

*The Land is Our History: Indigeneity, Law, and the Settler State*

By Miranda Johnson

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Reviewed by Fleur Te Aho

Miranda Johnson's *The Land is Our History* turns its gaze to a formative time in recent history for the development of indigenous peoples' status as "indigenous" and new settler state identities. Johnson examines some of the legal strategies engaged by indigenous peoples and their advocates in Aotearoa New Zealand, Australia and Canada from the early 1970s to the mid-1990s to advance their land rights and other claims. Johnson offers a thoughtful, high-level and sophisticated analysis of these moves, which is based on extensive archival research and interviews. She argues that a new, "astonishingly successful", definition of indigeneity as "first peoples" was fashioned through these legal struggles, one where "indigenous peoples' identities were inextricably bound to the land" – hence the text's title (3, 5). According to Johnson, this identity came with distinct collective rights (beyond civil rights), assertions of peoplehood that departed from calls for sovereign statehood, and operated to connect indigenous peoples with other indigenous peoples around the globe. In doing so, it opened up new spaces within the law and its institutions for indigenous peoples' claims to be heard, such as expanding evidentiary practices to allow indigenous oral traditions as evidence and shifting hearings from the courtroom to indigenous communities. It also breathed new life into common law aboriginal title and historical treaty promises as recourses for indigenous justice claims, forcing the states into negotiations with indigenous peoples. But not only did indigenous peoples change their own status through these struggles, in Johnson's view they also changed the foundational stories of the settler states of which they were a part. Through their legal strategies indigenous peoples undermined the benevolent origin tales of Aotearoa New Zealand, Australia and Canada and demanded that the states redeem themselves through the recognition of indigenous peoples' claims. Johnson describes the timing of the strategies as "impeccable", coming at a time of identity crisis for the three states as they loosened their ties to Britain and sought postcolonial identities that would locate themselves in the Asia-Pacific (3). Prior to this, she argues that indigenous peoples had exerted slim influence on state policy, which is what rendered their success in this period so striking.

The book covers significant ground. It has six substantive chapters, in addition to an introduction that teases out the unifying threads of the chapters and a brief epilogue. It is essentially chronological, tracking the legal strategies across the three states during this period and its impact. Rather than offering up an exhaustive history of the period, Johnson hones in on select key, defining, events. She brings the text alive by incorporating short biographies of some of the key actors she discusses, including indigenous leaders, judges, legal counsel and anthropologists. This helps to locate their positionings. She also quotes from indigenous leaders and activists, giving an essential voice to these actors, although their voices (and their diversity) could perhaps have been drawn out more in places.

The first four chapters focus on Australia and Canada. Chapter 1 argues that indigenous activists in the two states countered state policies of assimilation by emphasising their distinctive connection to the land and the rights associated with that connection. When the governments refused to negotiate land rights, activists then turned to the courts. Chapters 2 and 3 examine two early indigenous land rights cases: *Milirrpum v Nabalco Pty. Ltd. and the Commonwealth of Australia* (1971), known as the "Gove land rights case" bought by the

Yolngu people of Australia (Chapter 2), and *In re Paulette et al v The Queen* (initiated in 1973), the “caveat case” bought by the Dene people of Canada (Chapter 3). Johnson posits that, while the legal outcomes of the cases were not wholly positive for the claimants, the cases did prompt the establishment of commissions of inquiry into indigenous claims as public support for justice for indigenous peoples grew. Chapter 4 examines three of these commissions - the Indian Claims Commission (Canada), the Woodward Commission (Australia), and the Berger Inquiry (Canada) – showing how they further established the claims of indigenous peoples as “first peoples”.

As someone less familiar with these jurisdictions, especially Canada, I found the chapters engaging and informative. Johnson does a very good job of locating the events she examines in the broader social and political atmosphere of the time and teasing out their ramifications. She connects the strategies engaged in Australia and Canada to other legal developments, including across all three states the subject of her study. For example, she reflects on how the use of the testimony of indigenous witnesses in the Gove land rights case drew on experience in Canada and Aotearoa New Zealand.

