Review

Indigenous Crime and Settler Law: White Sovereignty after Empire by Heather Douglas and Mark Finnane Palgrave Macmillan, 2012, 280 pp (ISBN 9780230316508)

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Building on earlier work (Douglas 2005; Finnane and Richards 2010), Heather Douglas and Mark Finnane expose the myth of 'perfect sovereignty' in Australia in this important book. Their meticulous historical study demonstrates that although, according to international law, the English acquired sovereignty over the entire continent upon settlement (*Mabo*, per Brennan J), the exertion of sovereignty and the exercise of criminal jurisdiction over Indigenous people has been, in practice, uneven, piecemeal and imperfect. Rather than developing a central argument, the authors have central purposes: to provide a history of sovereignty in post-Empire Australia and to show that the question of how the criminal law should respond to Indigenous intra-racial violence is not yet settled (p xiv). It is the complexity of the encounters between Indigenous people and the criminal law from colonial times to present that the authors wish to, and do, impress upon their readers. To avoid oversimplifying this complexity, this review is necessarily impressionistic rather than comprehensive.

A central concern of the work is a practical question that confounds Australian courts daily: 'What is the role of introduced criminal law in addressing the victimization of one Indigenous person by another and what should it be?' (p 1). The method is to examine the criminal law's response to black-on-black violence, or 'indigenous *inter se* violence' (the Latin term preferred by the authors), in its historical context. As the story of 'competing claims to legal authority' (p 3) unfolds, we see the impact of this context upon the way in which the criminal law has responded to such violence. Over time, and under the influence of developments in anthropology, science, human rights and international law, there has been 'increasing recognition' of Indigenous customary law and 'cultural difference in Australian jurisdictions' (p 4). In telling this story, the authors provide a refreshing alternative to what Finnane has described elsewhere as a 'reductive' literature that either reduces such encounters to the continuing 'impact and survival of colonialism' or 'attribute[s] a current state of affairs to the alleged inherent violence of Indigenous culture' (Finnane and Richards 2010:238–9). Their conclusion? There are no easy answers.

Douglas and Finnane fill a lacuna in the academic literature on Indigenous people in the criminal justice system by telling a rarely acknowledged story behind Indigenous incarceration (Finnane and Richards 2010:239). Criminological analyses and government inquiries have discussed at length the contributions of systemic racism and institutionalisation of disadvantage to the over-representation of Indigenous Australians in custody. These important observations have exposed problems that need to be addressed, but the focus on the criminal justice system has obscured the backstory of the magnitude of Indigenous intra-racial violence (p 12). In bringing this backstory to light, this study reassesses the 'law as an instrument of domination' (p 6) narrative, demonstrating in the

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process that there has been a dialectical relationship between Aboriginal people and the criminal law.

In contrast to most historiographies of Australia, the authors 'de-centre' their exploration of colonisation by commencing in Western Australia to illustrate the dislocation of each settlement (or 'frontier') from central command in New South Wales. This approach brings to life the exigencies of the time, showing how the law struggled to shape the new colony while being shaped by local circumstances (ch 1). Through the voices of settlers, judges and policy-makers, the authors excavate some of the assumptions we make about our colonial past; for example, showing that 'these were not encounters between cohesive groups of Indigenous tribes and unified settler communities' (p 13). While acknowledging the violence perpetrated by the colonisers upon Indigenous people, this study shows that the settlers were shocked by the level of intra-racial violence among Indigenous people. We now know that reprisal killings were not unique to Indigenous Australia. They were also a central feature of social relations in medieval Europe:

> In most countries, compensation was arranged not between individuals but between kin-groups — because guilt, like vengeance, functioned collectively. The slaying of one member of a clan could be avenged by killing any member of the slayer's kin; therefore the payment to settle the feud and remove the threat of vengeance should be paid by all on the one side and shared between all on the other (Lenman and Parker 1980:24).

Some of the more perspicacious among them realised they were witnessing a customary system in operation (see, for example, p 18), but the question was, and continues to be, how should the criminal law respond to it? There was no single approach and whether and how to make Indigenous intra-racial violence amenable to the law was 'hotly debated' (p 64). A minority argued British law had no part to play, although such arguments were often based not only on liberal ideals, but also on the 'science of race difference' (Howard-Wagner 2007), as Justice Burnside's remarks in 1921 illustrate: 'Those tribunals are utterly unfitted for trying men who have the lowest form of human nature known, no moral intelligence comparable with our own, and who are asked to abide by laws they have no part in framing' (p 85).

The journey through colonial times — the policies of protection, assimilation and self-determination — exposes the continuing unevenness of the criminal law's response to Indigenous intra-racial violence and customary law. A possible solution that arose in the context of the push for self-determination is discussed in ch 6: the formal recognition of customary law. In describing the complexity of this vexed issue, the authors perceive a dilemma for both the settler legal system and customary systems: 'On the one hand, this refusal or inability to codify customary law contributes to uncertainty about what customary law is and how the state and its institutions should respond to it. At the same time, to define customary law, to write it, is to lose it' (p 188).

This chapter reminded me of the epiphany Foucault had about the limitations of our system of thought when he read the taxonomy of animals in 'a certain Chinese encyclopaedia' (Davies 2008:10). The passage is worth repeating:

> This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought — *our* thought, the thought that bears the stamp of our age and our geography — breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes 'a certain Chinese encyclopaedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i)

> frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies'. In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*' (Foucault 2012:xvi).

Because of these limitations settler law lacks the means to comprehend and accommodate a different way of seeing the world, a different way of being in the world (Watson 1997). This, perhaps, is the obstacle at the heart of the 'Indigenous law'–'settler law' encounter. However, the authors, guided by J A G Pocock, suggest it may be possible to build a portal between the two worlds. The first step, which they take in this book, is to acknowledge that 'sovereignty has more than one history'. This acknowledgment creates the opportunity for a 'dialogue between two peoples' and, ultimately, a 'treaty between histories' as a means of reaching greater mutual understanding (p 12).

It is to the question of 'sovereignties' that we return in the final leg of the journey through the 2007 Emergency Response to the present. Clearly, two systems of law operate in the 'real world' rendered by the authors (p 212). Although settler law has attempted to hold 'a monopoly on violence' (p 213), in practice there is not one single, uniform and 'monolithic' sovereignty. What the reader sees instead is 'a horizontal tapestry of partial sovereignties' (p 219), and this is the complex reality with which the criminal law continues to grapple.

Case

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

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