jurisprudence has not drawn such a stark division between questions of land rights and questions of sovereignty. In *Delgamuukw*, a decision that ultimately played a similar role in Canadian jurisprudence as *Mabo (No. 2)* by recognising Aboriginal title. In *Delgamuukw*, the Gitksan and Wet'suwet'en claimed "ownership and jurisdiction". See *Delgamuukw v British Columbia* [1997] S.C.R. 1010 (Opening Statement of the plaintiff at 21). See also *Delgamuukw v British Columbia* [1997] S.C.R. 1010 (Statement of Claim at para. 56, 56(A) and 57). In both the trial court and Court of Appeals' decisions, the claim for jurisdiction was dismissed. Although the Court of Appeal decision was appealed to the Supreme Court of Canada, only issues relating to Aboriginal title were argued and the Supreme Court of Canada was not directly confronted with issues of jurisdiction. However, despite the construction of the question before the Supreme Court, that Court's judgment addressed primarily the title issues. See discussion above at page 77.

COMMUNAL NATIVE TITLE AND SELF-GOVERNMENT

In *Mabo (No. 2)*, the High Court recognised that native title is a communal right.¹⁷

Section 223 of the *Native Title Act 1993 (Cth)*, consistent with the common law position, also defines native title as a communal right.¹⁸

The common law recognition of native title as a communal right requires the existence of a communal decision-making authority and decision-making structure to exercise the communal right.¹⁹ It implies recognition of decision-making power and decision-making authority by Aboriginal communities. As a result, recognition of native title as a communal right includes an implied recognition that the Aboriginal community must have at least a degree of self-government necessary to allocate the use of land to which a title extends. Therefore, as a communal title:

¹⁷ Interestingly, their communal title was recognised despite their traditional laws and customs containing no concept of community title. Instead, title was held by individuals or family groups; per Brennan J in *Mabo (No. 2)* at 22. Kent McNeil interprets the Meriam peoples' communal title as originating and deriving its content from their exclusive occupation as a community of the Island of Mer rather than from their traditional laws or customs, per Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Australia and Canada* (Saskatoon: Houghton Boston Printers, 2001) at 422. See also Toohey J in *Mabo v State of Queensland* (1992) 175 CLR 1 ("*Mabo (No. 2)*") at 188-92. However, this does not restrict the application of Meriam laws and customs in determining the existence and content of individual and group rights within the Meriam community. Therefore, despite the construction of a communal nature of title for the Meriam people, it is clear that the High Court in *Mabo (No. 2)* recognised native title as a communal right. See Brennan J in *Mabo (No. 2)* at 61-63.

¹⁸ Section 223 (1) states "The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters."

¹⁹ The communal nature "presupposes the existence of community authority that must be governmental in nature", per Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill Law Journal 473.

... decision making authority over Aboriginal or native title lands rests with the community involved. Aboriginal title therefore has governmental attributes that make it much more than a property right.²⁰

The relationship between communal title and self-government is most clearly expressed in Canadian jurisprudence where the communal nature of Aboriginal title in Canada, the equivalent of native title in Australia, has also been recognised. In *Delgamuukw*,²¹ the Supreme Court of Canada defined aboriginal title as a:

... collective right to land held by all members of an aboriginal nation.

Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property rights. [Emphasis added].²²

The Supreme Court of Canada recognised that as a communal right, there is an implied recognition that the aboriginal community must have at least a degree of decision-making power or self-government necessary to allocate the use of land to which title extends. Expanding this point, Justice Williamson of the Supreme Court of British Columbia in *Campbell v British Columbia*,²³ recognised that:

²⁰ *Ibid* at para 42.

²¹ *Delgamuukw v British Columbia* (1997) 3 SCR 1010.

²² *Ibid* at 1082-1083. Aboriginal title "encompasses within it a right to choose to what ends a piece of land can be put" at 1113. See *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 366 - 367.

²³ *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

On the face of it, it seems a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental. This seems essential when the ownership is communal. [Emphasis added].²⁴

Canadian courts have recognised that the right of a community to make decisions regarding the use of the land is a fundamental aspect of aboriginal title. The right of a community to make decisions regarding the use of the land includes the right to have a political structure for making those decisions. Therefore, in Canada and, I suggest, in common sense, the right of an aboriginal community to decide the use for the land encompassed by aboriginal title is an exercise of the right of self-government.

Like Canadian aboriginal title, the communal nature of native title in Australia must entail a continuing right of self-government. As McNeil notes:

... given the nature of the right to full beneficial ownership of the land, a determination of possessory native title in Australia, like its counterparts in

²⁴ *Ibid* at 362.

North America, must necessarily include the rights to manage the land and make decisions about the uses of the land subject to possessory native title.²⁵

The logical implication that the communal nature of native title necessarily entails decision-making powers to some degree has received recognition as an element of native title. The Federal Court in both *Miriuwung Gajerrong* decisions,²⁶ at first instance and in the Full Court, confirmed that native title confers the right to manage and determine the uses of the land according to Aboriginal laws and customs. Likewise, the consent determination affirmed in *Hayes v Northern Territory*²⁷ recognised the rights of common law native title holders to "make decisions about the use of the land and waters".²⁸ In affirming this consent determination, Olney J of the Federal Court, stated that this right to make decisions:

... would be a normal adjunct of the recognition of native title rights and interests in land.²⁹

²⁵ *Western Australia v Ward and Ors* (2000) 170 ALR 159 at 212-213 and *Ward v Western Australia* (1998) 159 ALR 483 at 645.

²⁶ *Western Australia v Ward and Ors* (2000) 170 ALR 159 at 32 and *Ward and Ors v State of Western Australia and Ors* (1998) 159 ALR 483 at 639-40; The High Court decision, *Western Australia v Ward* (2002) 191 ALR 1 did not address this issue.

²⁷ [1999] FCA 1248 (Unreported, 9 September 1999). The court order required parties to confer in order to agree on the final form of the determination. See also *Hayes v Northern Territory* [2000] FCA 671 (Unreported, 23 May 2000) for the final determination, especially subsections 3(d) and 3(f).

²⁸ Lisa Strelein 'The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title Case: *Hayes v Northern Territory*' (2000) 4:26 *Indigenous Law Bulletin* 13.

²⁹ Above n 27 at para 51.

More recently, the native title determination in *Rubibi Community v Western Australia*³⁰ was consistent with the decision in *Hayes v Northern Territory* and included "the right to make decisions about the use and enjoyment of the area".³¹

The consistent recognition that native title rights and interests include a right to manage and make decisions about the land indicates that this position is not contentious in Australian native title law. Therefore, the distinction between land rights and sovereignty that the High Court took in *Mabo (No. 2)* is not reflected in current native title determinations. These determinations recognise decision-making powers that are governmental in nature as an aspect of native title.

A further illustration of the governmental nature of native title is revealed when examining the classification of native title as "proprietary". Justice Brennan held that native title is a "proprietary community title".³² Deane and Gaudron JJ, in a joint judgment, supported Brennan J's conclusion that native title was a proprietary interest by determining that the extinguishment of native title would amount to an acquisition of property within section 51 (xxxi) of the *Commonwealth Constitution*.³³ Therefore, although the Court divided on this issue in *Mabo (No. 2)*, the prevalent view is that native title is a proprietary interest. As Richard Bartlett writes:³⁴

³⁰ *Rubibi Community v Western Australia* [2001] 112 FCR 409.

³¹ *Ibid* at 452.

³² Above n 1 at 52 per Brennan J.

³³ *Ibid* at 111 per Deane and Gaudron JJ.

³⁴ Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Houghton Boston Printers, 2001) at 416.

In accordance with general principles, the High Court has recognised the proprietary nature of native title ... Native title is afforded the degree of protection and enforceability 'against the whole world' due a proprietary interest.³⁵

Whilst communal title obviously has a proprietary aspect, it also has social, cultural and political dimensions that are beyond the scope of standard conceptions of private property. This is illustrated by the restricted options of alienation available to native title holders. Generally, private property is alienable to individuals.³⁶ In contrast, native title can only be surrendered to or acquired by the Crown or other Aboriginal communities.³⁷ Native title is only alienable to the Crown because it is only alienable to an entity that has governmental capacity. Private persons who have no authority to govern cannot acquire native title for themselves, because they do not have a governmental capacity.³⁸ The restrictions on alienation indicate that native title is more than a property right. This is because of its political and governmental aspects.

³⁵ Richard Bartlett, *Native Title in Australia* (Butterworths: Sydney, 2000) at 197. This is the conclusion of the section, 'The Proprietary Nature of Native Title', beginning at 184.

³⁶ Restrictions may apply and certain individuals may have priority (in the case of options), however, it is generally the case that private property may be alienated to individuals, corporations or in some cases, the Crown.

³⁷ Above n 1 at 59 - 60, 70 per Brennan J, at 88, 110 per Deane and Gaudron JJ, at 194 per Toohey J.

³⁸ This is also consistent with a foundational common law principle, that only the Crown can acquire new title. See Chapman J in *R v Symonds* (1847) [1840 - 1932] NZPCC 387 at 389 - 390.

It is important to note the limitations of the argument that communal title involves the recognition of decision-making powers and to emphasise the relationship between this recognition of self-government as an aspect of native title and the inherent right of self-government. Taken to its logical conclusion, communal native title infers decision-making power to make decisions relating to land. These are the decision-making powers that have been recognised by Australian courts, where recognition has been limited to decisions that are directly related to land or resources. This includes decisions such as how to manage, use and enjoy the land. It is difficult to logically imply that a communal land title requires decision-making power for decisions other than land, for example, for education or criminal justice. This is because native title is a right to land. Despite the governmental aspects of this proprietary right, native title is not a right to autonomy or to govern according to Aboriginal law. This limitation could restrict the manner in which self-government is recognised as an aspect of native title to decisions relating to land and resources.

But, this limitation is not fatal to the recognition of an inherent right of self-government. Common law self-government is a separate, but related, legal doctrine, emanating from British colonial law. The decision-making recognised as an aspect of native title, decision-making towards land, is properly characterised as an exercise of the inherent right of self-government.

I now consider a second argument that also disputes the distinction drawn between land rights and sovereignty.

AN ABORIGINAL RIGHT TO LAND AND SELF-GOVERNMENT: BEYOND SOCIAL DARWINISM

Land is a foundational concept in Australian law. Land is also central in Aboriginal law. However, these are two strikingly different conceptions of land. This has often caused confusion and as a result, Aboriginal rights and interests have often been extinguished, diminished or simply not recognised.

Australian relationships to land are predominantly constructed by notions of property and ownership.

Proprietary interests are afforded the highest protection under the law. A characterisation as property indicates that property remedies enforceable against the whole world will attach to the interest. Such remedies ensure the integrity of the interest.³⁹

In the High Court's decision in *Miriwung Gajerrong*, Justice Callinan explained the importance of property in describing the British arriving with:

³⁹ Above n 35 at 184.

... their common and statutory law which had long included a doctrine of adverse possession and settled notions about the use and occupation of land. These were closely connected ideas: land was to be used and enjoyed, and those who possessed, used and enjoyed the land should own it, albeit, at first, transiently.

