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Sovereignty

Introduction

Self-determination flows from sovereignty's character, shape and form. It comes from the political values and institutional structures that determine where power lies: the values that influence the nature of one's belonging to the state and one's opportunities for distinctive indigenous citizenship, deliberating according to values and processes that make cultural sense.

Sovereignty was originally a defence against outside interference in one's affairs, yet, for indigenous peoples, it can be an instrument of colonial subjugation. As an instrument, it is commonly confused or overstated. Sovereignty is not simply a body of rights once exclusively exercised by indigenous peoples, taken by settlers and reclaimed through indigenous resistance. Politics is more complex. The Declaration helps to make sense of sovereignty's character, limits and potential.

The meaning of Maori vis-a-vis Crown sovereignty has been a point of contention in New Zealand politics since the signing of the Treaty of Waitangi in 1840. This chapter introduces what it means for New Zealand's Waitangi Tribunal to find that the treaty did not signal the cession of Maori sovereignty. This finding invites the exploration of new theoretical possibilities, including the proposition that, if sovereignty is the people's collective authority, indigenous ethnicity can never be grounds for democratic exclusion.

Discourses of sovereignty open and close different political and theoretical spaces for thinking about who belongs to the political community, the terms of belonging and how and by whom those terms are set. Examples

from Australia and the US are also used to show how and why, and to contribute to the chapter's argument that sovereignty is not a static concept; it is not always interpreted in the same ways nor for the same reasons. People's changing values and the shifting nature of what is and is not possible change people's ideas about sovereignty—in particular, about the ways in which they think about conflicts between sovereignty as it is and as they would like it to be. The Declaration proposes new spaces of inclusion for indigenous peoples—a different kind of liberal sovereignty that makes the concept a potential instrument of self-determination through differentiated liberal citizenship.

Differentiated citizenship means that, in New Zealand for example, Maori are both part of the Crown and separate from it. The Crown and iwi and hapu (subtribes) exercise relative and relational political powers, which means that Maori are not junior partners in a bicultural project (O'Sullivan, 2007) but equal participants and shareholders in public sovereignty. Equal participation in public affairs provides the foundation for the development of noncolonial political relationships.

The powers of state sovereignty are diminishing. However, power imbalances remain a defining characteristic of indigenous politics. Sovereignty still provides a political and theoretical framework for responding to those imbalances. This is because sovereignty is part of the language that both states and indigenous peoples use to explain the powers that they think they justifiably hold and through which each makes its claims and counterclaims against the other. However, if one sees sovereignty as a relative and relational power—not absolute and incontestable—then one can think more broadly about the political significance of difference. 'Otherness' need not be a way of framing people negatively and outside the political system but a way of indigenous peoples asserting their differences positively and for their own purposes. Difference can be asserted as legitimate in the formation of public values and institutions, and the logic of participatory parity can be established. Not only indigenous people, but also indigenous epistemologies, may then contribute to public affairs with substantive authority.

With sovereignty thus reconfigured, when the Declaration gives the state priority over indigenous peoples in the event of conflict, the power of settler populations is mediated by indigenous people being able to participate in the development of the state's position on every political issue that requires deliberation. This is an essential part of the substance of shared

sovereignty. This chapter provides examples of the ways in which different indigenous peoples conceptualise sovereignty. While such conceptions contest settler hegemony, they nevertheless provide a foundation from which settlers and indigenous peoples can acknowledge that 'we are all here to stay' and that indigenous peoples are here to stay *as* indigenous. This chapter's consideration of sovereignty foreshadows the next chapter's discussion of a political order in which public decisions are made with reference to public reason and participatory parity, where the indigenous citizen is one who deliberates with substantive equality.

Contemporary Discourses of Sovereignty: New Zealand

In 2014, New Zealand's Waitangi Tribunal found that the Treaty of Waitangi was not a Maori agreement to transfer sovereignty to the British Crown. The finding did not fundamentally change the claim to self-determination, but it did lend moral and political urgency to the question of contemporary sovereignty's attributes. It also contextualised discussion of what sovereignty meant for the nature of indigenous nations' belonging to the postsettler state.

Further conceptual clarity on the meanings of sovereignty is still required, focusing on meanings that are just, pragmatic and politically valuable to self-determination and to indigenous peoples being 'sovereign in their own right yet sharing sovereignty with society at large' (Maaka & Fleras, 2005, p. 5). It was, in fact, the same search for shared sovereignties that has distinguished New Zealand politics since the treaty's signing in 1840.

The treaty provides context to that search, although not always in ways that contribute coherently to public discourse. As Apirana Ngata, a government minister, noted in 1923, the Treaty of Waitangi 'is on the lips of the humble and the great, of the ignorant and of the thoughtful' (as cited in Hill, 2004, p. 129). In 2004, another government minister, Trevor Mallard, remarked that the treaty is 'both bigger and smaller than many people think' (Mallard, 2004, para. 22). Public debate on the treaty's meanings and utility reflect evolutions in political and jurisprudential thought from it being a 'simple nullity' (*Wi Parata v Bishop of Wellington*, 1877, p. 78) to an instrument of important policy significance in contemporary times (Tawhai & Gray-Sharp, 2011).