The final two chapters focus on Aotearoa New Zealand, where Johnson identifies a different history of indigenous activism. In Aotearoa New Zealand, Māori activists in the 1970s were not seeking acknowledgement of their foundational role in the creation of the nation. Rather, they were contesting how that role, through the signing of Te Tiriti o Waitangi (the Treaty of Waitangi), had been misrepresented to present a tale of benign settler colonialism and of “one people”. The Treaty, they claimed, was a “fraud”. In key claims that followed before the courts and the Waitangi Tribunal, Māori were recognised as partners with the Crown with profound relationships with the land that burdened them (at least from some quarters) with guarding the national estate from incursion. Notably, the Waitangi Tribunal reframed Te Tiriti as guaranteeing Māori tino rangatiratanga or political authority, breathing new vigour into Te Tiriti for Māori justice claims. Chapter 5 traverses this history of activism before discussing the watershed Court of Appeal decision in *New Zealand Maori Council v Attorney General* (1987), known as the “Lands case”, which was brought in response to the large-scale privatisation of state-owned assets. Chapter 6 offers a detailed examination of the claim of Whanganui iwi (nations) to the Whanganui River, ultimately reported on by the Waitangi Tribunal in 1999 (with statutory recognition of the legal personhood of the Whanganui River given in 2017).

Johnson touches on key milestones in Māori claim making during this period aspects of which, given their significance, have been quite well traversed in other works. This means that much weighs on the gloss that Johnson offers. I was impressed by Johnson’s critique of the judges in the Lands case for conceiving of Māori in a “generalized, abstract, and unified” form (rather than the iwi and hapū, or extended kinship group, collectives in which they have historically organised) and for dodging the issue of the legitimacy of the assumption of state sovereignty over Māori (a bind for judges whose authority is drawn from the state) (126). Johnson also offers a new interpretation of Māori-state relations in this period. She disagrees with scholarly readings of the movements in Māori-state relations in the 1980s as reflecting just another example of Māori being coercively incorporated into the hegemony of the state. She argues that the Whanganui River claim allowed Whanganui iwi to “assert a new status in New Zealand” one grounded in their “distinct rights to their lands and waters based in spiritual attachment and deep identification with place” (159). According to Johnson, this “rethinking of history and national identity” ushered in new constitutional ideas (132). This is perhaps an

overly optimistic assessment, which raises the core issue I grappled with while reading the book.

At points I wondered whether a somewhat rosy picture of the status changes for indigenous peoples, and identity changes for settler states, wrought by indigenous claims-making during the period was being painted. However, this sense was ultimately countered by Johnson. For example, Johnson goes on to describe the results of indigenous claims-making as “complex and mixed” (11), even contradictory (165). Astutely, she recognises that rather than complete victory or defeat, indigenous peoples secured a “fragile truce” with states during the 1970s and 1980s. By this truce, states accommodated some indigenous claims, and indigenous peoples refrained from violence and calls for full sovereign statehood, instead submitting their claims to settler law. In the epilogue she concludes that this truce ultimately came undone in the twenty-first century in the face of extensive neoliberal reforms, social justice fatigue and critiques of indigenous difference – which is not a positive assessment at all of the strategies’ longer run impact. But the timelines historians deal in are far longer than a few decades. Johnson remarks that “[h]istorians cannot yet definitively assess the long-term outcomes of indigenous claims-making at the end of the twentieth century” (163). We do not yet know to what extent they have they helped or hindered the recent calls for constitutional transformation in Aotearoa New Zealand and Australia, for example. It is a tricky exercise to present a balanced picture, that both celebrates positive impact and recognises failures and harmful consequences. If Johnson seems at times to err on the rosier side, it is apparent that this is done because the achievements of this period, in her view, are too often and too easily overlooked. Ultimately, Johnson walks the line well, presenting a welcome account of indigenous strength and political and legal acumen.

*The Land is Our History* is an immensely good work of scholarship and a great read. It offers something for those interested not only in indigenous peoples, law and the settler states of Aotearoa New Zealand, Australia and Canada but, more broadly, for those interested in legal history, comparative research and contemporary state-building. It is an impressive and gripping book.