Justice Callinan notes the important of use and occupation in determining ownership of land. The most striking example of the pre-eminence of use and occupation in Australian law is Justice Blackburn's decision in *Milirrpum v Nabalco*⁴⁰ in his articulation of what constitutes 'property':

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate.⁴¹

However, relationships to land are not just defined by property use and ownership. Relationships to land may also be emotional. This emotional tie may be a familial connection, such as third generation farmers, or feelings of joy, fear or recognition of the sublime. Although relationships to land in dominant Australian society tend to be characterised by a relationship of use and ownership, they also often involve emotional interactions. However, despite this emotional connection to the land, the

⁴⁰ (1971) 17 FLR 141.

⁴¹ *Ibid* at 272.

dominant perception of land in Australian society is starkly different to Aboriginal relationships to land.

Land is central to traditional Aboriginal cosmology and social organization. The link between people, plant, animal, ancestral beings, morality and law make one's country an essential defining force in human relations.⁴² Galarrwuy Yunupingu explains the importance of land to Aboriginal people:

... land is all life ... we are part of the land and the land is part of us. It cannot be one or the other. We cannot be separated by anything or anybody.⁴³

The inseparable nature of person and land expressed by Galarrwuy Yunupingu is echoed by Silas Roberts:

It is true that the people who are belonging to a particular area are really part of that area and if that area is destroyed they are also destroyed.⁴⁴

It was in the Dreamtime that this complex relationship was established.⁴⁵ The Dreamtime is an indefinable past era when Australia was inhabited only by

⁴² Deborah Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Canberra: Australian Heritage Commission, 1996) in David Hollingsworth, *Race and Racism in Australia* (Katoomba: Social Sciences Press, 1998) at 174.

⁴³ Galarrwuy Yunupingu, *Our Land is Our Life: Land Rights- Past, Present and Future* (St Lucia: University of Queensland Press, 1997) at 2.

⁴⁴ Silas Roberts, former Chair of the Northern Land Council, from Fox R.W., "Ranger Uranium Environmental Inquiry" 2nd Report (Canberra: Australian Government Publishing Service, 1977) quoted in Paul Kaffman, *Wik, Mining and Aborigines* (St. Leonards: Allen & Unwin, St. Leonards).

djugudani and *malbu*.⁴⁶ These spirits roamed the land, creating landmarks, such as rivers, hills and rock formations. At various stages the spirits left the first Aboriginal people on the land, and left the language and law in the land. The ancestral beings left a master design for life. When the Dreamtime ended, the Dreaming creatures metamorphosed into natural features, such as a mountain or a star. Their life essence stays forever, so the Dreamtime continues. Aboriginal people refer to their heritage from the Dreamtime as the Law. This Law is evident in natural features in the land, a constant reminder of the need to uphold the Law. As Gagadju Elder, Bill Neidjie said:

Our story is in the land

it is written in those sacred places.

My children will look after those places,
that's the law.

Dreaming place

you can't change it, no matter who you are.

No matter you rich man, no matter you king.

You can't change it.⁴⁷

⁴⁵ For a more detailed explanation of the Dreamtime, see Robert Tonkinson, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart and Winston, 1978); Ronald M. and Catherine H. Berndt, *The World of the First Australians: Aboriginal Traditional Life: Past and Present*, 5th ed. (Canberra: Aboriginal Studies Press, 1999).

⁴⁶ These are Mardudjara words for ancestral beings and malevolent spirits respectively.

⁴⁷ Bill Neidjie, Stephen Davis, Allan Fox, *Kakadu Man ... Bill Neidjie* (Sydney: Mybrood, 1985) at 47 - 48. See also Bill Neidjie, *Story about Feeling* (Broome: Magabala Books, 1989). The "..." are in the original.

As a result of the Dreaming, there is a complex relationship between land, law, language and identity. This complexity is indicated by the following quotes:

Customary law is what I am, the essence of an Aboriginal person is customary law.⁴⁸

It is my father's land, my grandfather's land, my grandmother's land. I am related to it, it give me my identity. If I don't fight for it, then I will be moved out of it and [it] will be the loss of my identity.⁴⁹

The land is not merely a symbol of the political survival and identity of Indigenous peoples, it is central to the worldview, the spirit and the history of all Indigenous peoples in Australia. The identities, language and relationships of Indigenous peoples all come from the land. [Emphasis added].⁵⁰

In the final quote, Lisa Strelein makes reference to indigenous identities, language and relationships that "all come from the land". This is an important concept that is central to Aboriginal conceptions of land. This conception of land is unparalleled in

⁴⁸ Rosalie Monks speaking on Damien Carrick, "Customary Law and Anglo-Australian Law – Can They Mix?" *ABC Radio* (29 July 2003) <<http://www.abc.net.au/rn/talks/8:30/lawrpt/stories/s912416.htm>>.

⁴⁹ Father Dave Passi, plaintiff in the *Mabo* cases in Trevor Graham (Director), *Land Bilong Islanders* (Yarra Bank Films, 1990).

⁵⁰ Lisa Strelein, "Aboriginal Land Rights in Australia" (Native Title Research Unit at Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) [unpublished] at <http://www.firstpeoples.org/land_rights/australia/land_rights_in_australia.htm>.

non-indigenous Australia. This is often not understood today, as it was not understood at the time of the colonial frontier.

The relationship of Indigenous peoples to the land is that of a people, in this sense it is a collective identification and it is a permanent and inalienable identification. The spiritual and collective dimensions of the relationship were in direct contrast to the worldview of the colonists. The colonisers related to the land on an individual basis and on a commodity basis. They understood that the lands were or would become valuable to them and were unable or unwilling to understand and respect the relationship that Indigenous peoples held with those lands.⁵¹

It is interesting to consider the interaction between colonial and Aboriginal conceptions of property with the advent of social Darwinism. Social Darwinism developed by applying scientific Darwinian theories of evolution to human societies. Herbert Spencer, a 19th century English philosopher, popularised Charles Darwin's biological work, "Origin of the Species" (1860)⁵² as "the survival of the fittest" and, in a vulgarised form, extended this beyond species and applied the theory to races. This created a pervasive consciousness that certain races were superior to other races.⁵³ Given that social Darwinism emanated from Europe, it is hardly surprising

⁵¹ *Ibid.*

⁵² Charles Darwin, *On the Origin of Species by Means of Natural Selection, or, The Preservation of Favoured Races in the Struggle for Life* (New York: D. Appleton, 1860).

⁵³ See *Re Southern Rhodesia* [1919] AC 211.

that the races placed at the "developed" and powerful end of the scale, were European nations. The races placed at the lower end of this scale of civilization were indigenous tribal peoples. Essentially, social Darwinism posited that the scale of civilization is an evolutionary process and that those races at the lower end of the scale merely needed to "evolve" and progress in an evolutionary process to the top end of the scale. This theory has both directly and indirectly driven colonial policy towards indigenous people throughout the world for many years. Although the support of social Darwinism has declined, it still underpins numerous judicial decisions and provides a mindset difficult to overcome in order to recognise that indigenous peoples' culture and legal systems are equally valid and important.

An interesting aspect of social Darwinism is that the races that were "civilized" occupied the land in a manner fundamentally different to those placed at the lower end of the scale. The occupations that social Darwinism privileged were those that involved development of the land. This may have been farming, or more recently mining, but fundamentally involved building. Whether this involved building houses, court buildings or roads, it required some form of altering the land. These alterations to the land indicated the superiority of man over both beast and nature. Ironically, the fact that mankind has been so "successful" in altering the land, is now recognised as the cause of major environmental and health issues. The pollution of water sources, the extinction of thousands of species with thousands more at risk, the damage to the ozone layer, mass deforestation, salinity issues, global warming

and the damage to complex reef systems are directly caused by the alteration of the land that has occurred so rapidly since the Industrial Revolution.

In any event, for the purposes of social Darwinism, occupation that involved physical alteration of the land was privileged. This partially explains the placement of indigenous peoples at the "uncivilized" end of the scale. Although indigenous uses of land vary, Aboriginal peoples in Australia were predominantly, but not exclusively, hunter-gatherer societies. This nomadic lifestyle required and nurtured a tremendous body of knowledge about the land and its resources. Development occurred in the complex spiritual relationship between land, language, law, time, animals and people.⁵⁴ Therefore, occupation of the land was not necessarily accompanied by a sedentary lifestyle or physical development. Occupation of the land involved a complex spiritual relationship. As this manner of occupation did not visibly reflect European notions of occupation, social Darwinian theorists classified Aboriginal people in Australia as uncivilized.

Justice Blackburn's decision in *Milirrpum v Nabalco* must be analysed keeping in mind this Darwinian conception of property and hierarchy. This judgment is an example of the failure to comprehend Aboriginal relationships to land. Blackburn J was faced with the question of whether the relationship to land in Yolgnu society was proprietary. Blackburn J wrote that:

⁵⁴ Robert Tonkinson, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart and Winston, 1978). In particular, Chapter 1, "The Spiritual Imperative" at 14.

... the problem at present before the Court is to characterize what the Aboriginal relationship is as manifested by what they say and do to the land.

[Emphasis added].⁵⁵

Justice Blackburn assumed that Yolgnu relationships to land are determined by what they "do to the land". This is also evident from his indicia of property, quoted above, which includes the "right to use and enjoy". Not surprisingly, Blackburn J failed to comprehend Yolgnu relationships to land and ultimately relied on the familiar: Australian legal constructions of property and ownership. Blackburn J held:

In my opinion, therefore, there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.

The requirement that land ownership must be in accordance with common law understandings of property is grossly ethnocentric. Blackburn J completely failed to comprehend Aboriginal relationships to land and imposed one form of property ownership on the Yolgnu, assuming this form to be universal. However, forms of property ownership are not universal. Further, although referring to this exact

⁵⁵ Above n 40 at 268-269.

passage, Blackburn J blatantly ignored the Privy Council's warning in *Amodu Tijani v Secretary, Southern Nigeria* ("*Amodu Tijani*"),⁵⁶ where Viscount Haldane wrote:

... in interpreting the native title to land, not only in Southern Nigeria but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to redress that title conceptually in terms what are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. [Emphasis added].⁵⁷

The decision of Blackburn J in *Milirrpum v Nabalco* is a striking example of the difference between Australian conceptions of land and Aboriginal conceptions of land. The mistake Blackburn J made, by imposing common law indicia of what constitutes property, to Aboriginal conceptions of land, must not be repeated. The warning of Viscount Haldane must be heeded and social Darwinian constructions of race, hierarchy and land ownership must not be present in determining common law native title. In constructing native title in a manner that is respectful of Aboriginal relationships to land, one may see the utility of the concept of the inherent right of self-government.

⁵⁶ [1921] 2 AC 399.

⁵⁷ *Ibid* at 402 - 403. Blackburn J quoted Viscount Haldane in *Milirrpum v Nabalco* above n 40 at 284 - 285.

Native title is founded on the common law recognition of the continued Aboriginal right to land under Aboriginal law. It recognises Aboriginal relationships to land. This can be seen in both the common law and statutory definitions of native title. The definition provided by the High Court in its opening summary in *Mabo (No. 2)* defined native title as reflecting the entitlement of Aboriginal people to their traditional lands in accordance with Aboriginal law. Section 223 of the *Native Title Act 1993 (Cth)* defines native title as an Aboriginal right "in relation to land or waters". Both these definitions define native title as an Aboriginal relationship to land. The centrality of this relationship to land is also evident in the use of the term "connection" in these definitions.⁵⁸ It is clear that recognition of Aboriginal relationships to land forms part of common law native title.