The 2014 tribunal finding reinforced sovereignty as a site of critical inquiry concerned with fundamental questions of who belongs to the national polity, on whose terms and on what terms. Drawing sovereignty meaningfully and purposefully into contemporary politics is more complex than understanding the concept as a body of authority that Maori once held and that the Crown usurped and retains exclusively. Yet, as Chapter 9 shows, it is from this (over)simplified account that contemporary debates about sovereignty tend to occur.

The Waitangi Tribunal ('He Whakaputanga me te Tiriti', 2014) found that:

> - The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.
> - The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.
> - The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.
> - The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori.
> - The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary. (p. 529)

The New Zealand Government did not accept this finding; however, for Ngapuhi—who took the claim to the tribunal—and other Maori iwi, it vindicated their long-held position that the treaty was not a cession of sovereignty (Waitangi Tribunal, 'He Whakaputanga me te Tiriti', 2014).

The minister for Treaty of Waitangi negotiations, Chris Finlayson, argued that:

> There is no question that the Crown has sovereignty in New Zealand. This report doesn't change that fact … The Tribunal doesn't reach any conclusion regarding the sovereignty the Crown

> exercises in New Zealand. Nor does it address the other events considered part of the Crown's acquisition of sovereignty, or how the Treaty relationship should operate today. (as cited in Kenny, 2014, paras. 5–6)

This claim to exclusive Crown sovereignty may be interpreted as a statement of appeal to non-Maori reactionary sensitivities rather than wider political possibilities. However, the finding raises the important political question of whether sovereignty must belong to Maori or the Crown alone, or whether it is a fluid and evolving descriptor of political authority widely dispersed and exercised.

Sovereignty is complex, complicated and contested. It is challenged as public attitudes to power and authority change. These attitudes evolve with time and context, with people's values, and with political and economic constraints and opportunities. A more flexible interpretation than Finlayson's may position the state and indigenous nations as repositories of a relative and relational power that is not fixed in time, context or capacity.

Contemporary Maori politics and economic development strategies reflect the state's diminishing importance. As Habermas (1997) argued, 'the integrative capabilities of the state continue to diminish under the presence of regional movements, on the one hand, and worldwide corporations and transnational organisations on the other' (p. 37).

The state and the indigenous nation are fluid entities. They evolve, sometimes in ways that strengthen their political capacities and sometimes in ways that do not; sovereignty's strength and character is thus also fluid. Claiming a share in national sovereignty alongside an independent indigenous sovereignty is politically worthwhile because of what sovereignty is (as opposed to what it is not).

Britain entered into treaty negotiations in 1840 intending to acquire sovereignty and therefore the power to make and enforce laws over both Maori and Pakeha; however, it did not explain this intention to the *rangatira* (chiefs). Instead, it was proposed that Britain be given the right to exercise authority over its own settlers. In the Maori-language version of the treaty, this authority was described as *kāwanatanga* (governorship). *Rangatiratanga*, or chieftainship over their own affairs, was to remain as the chiefs 'full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties' (New Zealand History, n.d.,

Article the Second, para. 1). Cession of sovereignty cannot be read into this translation of the Maori version of the Treaty of Waitangi. Its reading into the translation is contested (Orange, 1987), and while the British governor, William Hobson, proclaimed sovereignty over the North Island by virtue of the treaty, his claim to the remaining islands was by 'right of discovery'. It was some time after the treaty's signing that the Crown acquired 'substantive sovereignty' (Orange, 1987, p. 13).

Sovereignty's capacity to recognise distinctive Maori claims, not as junior partners in a bicultural treaty 'partnership' (O'Sullivan, 2007) but as equal participants in a commonwealth, is important. It means that political thought need not be constrained by the bicultural presumption that sovereignty rests with the Crown acting as the Pakeha polity, conditioned by an obligation, read into the Treaty of Waitangi, that sovereignty be exercised in partnership with a homogenous Maori polity (O'Sullivan, 2007). In New Zealand, self-determination is not 'granted' by biculturalism's 'Pakeha state'; it is not the gift of a benevolent 'partner' but an inherent and extant right of prior occupancy that the Declaration affirms. The distinction is important, for a partner is not a substantively equal member of the sovereign polity (see Chapter 9).

This limited and limiting account of political authority diminishes self-determination's transformative potential. The underlying distinction is whether one understands sovereignty as a power that belongs independently to the state or whether it is exercised by the state as the agent of the people's shared political authority. Is sovereignty 'exercised from the people' or 'over them' (McCue, 2007, p. 22)? Are indigenous peoples part of the state or are they excluded as the 'other'—a people outside the state who are not entitled to a democratic voice?

If sovereignty was neither ceded nor pragmatically returnable to Maori as an absolute and incontestable embodiment of political authority, one must reframe debates about where political power belongs, and why, to include the possibility that it might be shared and to consider what recourses there might be 'for thinking about the possibilities of a non-colonial relation between indigenous and non-indigenous peoples' (Tully, 2000, p. 50). Rethinking the Crown as a commonwealth, rather than as a binary opponent, would significantly transform political possibilities. Recognising the Crown as not simply the Pakeha polity allows a shared liberal sovereignty in which the Crown is *also* Maori, as Justice Williams proposed (see the introduction to Chapter 5). In relation to this, Gover (2015) asked:

> whether the right of self-determination can operate as a *chapeau* for the self-governance provisions of the Declaration and so serve as a justificatory basis for those corporate rights, even if they are not supported by any equality-based justifications. (p. 366)

However, the possibilities of shared liberal sovereignty are broader than this legal framing suggests. The politics of indigeneity are 'an attempt to come to terms with how discourses and practices of sovereignty … set the conditions under which indigenous and other forms of "marginal" politics occur at all' (Shaw, 2008, p. 8).

