

Missed meanings: The language of sovereignty in the treaty debate

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177

Introduction

In the 13 years since the High Court's recognition of native title in the *Mabo* case, there has been intense scrutiny of the outcomes achieved through that recognition. For the most part this has focused on the number of successful determinations and the content of the rights reflected in those determinations.

For those of us who look further afield at the changes in the political and legal environment occasioned by the recognition of native title, there is a stark contrast between the potential limits of native title threatened by the adverse outcome in the appeal of the Yorta Yorta Nations on the one hand and the possibilities provided for the emergence of Indigenous rights to self-government on the other.

The then ATSIC chairman, Geoff Clark, repeatedly suggested that the native title process had failed and has called for greater energy to be devoted to a treaty process.¹ It has therefore been assumed that there is necessarily a disjunction between native title and the treaty process.

I have argued elsewhere that native title as a property right cannot be separated from native title as a self-government right.² The process of determination and negotiation of Indigenous Land Use Agreements (ILUAs) sets Indigenous peoples as one of hundreds of interest holders and, in its current form, does not adequately recognise the status of native title holding groups as political, legal and social entities. This is despite the fact that the establishment of these elements is part of the proof of native title. Indigenous law and social systems are dealt with as matters of fact.

Collective ownership of land based on Indigenous peoples' status as law-makers necessitates the recognition of a sphere of authority and autonomy in its administration. I will argue that native title in this sense is a recognition of an inherent sovereignty, as I understand that term, residing in Indigenous peoples. This is not a completely outlandish leap to make. Indeed, this necessary connection has been made recently in Canada, both in Federal policy and by the courts.³

¹ Clark 2001, in which the author spoke specifically about the litigious nature of native title and the gruelling standards of proof being applied to native title claimants, who are being forced 'to prove who they are and where they came from', thereby creating an unworkable and discriminatory regime for the recognition of Indigenous rights.

² Strelein 2001: 123–4.

³ An inherent right to self government has been recognised through both Canada's Federal Aboriginal Self-government policy and more recently, through the courts in *Campbell v AG (BC) and the Nisga'a Nation* (24 August 2000), 2000 BCSC 1123.

I do not subscribe to the view that Indigenous rights to self-government and the recognition of Indigenous sovereignty under common law are precluded. It is my understanding of the jurisprudence that while the international status of Australian state sovereignty is non-justiciable, the internal ordering of authority and jurisdiction and the consequences of settlement as a matter of domestic law are within the purview of the High Court.⁴ The question is, would the Court recognise it? It would take a much longer treatise to comprehensively answer that question, but a large part of the answer lies in how the courts understand the concept of sovereignty.

178

In Australia we are seeing a gradual recognition that native title claims cannot be successfully separated from the claims that Indigenous peoples make, as peoples, directly against the state. This has been recognised in part through the emergence of state framework agreements and more recently in Western Australia to proposed comprehensive agreement pilots for Tjurabalan, Martu and Northbridge. There is a recognised need on both sides that Indigenous peoples and state governments must engage in direct dialogue with each other, without the multitude of parties involved in a native title process.

The recognition of native title and the process of engagement between Indigenous peoples and the state have fostered the environment for the current treaty debate and refocused discussion on concepts of Indigenous sovereignty and self-government. This debate requires a dialogue in which each side seeks to understand the claims of the other and the language they use to express their claims. To move beyond the simplistic assertion that the question of sovereignty is not open the debate must go beyond rhetoric and delve deeper into the concepts at issue.

The idea of competing claims of sovereignty is one of the most difficult conceptual issues in the debate, as well as one of the most problematic political and rhetorical issues. The state claims that Australian sovereignty is indivisible. Indigenous peoples worry that in entering into a treaty they give up their sovereignty as Indigenous peoples.

Each side of the debate relies on the concept of sovereignty, yet their perspectives are so far apart. This raises the question, what concept of sovereignty is it that each party relies on and can they be accommodated through political negotiation?

Indigenous peoples' claims and the language of sovereignty

First, I want to examine the idea of Indigenous sovereignty and the language that Indigenous peoples use to assert their claims against the state. The assertion of identity, autonomy and authority and demands for recognition and respect from the colonial state have led Indigenous peoples to embrace the language of self-determination and sovereignty. The attraction of this language is, perhaps, foremost in the force of its imagery, as much as in its meaning, and also in its application in international law and politics.

The choice of language is by no means arbitrary. It is not simply a matter of suggesting that a debate in these terms will 'scare the horses' and should therefore be jettisoned. These terms are chosen because the implications that are conveyed through their use are intended to draw on other struggles for independence and recognition.

⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1: 32 and 81–2. In contrast Mason CJ rejected leave to appeal in two cases on the basis of a perception of the assertions of competing international sovereignty: *Isabel Coe v Commonwealth* (1994) 118 ALR 193, and *Walker v New South Wales* (1994) 126 ALR 321.