It is important to emphasise that these are Aboriginal relationships to land that must be comprehended in a manner unimpeded by Australian constructs of what relationships to land should be. Any imposition of Blackburn J's indicia of property or any other similar imposition harkens back to social Darwinism and fails to comprehend the centrality and importance of indigenous perceptions of their relationship to land. This is required not only by contemporary rights standards, which resolutely reject social Darwinian theories, but also by the nature of native title as an inherent right. An inherent right stems from Aboriginal law rather than from Parliament or the Crown. Therefore, native title requires interpretation in accordance

⁵⁸ Section 223(1)(b) provides, "the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters".

with Aboriginal relationships to land as distinct from an imposed interpretation relying on Australian common law norms of property, use and ownership of land.

Therefore, given the nature of Aboriginal relationships to land, a relationship that is complex and necessarily intertwined with law, language and identity, recognition of Aboriginal relationships to land as part of native title necessarily involves a recognition of Aboriginal law, language and identity. This is recognition of Aboriginal law, not just as it relates to land, but Aboriginal law as a holistic legal system.

Therefore, not only is Aboriginal law as it relates to land recognised and affirmed by the Australian common law in its recognition of native title, but Aboriginal law is broadly recognised and affirmed by the common law. This has far greater ramifications for inherent self-government as it is not limited to decision-making powers relating to land and resources.

CONCLUSION

There are two ways in which native title and self-government are related concepts. These conflict with the formal manufactured distinction the High Court explicitly drew between questions of land rights and questions of sovereignty. The right of self-government, in relation to decisions regarding land use, can be strongly established as an element of native title. In fact, this limited form of self-government has already been recognised in Australia. Further, the recognition of Aboriginal relationships to

land involves recognition of Aboriginal law, language and identity. By ensuring that Australian notions of property and land ownership are not imposed in determining Aboriginal relationships to land for the purposes of native title, the problems of social Darwinism are avoided and Viscount Haldane's warning in *Amodu Tijani* is heeded.

It must be noted that both of these examples involved recognition of self-government occurring within the limits of native title. However, self-government is more than just an aspect of native title. The inherent right of self-government is a related, but separate right. Importantly, self-government, as shown by its existence a necessary aspect of native title, does not fracture the skeleton of the Australian legal system.

Chapter Five

ABORIGINAL CUSTOMARY LAW

Despite the pervasive myth that there is only one legal system in Australia, since early colonial contact, there has long been judicial recognition of the existence of Aboriginal law.¹ This recognition is significant because it means that the Australian legal system has accommodated the operation of a separate legal system. That is, there is more than one complete legal system operating within Australia: the Australian legal system and Aboriginal legal systems. This amounts to recognition that Australia is a legal plurality.²

In addition to fundamentally challenging the fiction that Australia is not a legal plurality, but a monistic legal society, the judicial recognition of Aboriginal law includes recognition of Aboriginal decision-making and Aboriginal law-making power. This is the foundation of the common law inherent right of self-government. Self-government is the legal mechanism by which the Australian legal system recognises the existence and operation of Aboriginal legal systems.

¹ Although I refer to "Aboriginal law" in the singular, this is only for the ease of argument. I recognise that there are many Aboriginal legal systems and Aboriginal laws in Australia.

² I use the term "legal pluralism" and "legal plurality" to describe more than one legal system and the term "monism" to describe one legal system.

The myth that Australia is monistic society and that the Australian legal system does not recognise Aboriginal customary law as an existing legal system, is a result of both historical and contemporary legal doctrine.

THE GREAT AUSTRALIAN SILENCE

In 1765, Blackstone explained that if land was unoccupied or uninhabited and discovered by English subjects, then "all the English laws ... are immediately there in force".³ However, if land is cultivated and has been conquered or ceded, the King may alter the laws, but until this happens the ancient laws exist unless they are "against the law of God, as in the case of an infidel country".⁴ The pivotal concept is that vacant land includes territory possessed by "savage tribes".⁵ Aboriginal people were considered incapable of intelligent transactions with land,⁶ since they did not cultivate the land nor comprehend the "natural laws of God". As a consequence, Britain considered Aboriginal people in Australia as "savages". Therefore, neither Aboriginal ownership nor Aboriginal law was recognised by Britain.⁷

³ Sir William Blackstone, *Commentaries on the Laws of England*, 15th ed. vol. 1 (London, A. Strahan, 1809) at 107. Blackstone caveats that "this must be understood with very many and very great restrictions."

⁴ *Ibid* at 107.

⁵ Kenneth Maddock, *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* (Amsterdam: Nijmegen, 1980) at 7.

⁶ *Ibid* at 7.

⁷ It is important to recognise that Blackstone's academic writing has never reflected the reality of British colonial practice in North America, see Brian Slattery, *Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories* (Saskatoon: Saskatoon Native Law Centre, 1979) (D. Phil, University of Oxford).

The justification for the acquisition of Australia is premised upon the misconception that there was only one legal system. As a result, Australia was classified *terra nullius*, a land belonging to nobody. Australia was constructed as a space where no law operated, effectively a legal vacuum. Aboriginal law was deemed non-existent. As a result of *terra nullius*, the doctrine of discovery and the failure to recognise Aboriginal law as law, English common law entered Australia without any impediments and British law was imposed on Aboriginal peoples.

A GRADUAL AWARENESS

As the colonisers quickly came to realise that there were many Aboriginal peoples and that Aboriginal people had laws and owned the land, the presumption of *terra nullius* was challenged.⁸ At the same time, Aboriginal people were declared British subjects.⁹ This purportedly excluded any formal recognition of Aboriginal law.¹⁰ However, consistent with the coloniser's realisation of the fictitious foundation of *terra nullius*, there were various forms of executive, legislative and judicial recognition of Aboriginal law.

⁸ Henry Reynolds, *This Whispering In Our Hearts* (St. Leonards: Allen & Unwin, 1998).

⁹ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) ("ALRC") in vol 1. at para 23. Two British government reports declared that Aboriginal people were British subjects and subject to British law in all circumstances. In 1837, the Select Committee of the House of Commons Report and Grey's Report, published in 1840. There were also "numerous statutes" which declared Aboriginal people to be British subjects and therefore amendable to British law; see ALRC.

¹⁰ *Ibid* in vol. 1 at para. 58. The ALRC Report stated that, "the customary laws and practices of Indigenous people were denied any formal recognition by the general law".

Governor Macquarie & Governor Davey's Proclamations

In June 1816, Governor Macquarie issued a proclamation in an attempt to "curb internecine Aboriginal conflict in and near Sydney":¹¹

That the Practice, hitherto observed among the Native Tribes, of assembling in large Bodies or Parties armed, and of fighting and attacking each other on the Plea of inflicting Punishments on Transgressors *of their own Customs and Manners* at or near Sydney, and other principal Towns and Settlements in the Colony, shall be henceforth wholly abolished, *as a barbarous Custom repugnant to the British Laws*, and strongly militating against the Civilization of the Natives, which is an Object of the highest Importance to effect, if possible.¹²

Governor Macquarie's proclamation was in response to violence authorised by Aboriginal law. Although the term "law" is not used in the proclamation, there is recognition that these instances are in accordance with "custom". Further, this "custom" is inconsistent and "repugnant to" British law.

¹¹ Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney: Allen & Unwin, 1996) at 61.

¹² *Ibid.*

It is important to consider the terms "custom" and "law".¹³ The term "custom" may be used in two distinct senses. First, "custom" is often used to distinguish between what constitutes law and what does not. In this sense, custom is merely an accepted way of acting. If such a custom is breached, there is no legal recourse.¹⁴ The question then becomes when does custom constitute law? There is no simple answer, although essentially, over the passage of time and consistency of application, customs may crystallise into law.¹⁵

Secondly, the term "custom" may be used to refer to unwritten oral traditions that effectively operate in the same manner as law. In Australia, Aboriginal law is often referred to as customary law, a reference to the oral nature of the legal system. In this sense, the term "custom" refers to the unwritten nature of the law rather than its status as something lesser than law. This was recognised by Lord Denning in *R v Secretary of State for Foreign and Commonwealth Affairs* where he stated that:

These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.¹⁶

¹³ See Karsten, P. *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora - The United States, Canada, Australia, and New Zealand, 1600 - 1900* (Cambridge: Cambridge University Press, 2002).

¹⁴ This distinction is most clearly seen in international law, where custom ripens to customary law, but still remains subservient to treaties.

¹⁵ Gerald L. Gall, *The Canadian Legal System*, 4th ed. (Scarborough: Carswell, 1995) at 120.

¹⁶ [1982] 2 All ER 118 at 123.

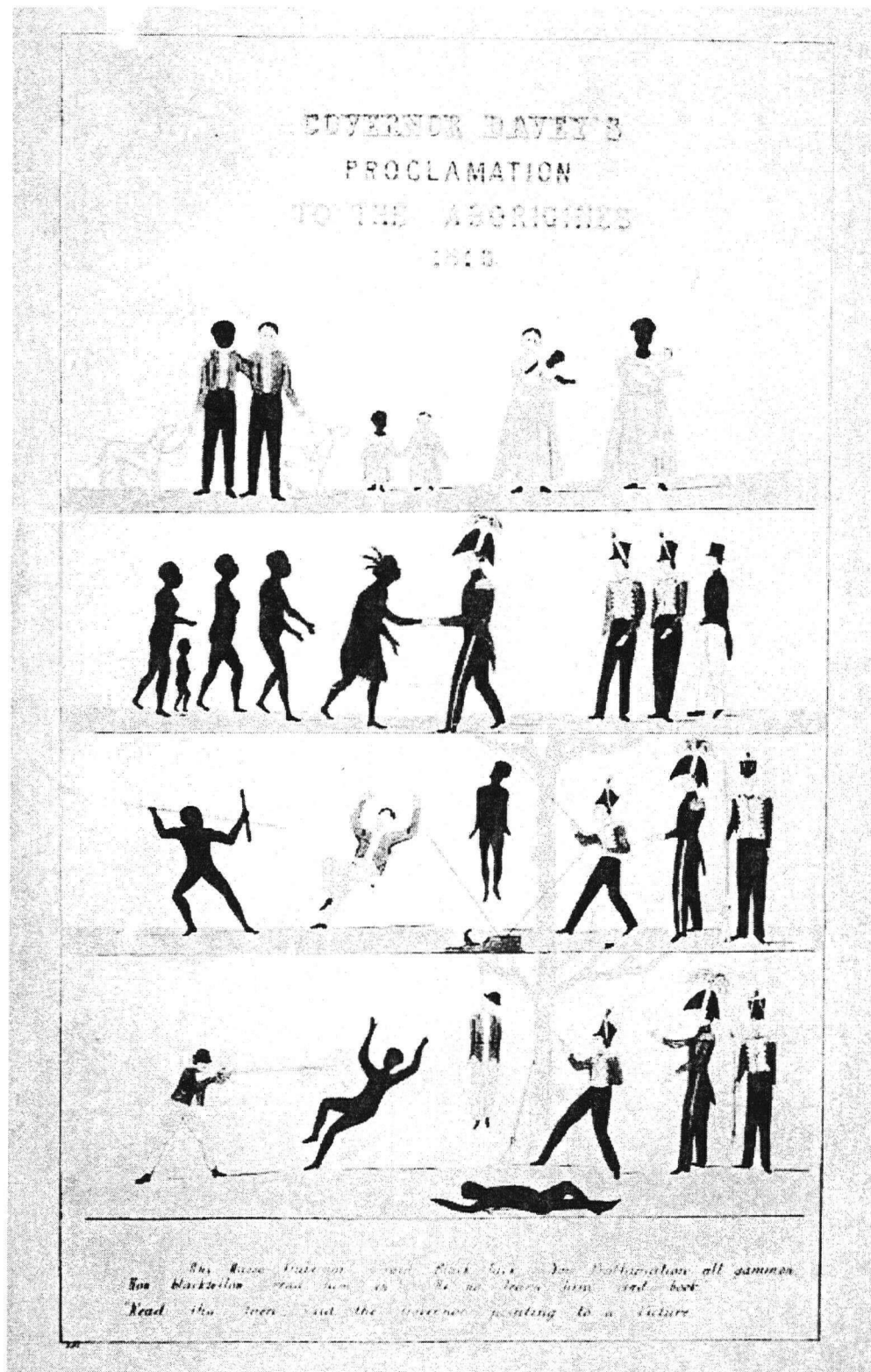
In Canada, "custom", in this second sense, has also been recognised as law. For example, Justice Morrow refused to overrule an Inuit customary adoption, respecting its status as "law".¹⁷

The use of the term "custom" in Governor Macquarie's proclamation accords with the second sense of custom, that it is merely law that has not been written down. Therefore, the recognition in Governor Macquarie's proclamation that Aboriginal custom governs Aboriginal behaviour is essentially recognition of Aboriginal law.