Sovereignty and Power

Sovereignty's positioning as either an absolute and unconditional indigenous authority, or as an absolute and exclusive Crown authority, contrasts with Palmer's (1995) argument that:

> Notions of sovereignty are collapsing all over the world … Far from being the indivisible omnipresent concept that Hobbes made it in *Leviathan*, sovereignty is more like a piece of chewing gum. It can be stretched and pulled in many directions to do almost anything. Sovereignty is not a word that is useful and it should be banished from political debate. (pp. 153–154)

However, sovereignty is real and powerful when one does not share it and when it is used as an obstructive force, though its dispersed location sometimes means that it is like the New Zealand constitution—one 'can't find it' (Palmer, as cited in Espiner, 2017). However, this makes sovereignty no less worth finding and reconfiguring. Otherwise, Alfred (1999) was correct to propose that 'Native communities will occupy a dependent and reactionary position relative to the state' (p. 59). If, instead, sovereignty is a way of describing power and authority (and where they are vested vis-a-vis where they might alternatively be vested), it is a very useful analytical tool.

Removing sovereignty from political discourse does not remove the centrality of power to relationships among peoples. Nor does it remove the unequal relationships that exist between coloniser and colonised, although it may diminish the language one has to think about these concepts and experiences. Shaw (2008) used Hobbes's account of sovereignty to explain liberal democracy's capacity for exclusion:

> The structure of sovereignty that Hobbes produces is enabled and authorized through the production of a shared ontological ground, and identity. This identity, in turn, rests upon the necessary exclusion of Indigenous peoples at several different levels, not least through the explicit marking of Indigenous peoples as 'different' as 'Other'. What is more crucial in determining the character of contemporary Indigenous politics, however, is that Hobbes renders the construction of this exclusionary identity, the process through which authority is produced and guaranteed, as pre-political, as necessary and natural rather than contingent and violent. (p. 9)

Sovereignty reflects a society's ideas about the origins, nature and proper location of political power within a political system. It can be used to position indigenous peoples as a political 'other'—beyond the state and beyond the political. These powerful constraints on political capacity may devalue humanity as the basis for membership of the political community and belonging. Such accounts of public authority make difference a political problem—they do not acknowledge liberalism's capacity to manage differences in human expectations of the good life.

Sovereignty, then, describes the location of public power and authority, the source of that authority and the manner of its exercise. A liberal theory of indigeneity may instead broaden liberal democratic practice to allow indigenous peoples to frame 'otherness' in their own ways and for their own purposes (O'Sullivan, 2014). 'Otherness' is not necessarily problematic as long as indigenous people are free to define the ways in which they will differ from the assimilationist paradigm's homogenous ideal. They might frame 'otherness' in ways that allow them to work out for themselves the terms of their inclusion in the postsettler liberal state. Difference then ceases to be the basis of political disadvantage. It becomes the basis on which indigenous peoples retain their identities and political structures to manage their own affairs.

Difference also becomes the basis on which indigenous peoples contribute to the formation of the values and systems that inform public policy decisions. It becomes a legitimate basis from which to enjoy influence over policy debate through asserting a substantive participatory parity (Fraser & Honneth, 2003).

Participatory parity presumes that the citizen is a person who deliberates (Aristotle, 1988). It supports differentiated citizenship as an alternative to an isolationist interpretation of indigenous self-determination and recognises King's (2012) view that 'The fact of Native existence is that

we live modern lives informed by traditional values and contemporary realities and that we wish to lead lives on our terms' (p. 302). Participatory parity is important because indigenous claims:

> are not only about compensation or reparations, but also about the terms of association between them and the colonial state. The injustice of expropriation of Aboriginal lands, for example, is not only about the dispossession of property … but the violation or denial of just terms of association. (Ivison, 2002, p. 100)

As Bohman and Rehg (1997) argued, 'deliberative democracy evokes ideals of rational legislation, participatory politics and civic self-governance' (p. ix). However, people participate with culturally framed conceptions of what is rational. If all are to deliberate, political systems need ways of admitting plural perspectives and rationalities.

Equal capacity to influence depends on a desirable but not always attainable condition: 'that each citizen be able to advance arguments that others might find persuasive' (Knight & Johnson, 2011, p. 295). Indeed, Rawls (1997) argued for the 'fact of reasonable pluralism' rather than the 'fact of pluralism' per se (p. 765). Cohen (1997) maintained that, rather than pursuing 'ideal fairness', one should pursue 'ideal deliberation' in public institutions (p. 70). This is because nobody 'is required to defer to the expert authority of another' (Estlund, 1997, p. 173) in conceptualising what is just nor in determining what weight should be given to justice in arriving at a decision.

Participation as a deliberator (Aristotle, 1988) with equal capacity implies opportunities for culturally grounded influence. Its precondition for equality is that 'first, *citizens* must be equal and, second, their *reasons* must be given equal consideration' (Bohman, 1997, p. 321). Participatory democracy is fundamentally different from exclusive majoritarian democracy. Therefore, it is not democracy per se that excludes indigenous people and their distinctive perspectives, but its structure.

