Sovereign Rights in the 21st Century

Jeff McMullen

Early in the 21st Century the population of Australia's First Peoples is approaching or may have already surpassed the number here when James Cook made his extraordinary claim of sovereignty on behalf of England's King George III.

In so many respects it is the unresolved question of sovereign rights that will overshadow the major political discussion in the next few years over recognition of the rightful place of the 'First Australians' who are still dispossessed, discriminated against and disempowered in their own land.

Ghillar Michael Anderson and Pangarte Rosalie Kunoth-Monks have been appointed by seventeen Aboriginal nations as head spokespersons for a rapidly growing Sovereign Union asserting that they have never ceded dominion and continue to hold land title under their Law and Culture.

These First Nations and others will meet in Central Australia in April to assert their law and present to the world a unified vision of how the full measure of sovereignty can be established locally.

Anderson, one of the founders of the Aboriginal Tent Embassy in 1972, currently is challenging the authority of Australian law in various jurisdictions. In the Brewarrina court he argued that Aboriginal people in independent nations could not be forced to pay land rates. By testing the limits and validity of Australian law to control First Peoples Anderson exposes the legal contradictions, duplicity and deceit in the settler society's creeping assertion of sovereignty.

As early as 1978, Wiradjuri man, Paul Coe, began a challenge in the High Court on the basis that the English settlers 'wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign Aboriginal nation'.

Since 1979 the Aboriginal Tent Embassy and many legal experts have maintained that Aboriginal Sovereignty must be recognized via treaties negotiated under international supervision.

From the Top End to Tasmania, from Noongar claims in Perth to the struggles of Kooris in southern NSW and around Canberra, voices are being raised in support of the principle of sovereignty. Many are rolling out 30 years of evidence from the Harvard Project on American Indian Economic Development that sovereign control at a local and regional level allows the First Nations to control the planning and effectively mobilise people and investment, the best way to eliminate poverty and disadvantage.

Kunoth-Monks, the Alyewerre elder from Utopia in Central Australia, says it is perfectly clear that almost two and a half centuries of assimilation and government control have not ended the pain of so many of her people. She described last November's gathering of Sovereign Union at the Aboriginal Tent Embassy and Old Parliament House as the best meeting she had ever attended because it focussed on the most pressing issues: survival and changes required at once for a sustainable future for their children and grandchildren.

Anderson sums up the argument for sovereignty by pointing out the truth that Aboriginal and Torres Strait Islander people never surrendered, never gave up their sovereignty, that the land itself was never ceded through any form of legal settlement and that, in fact, much case law and some important rulings in Australia's own courts recognize, at least in the view of some eminent judges, that Aboriginal people were never British subjects.

Justice Willis of the NSW Supreme Court (*R v Bonjon 1841)* ruled that Aboriginal people were 'unconquered and free", had their own laws and had rights 'as distinct people' and could not be seen as having ' tacitly surrendered'. Justice Willis said that Australia should acknowledge the existence of these Aboriginal laws and 'treaties should be made' with Aboriginal people.

Many others such as Justice Burton (*R v Murrell 1836)* have echoed the old European ascendancy logic that the 'natives' had not attained the 'numbers and civilisation…to be governed by laws of their own." Justice Isaacs ruled in the High Court in 1913 that the whole of the continent unquestionably belonged to the King of England. Justice Gibbs held that the 'contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.'

Will First Peoples ever be able to count on Australia's constitution and law to gain justice and genuine land rights, or is the historian (and *Tracker* columnist) Dr Gary Foley right in believing that only history will set this warped record straight?

Henry Reynolds argues powerfully in his latest book, *Forgotten War,* that Cook's claim of sovereignty over one of the world's great land masses had little basis in international law even at that time.

"*The audacious British claim was that they had acquired an original, not a derived sovereignty because there was no other."*

Reynolds cites the 1819 senior legal adviser to the Colonial Office counselling that NSW had not been acquired by conquest or treaty but as a 'desert and uninhabited territory'.

Take away the invalid claim of *terra nullius* and you see that the Crown's 'sovereignty' was really only a shield against its European rivals as Britain scrambled for new land to establish a penal colony.

Across the seas in Britain's lost American colonies, Chief Justice Marshall stated unequivocally in 1832 that the extravagant claims of 'discovery' of Indigenous lands

‘asserted a title against Europeans only and were considered as blank paper so far as the rights of the Natives were concerned’.

Reynolds argues that the legal fantasies about *terra nullius* in Australia when up to one million were spread around the vast Australian continent had profound effects on the way settlement unfolded.

“There was no need to negotiate with the Aborigines…War was the only means available to enforce both the asserted annexation and the massive appropriation.”

In Australia, Eddie Mabo’s courageous fight all the way to the High Court eventually swept away the lie of *terra nullius*. Yet in a deeply troubling way, Mabo (No 2) raises obstacles to Aboriginal people seeking to assert a fuller sense of sovereignty.

Despite the comments by the Mabo (No 2) Justices Deane and Gaudron that the acts and events of dispossession ‘constitute the darkest aspect of the history of the nation’, this same landmark judgement asserted that the Crown’s acquisition of sovereignty ‘over the several parts of Australia cannot be challenged in a municipal court’.

Since Mabo (No 2) the High Court has not considered challenges to the Crown’s sovereignty. In *Coe v Commonwealth* Chief Justice Mason said that Mabo (No 2) was ‘entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people’.

Here is the legal fortress erected by white man’s law. When it comes to sovereign rights, Aboriginal law is still ignored.

Unrecognized in the Australian Constitution except through state powers of exclusion and denied a Treaty to address the invasion, the war and the theft of a continent, Aboriginal and Torres Strait Islander people nonetheless can declare that they have survived the great obliteration and clearly are not doomed to extinction like foolish white supremacists had predicted.

While estimates of the Indigenous population in 1770 vary from about 300,000 to more than 1,000 000, the respected British historian, Phillip Morgan, contends that 750,000 is a reasonable total of the multiple clans that occupied this vast and bountiful country when the idiocy of *terra nullius* was floated as casually as Cook’s fluttering flag.

The multi-national, multi-lingual, many coloured faces of countrymen and countrywomen are mixing and changing as they have always done for countless thousands of years, with people coming and going, marrying and having babies. The layers of cultural identity of these people are unquestionably diverse but today around that same significant number, 750,000 people, are asserting their own distinct heritage as First Peoples of Australia.

These descendants of the *Children of the Sunrise* are youthful and have the numbers to develop a sustainable future. They should feel solidarity in knowing that among the world’s 370 million Indigenous people, many still struggle but some have achieved genuine sovereign rights.

With just 196 recognized countries in the world and over ten thousand groups of people defined by language, cultural and ethnic distinctions, it will be an ongoing process to work out how each fits into the jigsaw of nationhood.

We should not be afraid to study closely and learn from those First Nations that have successfully established a legal basis for their existence within larger nations.

Why does Australian Government refuse to consider the successful approaches utilized in the United States and on the Saami lands of Norway, Sweden and Finland where there has been a rapidly improvement in the wellbeing of many Indigenous people after a positive embrace of their sovereign rights?

What we are searching for in Australia is a fair and just nation that allows the First Peoples their rightful entitlement and establishes the effective self-determination to allow them to manage their destiny in a social partnership with whom they choose.

The real ‘Aboriginal problem’ is that Australia has been unable to negotiate an enforceable legal compact, one that allows the First Peoples their sovereign rights.