In Tasmania in 1816, Governor Davey also issued a "Proclamation to the Aborigines", that was posted on trees, in an attempt to inform Aboriginal people of Australian law and its reciprocal obligations. This proclamation, displayed below, diagrammatically represents the interaction of Aboriginal and British and the indiscriminate treatment of British law to both Aboriginal and British in the event of crime.¹⁸ This is to be read from bottom to top, and illustrates that violence between Aboriginal people and colonists will be punished regardless of whether an Aboriginal person or a colonist is the perpetrator. The third panel illustrates a truce and an acceptance by Aboriginal people of British law and the final (top) panel displays everyone living in harmony.

¹⁷ W.H. Morrow (ed.) *Northern Justice: The Memoirs of Mr Justice William G. Morrow* (Toronto: University of Toronto Press, 1995) at 150 - 152.

¹⁸ The attribution to Governor Davey is incorrect. The Proclamation was issued during the administration of Governor Arthur and is likely to have been designed by George Frankland.



Governor Davey's "Proclamation to the Aborigines" (1816).

This proclamation was effectively a political campaign to inform and convince Aboriginal people of the benefits and justice of being subject to British law. Importantly, the proclamation shows that British law applies to disputes between Aboriginal people and colonists but does not declare that British law applies to intra-Aboriginal disputes. The "Proclamation to the Aborigines" does not operate on the assumption of *terra nullius*. Rather, it operates on an assumption of pre-existing Aboriginal law and legal plurality.

The Prerogative of Mercy

In the early colonial period, the Government was responsible for both the initiation and final review of criminal prosecutions. The Attorney General exercised the functions of a Grand Jury. Without the Attorney General's initiative a person would not be sent for trial. The ALRC suggested that the Attorney General would rarely initiate a trial for intra-Aboriginal disputes. This is also alluded to in *R v Ballard*.¹⁹

Punishment could also be mitigated by the Governor's prerogative of mercy. Often, the Governor would either remit or mitigate punishment in recognition of the fact that Aboriginal people neither understood nor felt allegiance to British law. As a result

¹⁹ *R v Ballard or Barrett* (unreported, Supreme Court of New South Wales, Forbes CJ & Dowling J, 1829) in Dowling, proceedings of the Supreme Court, Vol. 22, Archives Office of New South Wales, 2/3205 at <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett_1829.htm>.

many capital sentences were commuted to transportation and Aboriginal prisoners were sent for religious instruction in preparation for an early release.²⁰

The 'guidelines' for applying the prerogative of mercy were informed by the connection between the offence under British law and the offence under Aboriginal law. If an Aboriginal person was found guilty and sentenced to death by the courts, but was not liable for death under Aboriginal law, the Governor would, as a general rule, exercise the prerogative of mercy.²¹ Consequently, only one Aboriginal person, Charley, was executed between 1788 and 1855 who would not otherwise have qualified for death under Aboriginal law.²²

These few examples indicate that the executive tacitly recognised Aboriginal law in the early stages of colonisation. This contrasts with the Supreme Court of New South Wales decision of *R v Murrell*²³ in 1834, which is often cited as authority for the proposition that the Australian legal system never recognised Aboriginal law.²⁴ To the contrary, Australia was a plural legal society in the early days of the colony and remains a plural legal society today. A trilogy of cases decided by the Supreme Court of New South Wales, including the decision in *R v Murrell*, reveals an active debate about the legality and justice of applying British law to Aboriginal people. This

²⁰ ALRC above n 9 vol 1 at para 42.

²¹ *Ibid.* Governor Gipps declared to the Executive Council, that this was the test applied.

²² *Ibid.*

²³ *R v Murrell* (1836) 1 Legge 72.

²⁴ *Wik Peoples v Queensland* (1996) 141 ALR at 465.

debate indicates that undue weight has been given to *R v Murrell* in its contemporary interpretation. This trilogy constitutes clear judicial recognition of Aboriginal law.

THE EARLY NEW SOUTH WALES TRILOGY: THE OTHER SIDE OF THE FRONTIER²⁵

In the early 19th century, the Supreme Court of New South Wales²⁶ decided three cases that considered the relationship between Aboriginal law and British law: *R v Ballard or Barrett* (1829),²⁷ *R v Jack Congo Murrell* (1834)²⁸ and *R v Bonjon* (1841).²⁹

²⁵ This is a reference to Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Melbourne, Penguin, 1982). Reynolds expressed his methodology in *The Other Side of the Frontier* as "a major challenge to conventional ideas about Aborigines and therefore to the way in which most Australians view important aspects of their past" at 2. Using this same approach, I revisit these cases and consider the colonial context. By giving equal weight and recognition to two legal systems, I hope to gain an understanding of the colonial mindset and insight into whether the early colonials perceived the colony as a plurality,

²⁶ The Supreme Court of New South Wales was the judicial body governing the new British colony. It was the most important court during the colonial frontier in Australia. In 1787, *Letters Patent* created civil and criminal courts for the arrival of the First Fleet in Australia but a radical overhaul did not occur until 1824. *Third Charter of Justice in 1824* established the Supreme Court of New South Wales, with both civil and criminal jurisdiction and granted the Chief Justice precedent over all British subjects, except the Governor or Acting Governor. The Supreme Court of New South Wales, in nearly all respects, has maintained continuity with the Court founded in 1824 under the *Third Charter of Justice*.

²⁷ For a general analysis of these cases, see Bruce Kercher, "Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales" 4(13) *Indigenous Law Bulletin* (1998) 7.

²⁸ Above n 23. Although this case was reported, much of the information is from a series of archival material and newspaper articles compiled by the Post-Colonial Institute. As most of the information is not paginated, I will refer to the relevant source where possible.

²⁹ *R v Bonjon* (unreported, Port Phillip district of the New South Wales, Willis J, 1841) at <http://www.law.mq.edu.au/scnsw/html/r_v_bonjon_1841.htm>. This case is also a compilation of archival material and newspaper reports, with the principal source of the judgment being the *Port Phillip Patriot*, 20 September 1841. This case is not paginated.

R v Ballard (1829)

*But I know no principle of municipal or national law, which shall subject the inhabitants of a newly found country, to the operation of the laws of the finders, in matters of dispute, injury, or aggression between themselves.*³⁰

In 1829, an Aboriginal man, Ballard, was accused of the murder of an Aboriginal man, Borrondire.³¹ The issue was whether the court had jurisdiction. *R v Ballard* was heard by Forbes CJ at first instance and by Forbes CJ and Dowling J on appeal.³²

This case arose because the Attorney General applied to the Chief Justice for his opinion on whether the Court had jurisdiction in this case. Although the Attorney General was inclined to discharge the prisoner, he requested the court's direction. Was this merely a pragmatic inclination to not prosecute? Or does it reflect a more complex recognition of the existence of Aboriginal law and the inherent injustice of

³⁰ Above n 19 at 105-106, per Forbes CJ. Cf. Marshall CJ in *Worcester v Georgia* (1832) 31 US (6 Pet) 515.

³¹ There is discrepancy in the reporting of the names of the victim and the accused. The *Sydney Gazette* and the *Australian* reported that Borrondire, also known as Dirty Dick, was the person killed. The *Australian* reported the defendant as Ballard but the *Gazette* called him Barnett. Also, Dowling J, in his notebook, recorded that Dirty Dick was the accused and Ballard the victim. It seems Dowling J incorrectly reversed the names of the victim and the accused.

³² It is important to recognise that the procedural nature of these cases is slightly hazy. I refer to the decisions as being at first instance and the final decision (or the decision on appeal) because to the best of my knowledge, this is the case. However, this may not be precisely correct. For instance, in this case, Forbes CJ heard the case and his first instance decision may just be comments from the bench, which would explain him participating on the appeal. However, given there were few judges, it is likely that the colonial judiciary was much more flexible with these procedural requirements than would be acceptable today. More specifically, there was only a bench of two because Stephen J was ill. This case is reported in a series of newspaper articles. The first, on 21 April 1829 in the *Sydney Gazette*, reports the Chief Justice's response to the Attorney General's query of jurisdiction. The decision is handed down on 13 June 1829. In addition to the transcript, there are synopsis's reported on 16 June 1829 in the *Australian* and the *Sydney Gazette*.

applying (or misapplying) British law in this situation and subjecting Aboriginal people to two legal systems in intra-Aboriginal disputes? At a minimum, the Attorney General's inclination indicates that he had grave doubts as to whether there was jurisdiction in this case. Given the severity of the charge of murder, it is reasonable to infer that the Attorney General was of the opinion that British law did not apply to intra-Aboriginal disputes.

In the first instance, despite being hesitant to pronounce on such an important matter whilst sitting alone, Forbes CJ was confident that there were situations both within and outside of British law.³³ He was confident that there was at least one situation where British law did not apply and he did not consider the existence of situations outside the scope of British law to be controversial. He operated on the assumption that Aboriginal legal systems existed and governed Aboriginal people without interference in certain situations. He operated on the assumption of legal plurality.

In his final written judgment, constituting the decision on appeal, Forbes CJ stated that:

I believe it has been the practice of the Courts of this country, since the

Colony was settled, never to interfere with or enter into the quarrels that have

³³ Above n 19. In *Sydney Gazette*, 23 April 1829. Forbes CJ suggested a distinction between a dispute occurring within a tribe, decided by their own customs, and an Aboriginal person, living in town, who was attacked by another Aboriginal person. He suggested that in the second situation, the Aboriginal person had placed himself under the protection of municipal law. Therefore, British law would govern the second situation and not the first.

taken place between or amongst the natives themselves. This I look to as matter of history, for I believe no instance is to be found on record in which the acts of conduct of the aborigines amongst themselves have been submitted to the consideration of our Courts of Justice. It has been the policy of the Judges, & I assume of the Government, in like manner with other Colonies, not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives.³⁴

This clearly recognises that, as a matter of practice, British law was not applied to intra-Aboriginal disputes. Did Forbes CJ also recognise this to be a matter of law? He held that it would be unjust and unconscionable to hold an Aboriginal person responsible in English law for an offence committed against one of his 'own tribe',³⁵ a sentiment echoed by Dowling J.³⁶

Forbes CJ made an important distinction, noting that in all interactions between Aboriginal and British settlers, British law did apply.³⁷ This does not appear to have been controversial. Dowling J also drew the distinction between intra-Aboriginal disputes and Aboriginal and colonists disputes, stating that:

³⁴ *Ibid* at 100 – 101.