Public reason guarantees voice in ways that other democratic forms do not require. Benhabib (1996) argued that deliberative democracy is theoretically well equipped to admit cultural claims alongside 'democratic inclusiveness and legitimacy' (Williams, 2004, p. 338). However, public reason presumes that all of the claims to be prioritised are morally just. Public reason is not equipped to manage unjust claims because these are, by definition, 'unreasonable'.

Participation through differentiated liberal citizenship—not distinctive nationhood alone—is preliminary to realising the Declaration's full potential as an instrument of self-determination. Nevertheless, there remain structural barriers to indigenous peoples' inclusion in policy development, including insufficient human capacity within both indigenous and state agencies (Quitian & Rodríguez, 2016). Policymakers need to know how indigenous people and institutions think about effective public policy. It is reasonable for indigenous people to expect this knowledge through their own presence and participation in the policy process. Indigenous workforce development strategies are important across all sectors of the economy. However, they are especially important in the public sector where they help to secure indigenous policy participation, contribute to indigenising bureaucratic policymaking (Maaka & Fleras, 2009) and the mainstreaming of indigenous thought. Indigenous research also contributes to the mainstreaming of indigenous policy by contributing to the politics of presence (Phillips, 1995)—that is, the presence of indigenous ideas in the national cultural and economic realms. Brayboy, Fann, Castagno and Solyom (2012) observed that:

> Native [university] faculty serve as activists, advocates, and change agents … by challenging dominant, racist, and discriminatory scholarship, practices and perceptions; by stimulating research in Indigenous issues; by developing and improving curriculum that is inclusive of Native perspectives and scholarship. (p. 93)

Indigenous intellectual presence means that, just as governments ought not focus on 'doing' justice 'to' indigenous peoples, policy ought not focus on doing things 'for' (or even 'with') them, as has become fashionable in Australia. Instead, as Cook (2017) explained in the New Zealand context, one might aspire to policy grounded 'on the richness of the Māori "way of thinking"' (We cannot forget the past, para. 1). Indigenous presence is an expression of shared sovereignty, a condition that helps liberal democracy to demonstrate its value to the aims and expectations of indigenous self-determination.

Shared Sovereignty

The Declaration helps to align shared sovereignty with the liberal presumption that government should occur by the people's consent. It allows discourses of sovereignty to contribute to capacities for citizenship that allow people to enjoy lives that they have reason to value (Sen, 1999a).

The first section of Article 46 of the Declaration (cited in Chapter 3) confirms the power of the nation-state. Its second section qualifies that power:

> In the exercise of the rights enunciated in the present Declaration, the human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. (UN, 2007b, art. 46[2])

The nation-state's interests will prevail in the event of conflict. However, Article 46 must be read in conjunction with the full Declaration, which explicitly presumes that indigenous peoples are part of the nation-state and shareholders in its sovereignty.

Indigeneity may conceptualise 'general forms of authority in competition with states' (Picq, 2014, p. 24) or it may reconfigure the meaning of the term 'state' itself. Rather than plural forms of authority in 'competition with states', a liberal theory of differentiated citizenship might imagine plurality within the state as an essential complement to the extant indigenous authority that exists beyond the state. Differentiated citizenship may then address what Picq called an 'inadequacy of the state' (p. 24). It may be that indigeneity 'disrupts state sovereignty' (p. 23). However, this raises questions about what or who is sovereign, where the sovereign power lies and how it might reasonably be distributed.

Shared sovereignty is concerned with the processes that are used to make decisions. It does not guarantee that policy outcomes will be just, but it does guarantee that, when injustice occurs, there is a mechanism for all

people to contribute to a reconsideration of the offending policy position. For example, it is an ambitious but worthy ideal for public institutions to recognise Habermas' (1997) argument that:

> when someone prescribes for another, it is always possible that he thereby does the other an injustice, but this is never possible with respect to what he decides for himself (for *volenti non fit injuria*—'he who consents cannot receive an injury'). Hence, only the united and consenting will of all—that is, a general and united will of the people by which each decides the same for all and all decide the same for each—can legislate. (p. 45)

Although an assimilationist rationale can potentially be read into this aspiration, an intellectual alignment with the politics of indigeneity ensures that one does not have unmediated majoritarian democracy such that the same people are always and necessarily on the losing side.

Indigenous conceptions of sovereignty are culturally located; they do not exactly parallel the concept as it is used at international law. However, the juxtaposition of international and indigenous perspectives to develop a liberal theory of differentiated citizenship may be possible and may hold considerable political value in helping to advance and give meaning to the right to self-determination.

While indigenous peoples can ordinarily identify a common territory, the capacity to utilise and govern it independently remains diminished for most indigenous populations. However, this does not mean that their sovereignty is, as a matter of course, overridden. It is certainly a weaker sovereignty than that which existed before colonial settlement, yet so too is state sovereignty a continuously less strong and secure construct that, in turn, creates new and different opportunities for indigenous peoples. Although these are not opportunities of absolute power, many indigenous peoples find purpose in their pursuit. Sovereignty 'depends on conditions that operate above the level of the individual states themselves' (Hindess, 2000, p. 31).