Robert Williams Jr has suggested that the language that Indigenous peoples adopt is often ‘an act of self defence’ because it ‘enables indigenous peoples to understand and express their oppression in terms that are meaningful to them and to their oppressors’.⁵ But I sometimes wonder if we as non-indigenous people – especially in legal and public policy debates are sufficiently reflective of the conceptions of sovereignty that are readily employed to deny Indigenous claims.

In our recent history Australia has been much more comfortable with the concept of ‘self-determination’ than with the concept of Indigenous sovereignty. This is an odd dichotomy because the two concepts are linked in Indigenous claims.

Self-determination has been used by Indigenous peoples to describe the broad array of claims made against the state *as peoples* – from claims to equality and freedom from discrimination asserted collectively, to claims to self-government, land title and the recognition of Indigenous laws and institutions. These are not claims for special rights or privileges. Rather, they are claims for recognition of the prior and continuing authority of Indigenous peoples, respect for their autonomy and distinct identity and status as the first peoples of the land that was colonised as Australia.

This issue of respect is fundamental to Indigenous peoples’ claims against the state and is an essential part of the language that is used. Self-determination, for example, has been expressed in international law as the freedom of a people to determine their own political status, and the freedom to pursue their economic, social and cultural development.⁶ The idea of ‘self’ and identity, and the power to ‘determine’ seems to provide recognition of the many aspirations implicit in Indigenous peoples’ claims. But it is the emphasis on process that is imperative.

The possibility of territorial and non-territorial autonomy remains central to the self-determination process.⁷ However, self-determination is not, in itself, secession or self-government or the right to vote. Rather, it is seen as a statement of principle, that whatever the nature of the institutions of government, they be chosen by the freely expressed will of the people.⁸ Understanding self-determination as a process, it has been argued, means that self-determination should be viewed as a continuum of outcomes up to and including secession.⁹

Many Indigenous peoples also voice their claims in the language of sovereignty. Although the understanding of sovereignty may be different to that put forward by the state, the appeal of sovereignty, similar to that of self-determination, is that it allows a people to ‘project onto it a promise of most of their political, socio-cultural, and economic aspirations’.¹⁰ The characteristic of self-rule is implicit in these claims.

In non-Indigenous legal and political theory, self-determination has been associated with the conventions of modern theories of sovereignty and statehood. The impact of this association is significant because states, governments and many theorists use the rhetoric of state-sovereignty to preclude recognition of Indigenous peoples’ claims.

⁵ Williams 1990a: 662. Though note Russell 1996 on the influence of framing claims in these terms.

⁶ This is the language used in international instruments including Article 1 of both the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*.

⁷ Anaya (1991: 409) argued that the self-determination principle is capable of embracing ‘more nuanced interpretations and applications, particularly in an increasingly interdependent world in which the formal attributes of statehood mean less and less’. As a result, self-determination should be seen as ‘a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics’.

⁸ Pomerance 1982: 26–34.

⁹ Pomerance 1982: 75.

¹⁰ Boldt and Long 1985: 334.

The difficulty for Indigenous peoples, then, is that the legitimacy of demands for the recognition of sovereignty, nationhood, self-determination or self-government are all assessed by non-Indigenous participants in the debate in terms that presume the very universals under challenge.¹¹ When Indigenous peoples voice their claims in the language of self-determination and sovereignty, there are a number of assumptions within those terms that are not necessarily shared between Indigenous and non-Indigenous peoples. Moreover, those assumptions, while rarely examined, inform the institutions within which Indigenous peoples make their claims. Therefore, they form the context within which those claims will be understood by decision-makers.

180

It is not simply the assertion of statehood, there are core assumptions in the theories of sovereignty that limit the ways in which *non*-Indigenous people understand the language of self-determination. These theories are based on certain conventions of thought so that a narrow range of familiar terms has come to be accepted as the authoritative traditions of interpretation.¹²

As I mentioned earlier, some may suggest that we should perhaps accept these habits of thought and find a new language to debate these issues. But one of the primary problems, as a number of theorists such as Jeremy Webber and Jim Tully have suggested, remains the limitations of the language of the non-Indigenous participants in this debate.¹³ Here, Tully notes, 'the injustice ... occurs at the beginning, in the authoritative language used to discuss the claims in question'. He argues that to respond justly to the claims of Indigenous peoples requires the questioning of often unexamined conventions, 'inherited from the imperial age'.¹⁴ Similarly, Irene Watson argues that movement away from colonialism can only occur where the state and non-Indigenous participants in the debate are prepared to question their own institutions and ways of thinking in order to listen to Indigenous peoples' claims.¹⁵

Indigenous peoples' claims may be difficult to capture in any alternative terms that we may suggest, or they may be distorted by the limits of language they are forced to use. Simply moving from a discussion of a treaty process to discuss Agreements does violence to the nature of Indigenous peoples' claims. This brings me back to my original point – non-Indigenous participants in the debate, particularly legal and political decision-makers need to complicate our understanding of sovereignty to understand what it is that is being protected and where the perceived threat really lies.