³⁵ *Ibid* at 99.

³⁶ *Ibid* at 109. Dowling J held that it would be most unjust and unconscionable to hold the prisoner amenable to the law of England for an offence committed against one of his own tribe.

³⁷ *Ibid* at 101.

We have a right to subject them to our laws if they injure us, but I know of no right possessed by us, of interfering where their disputes or acts, are confined to themselves, and affect them only.³⁸

Both Forbes CJ and Dowling J referred to instances of Aboriginal conduct that were governed by Aboriginal law and therefore outside the scope of British law.

Importantly, they both recognised the existence and binding quality of Aboriginal law.³⁹ Forbes CJ clearly described Aboriginal custom, governing Aboriginal people, as law. He held that an Aboriginal person "is governed by the laws of his tribe".⁴⁰

Forbes CJ held that Aboriginal people had a mode of redressing wrongs and that:

They make laws for themselves, which are preserved inviolate, & are rigidly acted upon.⁴¹

Forbes CJ recognised the limited knowledge of the nature of Aboriginal law but reasoned that, given the experience in other colonies, it was probable that the "institutions of the native ... will be found to rest upon principles of natural justice".⁴²

³⁸ *Ibid* at 108.

³⁹ Dowling J's decision is premised on the recognition of Aboriginal law and he recognises their "institutions", presumably a reference to governmental organs. "Until the Aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such an interference were practicable". *Ibid* at 106 – 107.

⁴⁰ *Ibid* at 102-103.

⁴¹ *Ibid* at 104.

⁴² *Ibid* at 101-102.

Therefore, Forbes CJ was of the "opinion that this man is not amenable to English law for the act he is supposed to have committed"⁴³ and the Court ultimately held that there was no jurisdiction and discharged Ballard.⁴⁴

The *Australian* newspaper commended this decision. In discussing the judges' presumption, it recognised that they:

... did not go upon the presumption of the native's innocence, but upon the injustice, the inconsistency, the absurdity of subjecting to the laws of civilized society, a savage, who, it was possible, might in his own estimation, and in the estimation of his countrymen, have been but conforming to some act of duty to his tribe, in imbruing his hands in the blood of his enemy.⁴⁵

It seems that public opinion, or at least a section of public opinion, was supportive of the separation of British law and Aboriginal law. Further, the injustice inherent in a situation where a person breaches British law whilst acting in accordance with Aboriginal law is criticized and the judicial recognition of this injustice was applauded.

⁴³ *Ibid* at 106.

⁴⁴ *Ibid* at 99.

⁴⁵ *Ibid*. In *Australian*, 16 June 1829.

R v Murrell (1836)

In 1836, Jack Congo Murrell and Bummarree were indicted for the murders of two other Aboriginals, Jabbingee and Definger at Windsor on the 21st December 1835. One of the victims was a member of the group that had killed Bummaree's brother and Bummarree relied on customary law as a defence. The New South Wales Supreme Court recognised it was clearly a case of obedience to the native custom of revenge killing. However, only seven years after *Ballard*, the Full Court reached the opposite conclusion and held that it had jurisdiction in an intra-Aboriginal dispute.

Forbes CJ heard this case at first instance but Burton J, on behalf of Forbes CJ and Dowling J, handed down the final unanimous decision. Forbes CJ offered contradictory opinions in this case. In the first instance, on 5 February 1836, he responded positively to the defence's plea that there was no jurisdiction, referring to it as "ingenious" and "perfectly just".⁴⁶ However, his opinion had been completely transformed by 11 April 1836 when Burton J read the unanimous opinion of the Court, holding that the Court did have jurisdiction.

Forbes CJ, at first instance, restated his decision in *R v Ballard* and recognised that Aboriginal people are "subject to the custom of their own laws".⁴⁷ Initially, Aboriginal

⁴⁶ Above n 23 from *Sydney Herald*, 8 February 1836.

⁴⁷ *Ibid*, from *Australian*, 9 February 1836.

law is accepted as law. But, the Court ultimately rejected that this recognition implied separate sovereignties. Burton J granted that Aboriginal peoples:

... are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.⁴⁸

Burton J recognised Aboriginal people as "free and independent" but did not recognise that Aboriginal people were governed by law. What is the basis of Burton J's distinction? Is it legally sound? Burton J was operating on a presumption of Aboriginal inferiority.:

Although it had been stated in evidence that the Blacks were generally considered as beasts of the forest, he, in present of the Almighty God declared, that he looked on them as human beings, having souls to be saved, and under the same divine protection as Europeans⁴⁹

⁴⁸ *Ibid*, from Supreme Court, *Miscellaneous Correspondence relating to Aborigines*, State Records of New South Wales, 5/1161 at 211.

⁴⁹ *Ibid*, from *Sydney Herald*, 16 May 1836. Burton J refers to himself as "he" in this quote.

Justice Burton couples his comments with a tone of self-congratulatory goodwill for at least recognizing Aboriginal people as human beings. Justice Burton expanded on his ethnocentric view in his "Notes for Judgment", where he stated that Aboriginal:

... practices are only such as are consistent with a state of the grossest darkness & irrational superstition and although in some cases being a show of justice – are founded entirely upon principles particularly in their mode of vindication for personal wrongs upon the wildest most indiscriminatory notions of revenge.⁵⁰

As a result of the denial of separate Aboriginal sovereignty, the Court did not draw a distinction between intra-Aboriginal disputes and disputes between Aboriginal people and colonists.⁵¹

Therefore, the Court accepted jurisdiction over an intra-Aboriginal dispute. In accepting jurisdiction, Burton J recognised that neither past practice nor general opinion recognised that the Court had jurisdiction in intra-Aboriginal disputes.⁵²

Burton J audaciously and erroneously asserted that this case was "the first of its sort"⁵³ and declared this to be "precedent for future proceedings in like cases".⁵⁴

⁵⁰ *Ibid*, from Supreme Court, *Miscellaneous Correspondence Relating to Aborigines*, State Records of New South Wales, 5/1161 at 239.

⁵¹ *Ibid*, from Supreme Court, *Miscellaneous Correspondence Relating to Aborigines*, State Records of New South Wales, 5/1161 at 214.

⁵² *Ibid*, from *Sydney Herald*, 16 May 1836.

⁵³ *Ibid*.

However, he did make a discreet reference to differing judicial opinions. Although this may be a reference to *R v Ballard*, it is more likely to be a reference to Forbes CJ and in particular, Forbes CJ's opinion expressed at first instance. Burton J did not address *R v Ballard* despite it being a contradictory decision by the same court seven years previously.

Chief Justice Forbe's change of opinion is particularly intriguing. Forbes CJ had been the subject of a strong attack from the conservative newspaper, the *Sydney Herald*.⁵⁵ The *Sydney Herald* accused Forbes CJ of being sympathetic to convicts, a republican and a populist. He was criticized for his constitutional position, as illustrated by a harsh editorial on 28 April 1836, where the *Sydney Herald* published, "We hope he has taken his departure from these shores forever as the Chief Justice and Legislator combined in one person".

The effectiveness of this attack was exacerbated by Forbes CJ's illness and his imminent departure, which prevented him from responding. Forbes CJ had been ill between delivering his initial view in *R v Murrell* and the final decision and had not sat after 29 March 1836 until 11 April 1836, the day the decision in *R v Murrell* was delivered. On 12 April 1836, Forbes CJ last appeared on the bench and he left the colony on 16 April 1836.

⁵⁴ *Ibid.*

⁵⁵ For example, on 31 March 1836, the *Sydney Herald* reviewed his career on issues as early as 1827. As Forbes CJ was both ill and preparing to leave the colony, he was unable to respond.

Perhaps these pressures led Forbes CJ to comply with Dowling and Burton JJ in the unanimous decision in *R v Murrell*? It is certainly surprising, given his strongly stated judgment in *R v Ballard* and his initial opinion in *R v Murrell*. With his departure, Dowling J was appointed Acting Chief Justice.⁵⁶ Burton J was “disappointed” and reportedly believed he had an enemy in the colonial office that had thwarted his appointment as Chief Justice. If Burton J was maneuvering for the Chief Justice position, perhaps he wished to distance himself from Forbes CJ’s “liberality” and gain favour with both the press and the public. Although these inferences are speculative, given the nature of colonial frontier law and colonial court’s heightened susceptibility to public opinion and politics, these external factors could provide some understanding to the context and reasoning of Forbes CJ’s radical change of opinion.

***R v Bonjon* (1841)**

Bonjon, a Wadora man, was charged with shooting and murdering Yammowing of the Colijon people.⁵⁷ Unlike Burton J in *R v Murrell*, Willis J did address previous Supreme Court of New South Wales decisions. However, Willis J did not consider himself bound by the decision in *R v Murrell*. He held that the New South Wales

⁵⁶ Forbes CJ was only leaving temporarily, however, due to ill health, he retired on 1 July 1837. Dowling J was eventually made the permanent Chief Justice.

⁵⁷ The Colijon are now referred to as the Kolakngat. Interestingly, the offence occurred in Geelong. This may have been an important factor, allowing Willis J to distinguish the case from *R v Murrell*, where the murder occurred in a very central, public location.

Supreme Court did not have jurisdiction over crimes committed by Aboriginal people against one another. This led to a heated rebuke from Dowling CJ, supported by Governor Gipps and the British Government, who declared that the question of jurisdiction had been settled in *R v Murrell*.

Following Forbes CJ in *R v Ballard*, Willis J drew a distinction between intra-Aboriginal disputes and disputes between colonists and Aboriginal people.⁵⁸ He stated that Aboriginal people were subject to British law only in the latter. He went a step further and declared that:

... there is no express law, that I am aware of, that makes the Aborigines subject to our colonial code.⁵⁹

After considering the nature of settlement and the misinterpretations by British colonists of the nature of Aboriginal occupation and Aboriginal law, Willis J concluded that:

... they are by no means devoid of capacity – *that they have laws and usages of their own* – that treaties should be made with them – and that they have been driven away, from Sydney at least, by the settlement of the colonists,

⁵⁸ Above n 29. He gave examples of the first situation; the murder of William Tuck by Merridio and Negaril tried by Burton J in Dec 1838 and executed. Also, Charles Kilmaister (and six other colonists) tried and executed before Burton J in Sydney in Dec 1838 for the murder of two Aboriginal children and an Aboriginal adult; Charley.

⁵⁹ *Ibid.*

but still linger about their native haunts.⁶⁰

In considering the question of jurisdiction, Willis J exhibited humility and questioned his authority to consider an issue of such enormity. He concluded that it was too momentous a question to be so hastily decided. However he did indicate that:

From these premises rapidly indeed collected, I am at present strongly led to infer that the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs. If this be so, I strongly doubt the propriety of my assuming the exercise of jurisdiction in the case before me.⁶¹

Despite this strong conviction, Willis J accepted jurisdiction and Bonjon was ordered to stand trial.