Modern sovereignty evolved in response to 'capitalist production requir[ing] a normative code with legal force to reorganize resources and space so they can be turned into commodities' (Forman, 2016, p. 285). The extent to which indigenous peoples influence that normative code is largely the product of their relative importance to the national economy. State sovereignty's relative importance as either a constituent

of (when inclusively structured) or constraint on (when exclusively structured) indigenous self-determination depends on the size of the state's incursions into indigenous affairs. However, state capacity is subject to increasing global economic constraints. At the same time, indigenous economic and political capacity to trade and engage with nonstate actors is increasing. Economic independence challenges subservience to the state. The international economic opportunities that Maori pursue are illustrative. Treaty settlements strengthen Maori contributions to the national economy. For example, between 2001 and 2010, the Maori economic asset base increased from NZ$9.4 billion to NZ$36.9 billion due in part to these settlements (Westpac New Zealand, 2014).

Treaty settlements strengthen democratic capacity by creating further avenues for independence. They show that Altamirano-Jiménez (2004) was wrong to dismiss economic entrepreneurship as the 'yoke of internal colonialism' (p. 354). Economic independence is preliminary to self-determination and essential to reducing subservience to the state. Economic factors show that sovereignty is more complicated than just indigenous authority over their own affairs. In Canada, substantive participation within the state is a pragmatic imperative when one considers that economic marginalisation costs the country C$28 billion a year (Public Policy Forum, 2017). Basic infrastructural investment in indigenous communities would reduce the financial cost of poverty by $2.2 billion each year (Public Policy Forum, 2017).

Sovereignty determines people's political location vis-a-vis the state. However, locations change, and, therefore, it is conceptually useful to find a language for discussing where one thinks power ought to lie and why. According to Wiessner (2008), sovereignty inheres in its bearer: 'it grows or it dies from within' (p. 1176). It can be summarised as an indigenous peoples' right to 'recapture their identity' (p. 1176) and to enjoy the political rights and responsibilities that such capacity requires. Sovereignty is concerned with the political capacity *for* citizenship to share in the construction of the public interest because:

> In the absence of a Philosopher King who reads transcendent normative verities, the only ground for a claim that a policy or decision is just is that it has been arrived at by a public [that] has truly promoted the free expression of all. (Young, 1989, p. 263)

Sovereign authority is best distributed to allow people to lead flourishing lives as politics' ultimate purpose (Aristotle, 1988). It ought to be distributed with reference to principles of 'objectiveness, reasonableness, necessity and proportionality' (Xanthaki, 2008, p. 282). Indigeneity means that sovereignty is inclusive and 'grounded in the right of all citizens to shape the society in which they live' (Clarke, 2006, p. 119). The concept of indigenous peoples as shareholders in public sovereignty assumes an active citizenship quite different from assimilation into a single homogenous entity. It is thus a form of citizenship of inherent political value—without it, self-determination's potential is curtailed.

Sovereignty as Ideology

Traditionally, political discourses of sovereignty are neither natural nor neutral (Shaw, 2008). They are not always attentive to diverse ways of thinking about public authority and what it could mean for indigenous peoples. One needs a responsive political theory to refute arguments that sovereignty is an absolute and coercive force with which indigenous people cannot compete. One needs to be able to set aside Alfred's (1999) argument that, for indigenous peoples to seek sovereignty, they must imitate all that it implies as a negative force inconsistent with indigenous political values. Alfred (2005) argued that one ought to 'de-think' sovereignty, which he labelled a 'social creation' reflecting non-indigenous political values. He wrote of the 'reification of sovereignty in politics' (Alfred, 2005, p. 33)—of a system that states use against indigenous political authority. However, Carroll (2012) objected that Alfred's (1999) 'intellectual battle is constructed around monoliths: the state versus indigenous peoples' (p. 157). Public sovereignty can instead be shared to advance indigenous interests.

A share in public sovereignty is not a right to be 'consulted' in policy development simply because the state cannot find the political will to ensure participation. Even the all-powerful sovereign of Hobbes's *Leviathan* exercises an authority for the people's collective benefit. It is an authority that can be withdrawn if it is not exercised for that purpose. The *Leviathan*'s sovereignty is indivisible and, for the time being, absolute, but it is not forever unconditional (Hobbes, 1946). Hobbes allowed sovereignty to reside in an assembly and for the individual to retain liberty over things that cannot be transferred to the commonwealth. The sovereign rules for

all, not for itself. When 'our refusal to obey frustrates the End for which the Sovereign was ordained; then there is no liberty to refuse: otherwise there is' (Hobbes, 1946, p. 142). Sovereignty is only valid when it is given freely by the commonwealth and exercises 'protection' as its specific purpose. Thus, a commonwealth is not simply a vesting of sovereignty in a person or assembly but a forging of unity (Hobbes, 1946).

Sovereignty's 'dynamism' appears when it is juxtaposed with a more substantive account of an indigenous right to self-determination. This book's principal intent is to show how the Declaration allows one to think broadly of power; that is, to accept Shaw's (2008) argument that sovereignty is not 'apolitical and uncontestable' (p. 9) but an expression of how people understand the just distribution and expression of political authority. Sovereignty ought also reflect the ways in which people wish to belong to a national political community.

McCue (2007) described her people's (Ned'u'ten) power as 'rooted in our creation stories, our spirituality and our organic and peaceful institutions. Sovereignty requires the energy of the land and the people and is distinct about locality' (pp. 24–25). In McCue's conceptualisation, sovereignty is not concerned with the power of domination but with balanced political relationships.