COLONIAL RECOGNITION OF ABORIGINAL LAW

A critical examination of these cases reveals a number of important issues. First, the current interpretation of early colonial law differs greatly from how it was considered

⁶⁰ *Ibid.*

⁶¹ *Ibid.* This statement resonates with the language of Marshall CJ in the United States Supreme Court decision in *Worcester v Georgia*, 31 US (6 Pet) 515 (1832). This raises an interesting question of whether the Supreme Court of New South Wales knew of this decision when deliberating on *R v Murrell* in 1834, two years after *Worcester v Georgia*.

at the time. Secondly, there was an active debate within the colonial judiciary and also between the judiciary, the British Legislature and the media. Finally, the judiciary did recognise the existence of Aboriginal law.

Contemporary Interpretation Flawed

The current position that Australian law applies to Aboriginal people in all circumstances is largely influenced by the decision in *R v Murrell*.⁶² Of the three cases, only *R v Murrell* was formally reported and only *R v Murrell* has been cited with approval in the 20th century.⁶³ However, all three cases were decided by the Supreme Court of New South Wales, considered the same question of jurisdiction but had vastly different results. The weight given to *R v Murrell* is unreasonable. All three cases should be examined carefully and with equal weight.

The decision in *R v Murrell* has been consistently misinterpreted. *R v Murrell* merely rejected absolute sovereignty, a rejection of the existence of Aboriginal state sovereignty recognisable in the international Westphalian system. This is the same type of sovereignty that the High Court rejected in *Coe (No. 1)* and *Coe (No. 2)*. However, this rejection does not impact on the existence of the common law right of self-government. The Court in *R v Murrell* did not consider questions of modified

⁶² For example, the ALRC did not question the denial of plurality and undertook its inquiry into Aboriginal customary law on the basis of legal monism.

⁶³ Above n 24 at 181 and *R v Wedge* [1976] 1 NSWLR 581 at 586.

sovereignty or self-government. An interpretation that suggests that *R v Murrell* excludes the possibility of continuing modified Aboriginal sovereignty is, with respect, incorrect.

In addition to the flawed interpretation of *R v Murrell*, the contemporary weight and respect attributed to *R v Murrell* is unreasonable on four grounds: conflicting authority, questionable precedential value, inadequate treatment of the law of nations and ethnocentricity.

First, *R v Murrell* did not address the previous related jurisprudence in *R v Ballard*, which extensively considered the same question of jurisdiction. Under the doctrine of *stare decisis*, the decision of a higher court within the same jurisdiction acts as a binding authority on a lower court within that same jurisdiction. *Stare decisis* literally translates as "to stand by decided matters" and requires a judge to follow particular previous decisions.⁶⁴ In this case, the question is whether the New South Wales Supreme Court was bound by its own previous decisions. Generally, courts are bound by their previous decisions unless those decisions were decided *per incuriam*. A decision made *per incuriam* is a decision made "through the want of care". This is a decision a subsequent court finds to have been mistaken, and therefore not binding. Burton J did not refer to *R v Ballard* and it is unlikely that this is sufficient to render the decision in *R v Ballard* *per incuriam*. More importantly, given that Burton J did not consider a previous, binding, contradictory decision, arguably, the omission

⁶⁴Above n 15 at 343.

to consider this relevant authority is sufficient to render the decision in *R v Murrell* *per incuriam* and therefore not binding.

Secondly, the debate continued after *R v Murrell*, as can be seen in *R v Bonjon*, indicating that its role as precedent was questioned at the time. Interestingly, on the day after Willis J's judgment was delivered, the Court in Melbourne heard a case involving two Aboriginal people charged with murder for the traditional spearing of another Aboriginal person in accordance with Aboriginal law. After the Crown prosecutor in Melbourne had examined *R v Bonjon*, the Crown declined to proceed. The prisoner was remanded to the next session and discharged the following month. Therefore, despite *R v Murrell*, the decision in *R v Bonjon* questioning jurisdiction was interpreted, at least by the Crown prosecutor, to be binding.

Judicial challenge to the decision in *R v Murrell*, to accept jurisdiction in an intra-Aboriginal dispute, continued after *R v Bonjon*. In 1841, the same year as *R v Bonjon*, Justice Cooper of the South Australian Supreme Court stated that it was:

... impossible to try according to the forms of English law, people of a wild and savage tribe whose country although within the limits of the province of South Australia, has not been occupied by Settlers, who have never submitted themselves to our dominion and between whom and the Colonists

there has been no social intercourse.⁶⁵

In 1846, Cooper J remained unwilling to concede that Aboriginal people should be tried for offences under British law and argued that he required legislative direction for an intra-Aboriginal dispute to be justiciable. He discharged the accused because there was no competent interpreter available.⁶⁶

Thirdly, Burton J in *R v Murrell* does not adequately consider or query the nature of the acquisition of sovereignty under the doctrine of discovery. This is an issue that flows through these early decisions. Although I do not consider this in detail, suffice it to say, Burton J's treatment of the law of nations, Vattel and the doctrine of discovery is inadequate, especially when considered in comparison with the other two cases in the trilogy.⁶⁷

Finally, Burton J's reasoning relies on the ethnocentric premise of Aboriginal inferiority. If this is the premise underlying the decision that has been interpreted as denying legal pluralism in Australia, should this decision continue to be recognised in contemporary times? Does it hold up to contemporary standards or should this reasoning be recognised as erroneous and rejected as the High Court rejected the

⁶⁵ ALRC above n 9 in vol. 2 at para 45.

⁶⁶ Finally, in 1848, Cooper J accepted jurisdiction for an intra-Aboriginal dispute. However, before the trial started, he stated that in the event of a conviction, he would stay any execution required by law and refer the case to the Governor.

⁶⁷ For further information, see Reynolds above n 11.

Federal Court decision of *Milirrpum v Nabalco*⁶⁸ in its landmark decision in *Mabo* (No. 2)?⁶⁹ Burton J's reasoning does not conform to current jurisprudence,⁷⁰ anthropological theory⁷¹ or contemporary standards. Even if this was acceptable at the time, which is debatable, this reasoning is not acceptable today. This decision should be re-examined as the High Court re-examined the decision of *Milirrpum v Nabalco*.

Therefore, a contemporary interpretation of *R v Murrell* as binding or final authority for the proposition that Australian law does not recognise Aboriginal law or Aboriginal sovereignty overstates the significance of this decision. In addition to failing to consider either the historical context or the judicial recognition of Aboriginal law in contemporary times, this interpretation conflates the decision to exclude the possibility of recognising continuing modified Aboriginal sovereignty and Aboriginal self-government. This overstatement of *R v Murrell* perpetuates harmful legal and social myths and is simply incorrect.

⁶⁸ *Milirrpum v Nabalco* (1971) 17 FLR 141.

⁶⁹ *Mabo v Queensland* (No. 2) (1992) 175 CLR 1.

⁷⁰ Lord Denning in *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] 2 All ER 118 at 123 where he states that, "These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community." See also Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 A.C. 399 discussed in Chapter 2 and Hall J in *Calder v British Columbia* [1973] SCR 313; 34 DLR (3rd) 145 where he repudiates the lower court for being barbaric and uncivilised.

⁷¹ See Norbert Rouland, *Legal Anthropology*, trans. by Philippe Planel (London: Athlone Press, 1994).

The Debate

There was an active dialogue in the early colonial period questioning the effect of acquisition on Aboriginal law. This dialogue continued and judges, governors and legislatures debated the question of legal pluralism for many decades. As mentioned above, Cooper J continued questioning the acceptance of jurisdiction and on at least one occasion, Crown Counsel chose not to prosecute. In Western Australia, Governor Hutt who held office from 1839 – 1846, rejected the British Government's position that Aboriginal people were subject to British law for offences committed against each other.⁷²

The diverging opinions held within the judiciary are evident from the three conflicting decisions made by the same court over a period of twelve years. The strongly worded judgment of Burton J in *R v Murrell* is in direct contrast with the decision by Forbes CJ in *R v Ballard* and Willis J in *R v Bonjon*. Not only were differing opinions expressed by different judges, but differing opinions were expressed by Chief Justice Forbes. Forbes CJ's decisions at first instance and on appeal in *R v Ballard* and at first instance in *R v Murrell* are in stark contrast to his participation in the conflicting unanimous judgment of *R v Murrell*. It is clear from these decisions that

⁷² ALRC above n 9 in vol. 1 at para 45. Governor Hutt was in office from 1839 – 1846. During Governor Hutt's term, any acts "by natives against natives" in accordance with their own law, were ignored; Hasluck, *Black Australians* (Melbourne: Melbourne University Press, 1942). In contrast, Governor Fitzgerald, Governor Hutt's successor, complied with the British position contained in Grey's report and adopted a policy that resulted in the imposition of severe penalties.

there was a broad divergence of opinion within the colonial judiciary regarding the application of British law to intra-Aboriginal disputes. It is over-simplistic to rely on *R v Murrell* as *R v Murrell* does not reflect this debate nor the general opinion within the judiciary at the time.

The diverging opinions between the judiciary and the British Government is symptomatic of numerous declarations of the British Government that stress that Aboriginal people were British subjects and subject to British law, declarations that the judiciary interpreted to exclude the application of British law from intra-Aboriginal disputes. It was only in *R v Murrell*, in which Burton J himself recognised that his interpretation of the legislation was "in strict terms,"⁷³ that it was held that the British and colonial legislation governed Aboriginal peoples in all circumstances. However, even after this decision expressing unanimity between the judiciary and the Government, judges, in particular Justice Cooper, continued to question the application of these declarations to intra-Aboriginal disputes.

There was also a divergence in opinion between the judiciary and the press, to which Burton J referred to in his judgment in *R v Murrell*. However, at other times, the newspapers applauded the Court for its decision, thereby distancing itself from the Government's positions. For example, *R v Murrell* was met with "surprise"⁷⁴ and

⁷³ Above n 23 from *Sydney Herald*, 16 May 1836.

⁷⁴ *Ibid*, from *Sydney Herald*, 5 May 1836.

one correspondent to the Sydney Herald urged future consideration.⁷⁵ A further example is the high praise the *Australian* gave to the decision in *R v Ballard*.

Recognition of Aboriginal Law

The debate focused on the question of whether the Court's jurisdiction should be recognised in intra-Aboriginal disputes. It was a question of whether British law negated Aboriginal law in all circumstances. The crucial principle that arises from this dialogue is not whether the position of the judiciary prevailed over the legislature, or whether Burton J's opinion ultimately prevailed over the judgments of Forbes CJ, but rather that, despite the various positions taken in this controversy, there was consistent recognition that Aboriginal people were governed by Aboriginal law. This was evident in *R v Ballard*, *R v Murrell* at first instance and *R v Bonjon*. Even Burton J, in *R v Murrell*, recognised Aboriginal custom and that Aboriginal people are governed by their own system of rules. Although he denied its status as law, under a particularly narrow, ethnocentric definition grounded in law of nation's understandings of law, state and sovereignty, Burton J's recognition of custom amounts to contemporary understandings of law. Applying Lord Denning's test in *R v Secretary of State for Foreign and Commonwealth Affairs*, Burton J's concept of "custom" in *R v Murrell* is merely that it is unwritten law.

⁷⁵ *Ibid.* Future consideration was urged in order to prevent a "legal murder".

In any event, the fact that Burton J recognised Aboriginal people were governed by rules, even if he did not recognise that these rules were law, is a striking example of the depth of understanding the colonial judiciary had of Aboriginal peoples. The colonial judiciary did not consider Aboriginal people as without law.

There is recognition of Aboriginal law in this trilogy and in Governors' proclamations, discretions, legislation and other judicial decisions. This recognition continued beyond the early 19th century.

Towards the end of the 19th century, it seems that the judicial revolution and flexibility ceased. Opposition, such as that voiced by Justices' Willis and Cooper, was slowly overwhelmed by judgments recognising jurisdiction in intra-Aboriginal disputes. In addition, the pastoral frontier had begun to advance rapidly into the interior and as it did, "the clever words of newspaper editors and the ethical dilemmas of evangelists became increasingly irrelevant".⁷⁶ Settlers, beyond the range of the police, were often unconcerned about Aboriginal rights and began to view Aboriginal people as trespassers. At this time, frontier violence escalated and a number of infamous massacres occurred.⁷⁷

⁷⁶ Robert Foster, Rick Hosking & Amanda Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory* (Kent Town: Wakefield Press, 2001) at 5.

⁷⁷ This is not to say that there was no frontier violence before this time. For example, Pemulwuy has been touted as the first guerilla fighter, who fought from 1790 to 1802 when he was shot. From 1822-1824 the Wiradjuri resisted colonisation along the Murray River. In Tasmania, the Black War was fought from 1827 - 1830. In Western Australia, Yagan led the Noongar resistance from 1831 - 1833. In 1834, the Pinjarra massacre occurred. However, in the 1840's, the commonality and the extent of the violence increased. For example, the Maria Massacre in South Australia and the Rufus River conflict. For more details on these massacres, frontier violence and Aboriginal resistance, see *ibid*. See also, Henry Reynolds, *The Other Side of the Frontier* (Ringwood: Penguin, 1982); Meredith Hooper, *Doctor Hunger & Captain Thirst* (North Ryde: Methuen, 1982); Bill Peach, *The Explorers* (Sydney: ABC Enterprises, 1984).

There was relatively little explicit legal development during this period. Aboriginal people were considered beyond or external to the law.⁷⁸ There was little or no protection offered by a predominantly permissive legal culture. There is a rich body of material referring to the atrocities that took place and the moral ambivalence of the protectionist and assimilationist social policies, most starkly illustrated by the *Aboriginal Act 1905 (Cth)*, an act that created Protectors and authorised the removal of Aboriginal children. However, there was also a variety in the approaches taken by States, some apparently more progressive. All of the approaches taken by the different states are set out in a variety of reports, the most pertinent of which is the *Bringing Them Home Report*.⁷⁹

Despite this bleak history, there were instances of recognition of Aboriginal law, particularly in the 1920's and 1930's. For example, in 1936, an ad-hoc court was established by the *Native Administration Act 1905-1936 (WA)* with jurisdiction for offences by Aboriginal people against Aboriginal people. Section 63(2) of this Act allowed for customary laws to be taken into account in mitigation of punishment. There were also attempts at Aboriginal courts and Aboriginal police in Queensland.⁸⁰ Further, the legislature began to make provisions for the recognition of Aboriginal

⁷⁸ ALRC above n 9 in vol. 1 at para 48, where there is reference to the 1920's and 1930's as a phase of non-recognition.

⁷⁹ Australia, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: Human Rights and Equal Opportunity Commission, 1997).

⁸⁰ ALRC above n 9 in vol. 1 at para 49. See also para. 49 - 58 for details of administrative and legislative responses to rectify the non-recognition of Aboriginal law.

law.⁸¹ As a result, a variety of criminal reforms providing the discretion to recognise Aboriginal law as a mitigating circumstance in sentencing were implemented.

It was not until the 1967 referendum that the Federal Government had the responsibility and the power to make laws with respect to Aboriginal people and Aboriginal people were counted in the national census. Arguably, it was only at this time that Aboriginal people were brought within Australian law and that before 1967, Aboriginal people were outside Australian law. Considered in this way, the referendum indicates further and extensive recognition of the existence of Aboriginal law throughout the colonial frontier.⁸²

THE CONTEMPORARY SITUATION

In recent years, there has been an increasing tendency by the courts to recognise and enforce Aboriginal law. Aboriginal law has been recognised in substantive criminal law, as relevant to the exercise of discretion in sentencing, in assessing damages for loss of amenities, and for the purpose of adoption laws.⁸³ A recent study in Western Australia summarises the approach of Australian courts to

⁸¹ ALRC above n 9 in vol. 2 in Pt 6 from para 678.

⁸² The status of Aboriginal peoples regarding the law is still ambiguous. Since the 1967 referendum and the consequential amendment to s 51 (xxvi) of the *Constitution*, there has been continual debate as to whether this constitutional provision to make laws with respect to Aboriginal people may be used for beneficial purposes. See *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 and in particular the judgment of Gaudron J.

⁸³ *Ibid* at 58. See *Napaluma v Baker* (1982) 29 SASR 192 followed in *Dixon v Davies* (1982) 17 NTR 31 for damages.

Aboriginal law in the areas of criminal law, civil law and family law.⁸⁴ In criminal law, Aboriginal law has been considered in diverse areas, including bail, procedure, sentencing and defences such as consent, duress, provocation and honest claim of right. In civil law, Aboriginal law has been recognised in coronial and burial matters and also in family law for marriages and the placement of children.

More comprehensively, the continuing vitality of Aboriginal law was recognised by the High Court decision in *Mabo (No. 2)*.⁸⁵ This watershed decision recognised Aboriginal law as a source of indigenous rights to land.

Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.⁸⁶

⁸⁴ Law Reform Commission of Western Australia, *Approach of Australian Courts to Aboriginal Customary Law*, Background Paper No. 1 (December 2003). This paper attempts to exhaustively summarise decisions that consider Aboriginal law. This is the first background paper of the Law Reform Commission of Western Australia's current project on Aboriginal customary law. The terms of reference are much broader than the ALRC (although limited to Western Australia) but do require that the ALRC report is considered. Since there are many more programmes in place and people are far more receptive to the idea of reconciliation and community based justice mechanisms, the Law Reform Commission of Western Australia sees itself as building on from the work of the ALRC, although not being as restricted in their scope. As Heather Kay replied, when asked about the progress of the current reference:

I think predominantly the issues we have come into contact with concern the need for communities to feel empowered, and often customary law is what communities focus on to give them this sense of empowerment.

per Heather Kay, Executive Officer of the Law Reform Commission of Western Australia, email, 6 April 2004.

⁸⁵ Rob McLaughlin 'Some Problems and Issues in the Recognition of Indigenous Customary Law' 3(82) *Aboriginal Law Bulletin* (1996) 4; Noel Pearson, 'Reconciliation to be or Not to be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government within the Australian Nation' 3(61) *Aboriginal Law Bulletin* (1993) 14.

⁸⁶ Above n 69 at 58 per Brennan J.

The recognition that Aboriginal law influences the content of native title acknowledges an existing body of Aboriginal law. Brennan J also recognised that Aboriginal law is dynamic. He held that native title is not a bundle of specific rights frozen at the assertion of British sovereignty, but has continued to develop over the last two centuries.⁸⁷

Therefore, there is legal recognition of Aboriginal law as a dynamic body of law in both historical and contemporary times. What are the implications of this recognition?

ADMINISTRATIVE FLEXIBILITY OR LEGAL PLURALITY?

Two inferences may be drawn from these instances of recognition. First, that there was an era of "administrative flexibility", as suggested by the Australian Law Reform Commission ("ALRC") or secondly, that Australia was (and is) a plural legal society. Two reports, the ALRC's, *Recognition of Customary Law*, which although published in 1986 is still considered a relevant and important work and the Report of the Royal Commission on Aboriginal Peoples ("RCAP")⁸⁸ published in Canada in 1996, must be considered. Both of these reports were major contributions to the documentation

⁸⁷ *Ibid* at 41 per Brennan J. See also Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Houghton Boston Printers, 2001) at 416 - 465; Jeremy Webber, "Native Title as Self-Government" (1999) 22:2 University of New South Wales Law Journal 600 at 602.

⁸⁸ Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2:2 (Ottawa: Canada Communication Group, 1996) ("*Restructuring the Relationship*"); Canada, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communication Group, 1993) ("*Partners in Confederation*").

of the history of colonial contact and the effect of colonialism on both indigenous peoples and indigenous law.

The ALRC report considered the recognition of Aboriginal law by Australian courts. This report has serious limitations.

The ALRC considered whether it would be desirable to apply Aboriginal customary law to Aboriginal people. The report focused on the recognition of Aboriginal law by the courts in criminal law, family law and for the purposes of hunting, fishing and gathering rights. The ALRC concluded that although Aboriginal law has been recognised in some cases, this recognition has been "exceptional, uncoordinated and incomplete."⁸⁹ They concluded that recognition did not amount to a legal obligation but was merely a matter of administrative flexibility. As a result, the ALRC considered that the scope for recognition through the common law was "very limited" and determined that Australia is not required, although not prohibited, from recognizing Aboriginal law.⁹⁰

Although, according to the ALRC, Australia is not required to recognise Aboriginal law, the ALRC recommended that Aboriginal law should be recognised in appropriate ways.⁹¹ "Appropriate ways" were limited to opportunities of recognition within the existing judicial and administrative structures. As a result, the ALRC

⁸⁹ Above n 9 vol. 1 at para 62 - 63, 68, 70 - 75, 76 - 84 and 85. For a summary, see above n 3 vol. 2 at para 1005.

⁹⁰ Above n 9 vol. 1 at para 171-8.

⁹¹ *Ibid* at para 194.

recommended avoiding the creation of new and separate legal structures.⁹²

Essentially, the ALRC's recommendations were to maintain the current monistic legal structure⁹³ where the general law is not excluded and Aboriginal laws are not directly enforced.⁹⁴

While this report contains valuable factual information, it is nonetheless flawed in its conception, analysis, conclusion and recommendations. Conceptually, it is limited by its terms of reference to consider only how to "apply" Aboriginal laws. This does not allow for any shift in the current power imbalance between Australian and Aboriginal legal systems. As a result, the analysis did not consider Aboriginal law as an equal legal system, a failure inconsistent with contemporary social and legal thought and international law.⁹⁵

The ALRC's analysis did not adequately address the injustice of the historical and contemporary silencing of Aboriginal law. The ALRC did not consider international law and self-determination as rights relevant and applicable in Australia. Further, the ALRC failed to consider the common law inherent right of Aboriginal self-government. There was no genuine consideration of any legally enforceable rights. Instead, the ALRC report showed concern for public opinion and pandered to fears of legal pluralism, ultimately deferring to Parliament to make a political decision.

⁹² *Ibid* at para 196.

⁹³ *Ibid* at para 199 - 207.

⁹⁴ *Ibid* at para 200 - 203, 208.

⁹⁵ Above n 71. See also Lord Denning in *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] 2 All ER 118 at 123. See also the discussion of self-determination in Chapter 1.

Not surprisingly, the ALRC did not make any recommendations beyond the current scope and structure of the Australian legal system. These recommendations were limited in this manner as a result of the ALRC conclusion that Australia is not required to recognise Aboriginal law, a conclusion inconsistent with both the common law and international law.

The ALRC's reliance on "administrative flexibility" failed to consider properly the active debate or the consistent recognition of Aboriginal law that has occurred both historically and in contemporary times. The ALRC's interpretation that these were merely acts of administrative flexibility was an interpretation grounded entirely within the ideology of legal monism. However, this debate and the recognition of Aboriginal law constitute a serious judicial challenge and are more than merely administrative flexibility. Not only was this debate part of a dialogue between the colony and Britain, questioning the British interpretation of the doctrine of discovery and the justice of applying British law to intra-Aboriginal disputes, this dialogue involved consistent recognition of another legal system. Australia was, and still is, a plural legal society.