Shared sovereignty need not presume the 'parallel law-making system' that the Federal Court of Australia dismissed in *Yorta Yorta v The State of Victoria* (1998, para. 44) because, wherever sovereignty resides, it is shared and distributed in ways more complex than a simple binary can describe. The Uluru Statement from the Heart described enduring indigenous sovereignty as:

> *a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be reunited with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty*. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.
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> …
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> With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood. (Referendum Council, 2017, paras. 3–5, emphasis in original)

The Referendum Council (2017) sought 'constitutional reforms to empower our people and take *a rightful place* in our own country' (para. 8, emphasis in original). Arguing that 'When we have power over our destiny our children will flourish' (para. 8), the council called 'for the establishment of a First Nations Voice enshrined in the Constitution' (para. 9). It was maintained that a guaranteed voice would structure public reason into Australia's constitutional framework. Having such a voice implies changing political relationships to alter what it means to be an indigenous citizen. Constitutions are statements about who belongs and who does not. The *Australian Constitution* is clear—citizens do not belong on equal terms and race is a criterion for exclusion:

> If by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted. (s. 25)

Liberal societies exclude to protect the interests of the more powerful and for fear that another's claim to a share in political authority might diminish their own. 'They exclude through the denial of history to make another's claim seem unreasonable' (O'Sullivan, 2018b, para. 7) and often in the language they use to describe democracy. For former Australian prime minister Malcolm Turnbull, the proposed voice was 'contrary to equality and citizenship' (Belot & Laurence, 2017, para. 1), as it gave indigenous people rights beyond those held in common with other citizens. There was to be no space for political participation from distinctive cultural or sociohistorical perspectives. 'One person, one vote' satisfied liberal democracy, whereas the Referendum Council seemed to propose one voice of equal value, reflecting a more expansive and inclusive conception of equality.

McCue's (2007) account of sovereignty provides a further perspective. In exercising their sovereignty, Ned'u'ten:

> Clan members and hereditary chiefs are guided by the attributes of peace, respect, generosity, balance, harmony, compassion, sharing, gifting and discipline in their relations with all that is alive, all that has gone before, and all that has yet to come. These attributes are inalienable, inherent and sacred. (p. 25)

However, as McCue (2007) remarked, it remains difficult to examine sovereignty as a term that describes 'inherent' indigenous power. This is because the 'meaning of "sovereignty" is yet to undergo significant Indigenous and political treatment, definition and elaboration, especially with respect to its coordinate relationships to the right to self-determination and Indigenous worldviews' (pp. 19–20). This book goes some ways towards filling that gap in both liberal and indigenous political thought, confirming that, at the very least, sovereignty presumes protection from external interference.

McCue (2007) explained that, for the Ned'u'ten people, 'the exercise of sovereign jurisdiction' occurs:

> - within our potlatch system, our clan and house structures as units of politics/territories;
> - when our hereditary leaders fulfil their responsibilities and obligations; and
> - when there is a transmission of oral histories and traditions, principal customs, and ceremonies from one generation to the next. (pp. 24–25)

According to Coates and Newman (2014), the Supreme Court of Canada's decision in *Tsilhqot'in Nation v British Columbia* highlights that:

> at a fundamental level … Aboriginal communities have a right to an equitable place at the table in relation to natural resource development in Canada. Their empowerment through *Tsilhqot'in* and earlier decisions has the potential to be immensely exciting as a means of further economic development in Aboriginal communities and prosperity for all.
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> …
>
> the time is now for governments, Aboriginal communities, and resource sector companies to work together to build partnerships for the future … We need to keep building a national consensus that responsible resource development that takes account of sustainability issues and that respects Indigenous communities contributes positively – very positively – to Canada and its future. (p. 21)

From another Native American perspective, sovereignty is:

> more of a continued cultural integrity than of political powers … to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty. (Deloria, 1999, p. 113)

In the US, the Circuit Court of Appeals for the District of Columbia held that:

> The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint. (as cited in Wiessner, 2008, p. 1168)

Wiessner (2008) explained that the Court 'also observed that tribal sovereignty is strongest when based on a treaty or when the tribal government acts within the borders of the reservation in matters concerning only tribal members' (p. 1168). Tribal sovereignty is then restrained and conditional.

Independent Indigenous Nations

In 1831, in *Cherokee Nation v Georgia*, Supreme Court Chief Justice Marshall described indigenous nations as 'domestic dependent nations' (p. 2). According to Carroll (2012), the concept, which resembles 'that of a ward to his guardian', continues to influence 'a large part of the present definition of tribal sovereignty' (p. 145). An alternative perspective is that indigenous nationhood implies equality. Justices Thompson and Story's dissenting opinion, in the same case, sets out principles of sovereignty that are capable of plural interpretation and are not conditioned by ward like dependence:

> The terms *state* and *nation* are used in the law of nations … as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union.… We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty of the right to govern its own body, it ought to be considered an independent state […] to be placed among sovereigns who acknowledge no other power. (as cited in Duthu, 2013, p. 13)

In 2016, in *United States v Bryant*, the Supreme Court considered tribal courts' capacity to ensure fair trials and safe verdicts. The case, which became a test of tribal sovereignty, recognised that 'no liberal sovereign can be absolved of the imperative to protect the rights of the accused in its criminal proceedings' (Cutler, 2016, p. 1752).