The ALRC report had inherent limitations that resulted in its incapacity to consider the possibility of recognising Australia as a plural legal society. This is inconsistent with international discourse on self-determination and the common law inherent right of Aboriginal self-government. The more recent report by RCAP considered similar

issues in the context of Canada.⁹⁶

RCAP operated on a fundamentally different premise from the ALRC and was not limited to "applying" indigenous law within the paradigm of legal monism. The terms of reference were ambitious and reflected "the depth of the challenge this country has yet to meet".⁹⁷ RCAP considered four interdependent areas: the reality of societal and cultural difference, the right of self-government, the nature of aboriginal nationhood and the requirement for adequate land, resources and self-reliant economies.⁹⁸ Although this inquiry was much broader than the ALRC's, it did consider the interaction between aboriginal law and Canadian law. Further, RCAP comprehensively considered the common law right of self-government and determined that this was an inherent right arising from aboriginal peoples' original status as independent and sovereign nations.⁹⁹ As René Dussault stated at the launch of RCAP's Final Report:

Our view on this issue is clear. The inherent right of Aboriginal peoples to govern themselves is firmly anchored in history and, we believe, in law.¹⁰⁰

RCAP concluded that the right of self-determination is the fundamental starting point

⁹⁶ RCAP: *Restructuring the Relationship* above n 88 at 186.

⁹⁷ Georges Erasmus, speaking with René Dussault, "Address for the Launch of the Report of the Royal Commission on Aboriginal Peoples" at <http://www.ainc-inac.gc.ca/ch/rcap/spch_e.html>.

⁹⁸ *Ibid.*

⁹⁹ RCAP: *Restructuring the Relationship* above n 88 at 193. RCAP concluded that the inherent right of Aboriginal self-government is recognized and affirmed in section 35(1) of the *Constitution Act 1982* above n 88 at 213.

¹⁰⁰ René Dussault, speaking with Georges Erasmus, "Address for the Launch of the Report of the Royal Commission on Aboriginal Peoples" at <http://www.ainc-inac.gc.ca/ch/rcap/spch_e.html>.

for Aboriginal governance. Further, RCAP determined that aboriginal peoples also possess an inherent right of self-government within Canada as a matter of Canadian common law and Canadian constitutional law.

Although Canada has a different political and constitutional structure than Australia, the shared colonial common law heritage is the nexus that makes this report not only relevant, but also crucial, to understanding the common law position in Australia.

These two reports have vastly different perceptions of the relationship between indigenous law and Australian and Canadian law respectively. The ALRC report considered the question of how to "apply" Aboriginal law and determined that recognition of Aboriginal law amounts only to instances of administrative flexibility. The ALRC report was a self-fulfilling prophecy. In contrast, RCAP considered short and long term solutions to historical and contemporary injustice and determined that the only way forward was to recognise the existence of indigenous legal systems through the inherent right of self-government and the right to self-determination. RCAP recommended the recognition of legal pluralism.

There is a choice in the contemporary juridical system. However, one must question the continuing adoption of an out-dated report, which ignores contemporary domestic and international legal obligations and human rights standards, as the pre-eminent statement on the recognition of the existence of Aboriginal law. The position of "administrative flexibility" taken by the ALRC must be rejected. Once this occurs,

RCAP's useful and informative document, especially its consideration of the recognition of self-government and its articulation of the relationship between recognition of Aboriginal law and the inherent right of self-government, should be adopted.

ABORIGINAL LAW AND SELF-GOVERNMENT

The recognition of Aboriginal law by Australian courts demonstrates that a limited degree of self-government or law-making powers remained with Aboriginal people after the assertion of sovereignty and after the drafting of the *Commonwealth Constitution* in 1901. This relationship is best explained by briefly considering Canadian jurisprudence.

Since 1867, Canadian courts have recognised and enforced laws made by Aboriginal societies. These cases primarily concern customary marriage, beginning with *Connolly v Woolrich* (1867).¹⁰¹ More recent cases include *Wewayakum Indian Band v Canada*¹⁰² and *McLeod Lake Indian Band v Chingee*.¹⁰³ The relationship between the recognition of Aboriginal law and common law self-government is clearly articulated in Justice Williamson's judgment in *Campbell v British*

¹⁰¹ (1867) 11 L.C.J 197.

¹⁰² [1991] 3 FC 420 at 430.

¹⁰³ These cases primarily concern customary marriage, beginning with *Connolly v Woolrich* (1867) 11 LCJ 197. More recent cases include *Wewayakum Indian Band v Canada* [1991] 3 FC 420 at 430 and *McLeod Lake Indian Band v Chingee* (1998) 165 DLR (4th) 358. See *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 358 - 360 for other authorities.

Columbia.¹⁰⁴ Justice Williamson accepted that Aboriginal people had legal systems prior to contact and that these legal systems, although modified, continued after contact. The recognition of customary law by Canadian courts demonstrates:

... not only that at least a limited right of self-government, or a limited degree of legislative power, remained with Aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense.¹⁰⁵

Therefore, in Canada, the right to make laws survived the assertion of sovereignty and Confederation.

In Australia, the right to make laws also survived the assertion of sovereignty. This can be seen in the recognition of Aboriginal law by the courts, legislature and the executive. Despite *R v Murrell*, instances of Aboriginal customary law and the existence of Aboriginal law-making power are recognised as occurring within the nation-state. This one aspect of Aboriginal sovereignty, the right to make laws, is recognised as existing in Australia. Therefore, Aboriginal law-making power exists harmoniously with Crown sovereignty.

¹⁰⁴ *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

¹⁰⁵ *Ibid* at 355.

The continuing recognition of Aboriginal law, enforceable in the courts, is recognition of political structures that do not derive their authority from constitutional division of legislative power.¹⁰⁶ The recognition of political structures and the right to make laws, which bind the Aboriginal community, is the means by which a right of self-government is implemented.¹⁰⁷

CONCLUSION

The early colonial period was effectively a time of legal pluralism. Despite the classification of Aboriginal people as British subjects, in practice, the application of British law to Aboriginal people was conditional. The early practice was to apply English law to offences committed by Aboriginal people against colonists and visa versa. However, where an Aboriginal person committed an offence against another Aboriginal person, the applicability of British law was questioned and Aboriginal law was recognised.

The contemporary interpretation of *R v Murrell* as authority for the proposition that the Australian legal system has never recognised Aboriginal law both misinterprets and grossly overstates this decision. It also fails to recognise two other important decisions in *R v Ballard* and *R v Bonjon*. A consideration of these three cases

¹⁰⁶ In Canada, this was in the *Constitution Act 1867*. In Australia, the *Commonwealth Constitution*.

¹⁰⁷ *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 (Written argument of the Nisga'a Tribal Council).

reveals an active debate within and between the judiciary, government and press, which indicated that Aboriginal law was recognised.

This recognition continued into contemporary times, including the period leading up to *Coe (No. 1)* and *Coe (No. 2)*, where the assertion of absolute sovereignty was rejected. However, as mentioned in Chapter 2, these cases did not consider the continuing existence of modified Aboriginal sovereignty. Rather, the colonial common law doctrine of self-government, as articulated by Chief Justice Marshall in *Worcester v Georgia*, forms part of Australian common law. Modified sovereignty and the inherent right of self-government are consistent with the continuing recognition of the existence of Aboriginal law.

The recognition of Aboriginal law is more than mere "administrative flexibility" and amounts to recognition of legal plurality. With the recognition of legal plurality and Aboriginal customary law, it is recognised that Aboriginal people have law-making power and the right to make laws. This is the foundation of the common law inherent right of self-government.

Chapter Six

CONCLUSION

*Discussion on Aboriginal sovereignty in Australia is almost forbidden.*¹

The failure to recognise and give effect to Aboriginal rights, including Aboriginal self-government, has contributed to a significant power imbalance between Aboriginal people and the wider Australian society. This imbalance is manifest in a lack of education, employment and healthcare options for Aboriginal people and in the overrepresentation of Aboriginal people in the criminal justice system. While it is true that Australians have embraced some aspects of Aboriginal culture – especially in art and sport – governments and the courts cling stubbornly to colonial attitudes when it comes to matters of justice and civil and political rights.

Aboriginal self-government is a common law right. In order to maintain the conceptual integrity of the Australian legal system, after years of misapplication, the common law must be correctly applied.² The continuing failure to recognise self-government contributes to the current power imbalance and reinforces the colonial mindset that remains prevalent in Australia today. It is time to address the flawed

¹ Michael Mansell, "The Bicentenary and Aboriginal Sovereignty" (1988) Law Institute Journal 1206 at 1207.

² For a discussion of how the recognition of native title involved the correct application of the common after years of misapplication, see Garth Nettheim, Gary Meyers & Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Canberra: Aboriginal Studies Press, 2002) at 238.

interpretation of the common law and the injustices this interpretation perpetuates.

As Germaine Greer writes:

There is only one way to escape from an impasse, and that is to turn back to the point where you went wrong, sit down on the ground and have a think about it.³

It is time to stop. The dominant argument used to deny the existence of self-government cannot be maintained. An argument that self-government is incompatible with the Australian state fails to comprehend the distinction between absolute and modified sovereignty. Although Australian courts have rejected absolute sovereignty, there has never been any judicial consideration of the existence of modified Aboriginal sovereignty or the inherent right of self-government.

By returning to the pivotal periods in colonial history, it becomes apparent that the inherent right of self-government existed as part of the colonial common law imported into Australia. This is most clearly stated in Chief Justice Marshall's leading judgment in *Worcester v Georgia*.⁴ Although self-government was not explicitly recognised in Australia, the colonial judiciary did consistently recognise the existence of Aboriginal law. Despite British declarations to the contrary, internal Aboriginal disputes were considered to be beyond the reach of British law and

³ Germaine Greer, *Whitefella Jump Up: The Shortest Way to Nationhood* (Melbourne: Black Inc, 2003) at 2.

⁴ (1832) 31 US (6 Pet) 515.

governed solely by Aboriginal law. The recognition of Aboriginal law continues today. This is the foundation of the inherent right of self-government.

In order for the inherent right of self-government to become a reality, there must be fundamental changes to both the Australian legal system and the perception of the Australian legal system. The Australian legal system is not fragile. It is a dynamic body of law. Fears that recognition of modified Aboriginal sovereignty and Aboriginal self-government will fracture Australia's legal skeleton are unfounded and fanciful. Despite "the sky is falling" critics, native title has not brought the legal system to its knees. However, the conservative interpretation of this common law right and the continuing denial of modified Aboriginal sovereignty and self-government are slowly but surely undermining both the legal and political systems and Aboriginal peoples' claims to justice.

Sovereignty is not the S-word.⁵

In a free and democratic society, political discussion on an issue fundamental to Australia's nationhood must not be silenced. The continuing maintenance of the position that sovereignty and self-government are issues beyond the scope of Australian law perpetuates historical colonial injustice and amounts to a contemporary denial of fundamental human rights.

⁵ Larissa Behrendt, "Slicing the Circle: Treaty, Native Title, Aboriginal Sovereignty and the Compartmentalizing of Indigenous Rights in Australia" (Paper presented to the Indigenous Bar Association Conference in Ottawa, 2000) [unpublished] at 4.

The common law right of Aboriginal self-government must be recognised. This is not only a matter of morality and justice; it is a matter of law.

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