Significantly, in her analysis of the case, Cutler (2016) did not use the state courts' standards as the necessary point of comparison. This is because tribal sovereignty is not simply a replication of the state's. Tribes predate the US itself, being 'both preconstitutional and extraconstitutional' (Cutler, 2016, p. 1755), which entails that their sovereign powers do not proceed from the national constitution. Therefore:

> Procedural protections for tribal court defendants should be measured not by replication of state and federal public defense systems, but rather by analyzing tribal courts under international principles of comity to determine if a verdict is fundamentally fair. (Cutler, 2016, p. 1752)

Affirming tribal sovereignty's independence makes it clear that it is not a subset of the colonial authority of the state. People have the right to a fair trial—not as the colonial state defines it, but as international law protects it (Cutler, 2016). The Declaration provides guidance on procedural fairness:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. (UN, 2007b, art. 34)

The difficult question for contemporary politics to resolve is that the 'inherent' sovereignty recognised in *United States v Bryant* conflicts with Chief Justice Marshall's earlier insistence that tribal sovereignty belongs to indigenous nations as 'domestic dependent nations'.

Dependency undermines sovereign political authority, leaving much of the scope for indigenous wellbeing vulnerable to the goodwill of the state. '[T]he rights-affirming strain of [Chief Justice Marshall's] doctrine' is important, while its 'rights-limiting strain … is out of step with contemporary human rights values' (UN, 2012a, p. 7). The politics of indigeneity must resolve the philosophical contradiction between recognising indigenous rights so that states may honour international

standards of justice, supported by economic and social imperatives to maximise indigenous capacity, and, conversely, the state's wish to retain political authority over indigenous peoples.

Five hundred and sixty-six American Indian and Alaskan Native tribes enjoy nation-to-nation relationships with the US. However, there are many other groups, including Native Hawaiians, that do not receive equivalent recognition (Independent Sovereign State of Hawai'i, 2017) even though they have long sought it. For example, the Nation of Hawaii, the oldest Hawaiian independence organisation, wishes to restore the 'National Sovereignty of the Hawaiian people' as a meaningful and practical path to self-determination (Independent Sovereign State of Hawai'i, 2017, p. 1).

Indigenous Hawaiians do not enjoy any legal arrangements for self-government to support the apology that the US offered in 1995 for 'the overthrow of the Kingdom of Hawaii' in 1893 and the suppression of the people's 'inherent sovereignty' (UN, 2012a, p. 11). While the US acknowledged that reconciliation logically follows apology, it remains an elusive aspiration.

H-K Trask (1999) demonstrated sovereignty's simplicity and reasonableness for Hawaii:

> Because of the overthrow and annexation, Hawaiian control and Hawaiian citizenship were replaced with American control and American citizenship. We suffered a unilateral redefinition of our homeland and our people, a displacement and a dispossession in our own country … orphaned in our own land. Such brutal changes in a people's identity—their legal status, their government, their sense of belonging to a nation—are considered among the most serious human rights violations by the international community today. (p. 16)

An alternative Hawaiian perspective is that, for 'Kanaka Maoli, our struggle has always been about nationhood, an essential foundation for the practice and perpetuation of our culture' (Trask, 2012, p. 285).

Land and education are essential to culture. Ho'omanawanui (2012) argued that the Declaration validates indigenous claims to recover lands from military jurisdiction. For example:

> 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

> 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities. (UN, 2007b, art. 30)

Ho'omanawanui (2012) also argued that the implementation of the right to education, at Articles 13 and 14 of the Declaration could have 'dramatic' and 'positive' (p. 291) effects on measures such as teaching in the Hawaiian language:

> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
> 2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means. (UN, 2007b, art. 13)

Further:

> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
> 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language. (UN, 2007b, art. 14)

The cultural validation that public support for indigenous education provides is an important measure of political recognition. It is a statement that indigenous people belong to the nation-state as citizens.

The Inuit Circumpolar Council (2009) asserted its sovereignty with reference to the Declaration and earlier UN instruments, insisting that 'Central to our rights as a people is the right to self-determination' (art. 1.4). The council's declaration on sovereignty is an assertion of a transnational Inuit right to share political authority with the Arctic states. It challenges sovereignty as the preserve of single nation-states in whose formation Inuit people had no say. The right to self-determination transcends state boundaries to once again show that indigenous sovereignty is not a simple parallel to the sovereignty claimed by the postsettler state. From one Haudenosaunee perspective:

> We were and are not citizens of the United States, Britain, or Canada and as it was agreed when the US–Canadian border was drawn it ought to remain 'ten feet above our heads'. (Garrow, 2012, p. 172)

Sovereignty is a treaty right compromised by interference with indigenous people's free passage across traditional territories divided by an imposed international border. The Declaration states that:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. (UN, 2007b, art. 36)

The Declaration may lend moral persuasiveness to a treaty right that neither Canada nor the US have respected, for it maintains that:

> 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
> 2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of indigenous peoples contained in treaties, agreements and constructive arrangements. (UN, 2007b, art. 37)

The Distribution of Sovereignty

The Declaration is ultimately concerned with plurality in the distribution of public sovereignty to uphold diversity. Ivison, Patton and Sanders (2000) claimed that:

> one of the interesting consequences of the encounter between liberalism and its colonial past and present might be a more context-sensitive and multilayered approach to questions of justice, identity, democracy and sovereignty. The result would be a political theory open to new modes of cultural and political belonging. (p. 21)

A series of polarising questions concern how political authority is distributed, how people belong and how and why they might consent to state authority. Indigenous demands for an inclusive public authority occur because people are entitled to 'safe spaces' (Wiessner, 2008, p. 1174) to construct lives that they have reason to value (Sen, 1999a). Indigenous peoples are not going to go away; sovereignty is their insistence on the right to be present and 'to stay' *as* indigenous. Yet states resist the reconfiguration of sovereignty, not recognising that one community's need for relationships with others makes sovereignty relative and relational. Sovereignty ought not be conditional on indigenous peoples sacrificing their cultural values or adopting institutional arrangements at odds with those values.

Sovereignty can be understood as the authority to realise self-determination's potential, which in turn presumes substantive recognition of property and governance rights. From this foundation, broader consideration of the distribution of political authority and the precise terms on which sovereignty is shared might occur—that is, the terms on which peoples might belong together differently (Maaka & Fleras, 2005). The nation-state is not necessarily the only place in which sovereignty lies. When the nation-state exercises sovereignty, it only does so on the people's behalf. In this context, distinctions between the people who are included and the people who are excluded assume great political importance.

The idea that indigenous people constitute distinct groups disturbs the presumption that consent to government might be given through culturally homogenous majoritarian democracy. Majoritarian democracy is routinely used to challenge indigenous claims and to restrict distinctive and guaranteed indigenous participation in public affairs—as Australian

prime ministers Turnbull's and Morrison's rejection of an Indigenous Australian voice to parliament showed. The presumption that a majority is always morally prior to a minority and more likely to be virtuous in its policy objectives means that the arguments for particular and distinctive indigenous contributions to policymaking are not always admitted. However, sovereignty ought not be used as a 'shield' to protect the state from indigenous objections to its abuse of power (Wiessner, 2008). It is significant that, as early as the 1830s, the Native American William Apess sought recognition of the 'rights of indigenous peoples as liberal subjects' (Dahl, 2016, p. 3).

Liberalism's inability to give theoretical justification to 'conquest' does not mean that it needs to understand indigenous peoples 'as paternalistic wards of the state unable to make political claims of their own' (Dahl, 2016, p. 3). Liberal political rights presume personal agency, not the patient anticipation that the benevolent state will one day 'do justice' to indigenous claims, as Waldron (2004, p. 253) expected. Instead, the Declaration is both the outcome and expression of indigenous agency as liberal citizens sharing national sovereignty, just as sovereignty is shared by other citizens.

Contemporary postsettler states struggle to manage political pressures for inclusion and exclusion; likewise, they struggle to acquire legitimacy, at least symbolically, in the eyes of indigenous citizens. Legitimacy would mean that indigenous peoples would find it unnecessary to think exclusively outside a liberal framework to acquire political voice and influence—that is, a share in national sovereignty. They would find their experiences aligned with Rousseau's understanding of popular sovereignty as the mechanism through which individuals become citizens concerned with the common good (Habermas, 1997). Maximum authority over their own affairs would occur alongside a distinctive space in public sovereignty as one of the Declaration's central presumptions. Indeed, if 'sovereignty … is a social creation' as Alfred (2005, p. 46) proposed, it is logically a continually evolving phenomenon. The very fact that it is not an 'objective or natural phenomenon, but the result of choices made by men and women, indicative of a mindset … rather than a natural force creative of a social and political order' (p. 471) means that it is a phenomenon over which people can reasonably expect to enjoy agency.

Conclusion

As a concept, state sovereignty is both constrained and variable (i.e. not static). Public attitudes to power and how it should be shared evolve with time and context and in response to changing political and economic constraints and opportunities. Politics occurs from assumptions about what makes power legitimate and what makes it illegitimate. It is the political spaces that sovereignty creates, and those that it limits, that are important. An expansive politics of potential cannot be defined or limited by these theoretical descriptions of political possibility but nor can it develop without reference to them. Colonial political theory gave states power over people (e.g. the power to dominate was the essential message that the colonial order took from Locke's theory of labour, as discussed in Chapter 3). However, indigeneity's juxtaposition with liberalism proposes the state as the *agent* of the people's sovereignty (as opposed to the *force* that exercises coercive and destructive power over some—but not necessarily all—people).

The juxtaposition provides ways of thinking about the political values and expectations that would moderate the dominance of the majority. Ultimately, indigenous sovereignty over their own affairs, and through equal membership of a liberal state, is possible, and the Declaration shows how. To this end, the politics of indigeneity's theoretical engagement with liberal democracy requires a form of differentiated citizenship to check unbridled majoritarian rule.

Differentiated citizenship promotes a cohesive and inclusive liberal political community, for indigeneity is a politics of 'shared sovereignties' (Maaka & Fleras, 2005, p. 187). Its substantive character and relationship with self-determination and sovereignty is the following chapter's concern. Differentiated citizenship's opposite is an exclusionary politics in which a settler cultural identity, rather than citizenship, is the criteria for democratic participation. A New Zealand proposal of this kind is then discussed in Chapter 9 and contrasted with models of indigenous inclusion in the sovereign public, including New Zealand's guaranteed Maori parliamentary representation.

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