Nation-building and the legitimacy of government

The prior discussion leads to a second immense difficulty that Indigenous peoples face when trying to find a place within the theories of sovereignty and self-determination and an accommodation within the state. That is, while not necessarily seeking secession or independent statehood, the claims do challenge the legitimacy of the authority of the state. There is continued resistance to the claims of Indigenous peoples because these claims are perceived as a threat to the sense of Australia's national identity.

¹¹ Boldt and Long 1985: 335–7, and Tully 1995: 9, 36.

¹² Tully 1995: 36.

¹³ Webber, 1993: 136, echoes the philosopher Ludwig Wittgenstein, 1974, whose own struggles, particularly with his class, led him to theorise that 'the limits of my language are the limits of my world'. For an explanation of Wittgenstein on culture and constitutionalism, see Tully 1995: 103–13.

¹⁴ Tully 1995: 34, 39, 47–8 and 53.

¹⁵ Watson 1997: 58.

Australia's national identity and the fragility of our shared mythology is an important factor in the ability of non-Indigenous people to engage in a treaty debate. Here, however, I want to make the link between the idea of nation-building and the concept of 'sovereignty'. The concern over a competing sovereignty lies at the base of arguments against the right of Indigenous peoples to self-determination, particularly where they express demands for self-rule. While Indigenous peoples' claims may reflect the same principles of consent and self-rule that colonial states relied upon to assert their own independence, they challenge the legitimacy of that nation-building both from an internal and external perspective.¹⁶

Understanding the theoretical debates in these spheres is important because the ways that Indigenous peoples' claims are represented are affected by the language they adopt. 'Self-determination' and 'sovereignty' are inextricably linked in political theories of governance and in international law theory, just as they are in Indigenous claims.

181

Social contract theories and theories of individual rights are often considered to be the most influential philosophies in the process of nation-building through which elaborate mythologies have been created.¹⁷

The story of sovereignty in modern political theory places authority with the people, in name at least, providing legitimacy to the democratic state. Authority, it was argued, derived from agreement among the people and vested in, or was delegated to, a representative government. Unable to disengage from the idea of a supreme authority, the revolutionary, rhetorical quality of popular sovereignty is coupled with companion theories of governance that legitimise the exercise of sovereign power by governments.¹⁸

Social contract theories are premised on the notion that individuals freely enter into civil society through a compact to better protect their natural freedom.¹⁹ The constitution of a society is seen as a deliberate self-determining act.²⁰ The social contract theories rely on the fiction of the 'founding moment' that reinforces the idea of consent.²¹ Remembered events in the history of a state, such as Australia's federation in 1901, or the republican revolutions of France and the United States, provide a reinforcing moment. Through this mythical agreement between the people, the authority of government is a delegation of powers from the people.²² This provides legitimacy for the powers exercised by government and provides a basis for defining the limits of that power.

¹⁶ Russell 1996: 3.

¹⁷ Boldt and Long 1985: 342; also Hindess 1996: 14.

¹⁸ Boldt and Long, 1985: 335. Tully, 1995: 52, used the phrase 'unmonarched'. Compare the thoughts of Foucault, 1980: 121, 'we need to cut off the Kings head: in political theory that has still to be done'.

¹⁹ Locke, [1690] 1956: 49, and Rousseau [1762] 1968: 60. Kant, [1887] 1974: 161 [ss.43, 44], explained this as the need to regulate mutual influence when people come into reciprocal contact.

²⁰ For Locke, [1690] 1956: 50–1, there was a presumption that individuals have the capacity to govern themselves and therefore give up only so much of their freedom as is necessary for their better protection in society. This presumption relies on a view of the pre-civic state of nature as one of natural equality and freedom. Compare Hobbes, [1651] 1996: 89 chapter 13, whose argument for strong government assumed a state of nature in which life was 'solitary, poor, nasty, brutish and short'. See also Machiavelli [1640] 1969. Other theorists saw the purpose of government to provide for a common conception of Right or a common

will, for example, Kant, [1887] 1974: 163, [s.44]. For Hegel, [1821] 1967: 155, the state is committed to the promotion of higher ideals, in direct contrast to the minimalist view of the state adopted by liberal thinkers.

²¹ Tully, 1995: 69, pointed to the imposition of a constitution on current generations as premised on the idea that any 'rational' person would agree today, reflecting Locke's own conception of the modern constitution as the pinnacle of human progress. It appears that despite disagreeing with Hobbes's view of irrevocable accession to a ruler, Locke's theory too has a sense of permanence.

²² Locke, [1690] 1956: 122, thought this power could be revoked if misused. Contrast Hobbes, [1651] 1993: 88–93, 97, 102–5, who retained elements of absolutism, prioritising the need for order over liberty. Rousseau, [1762] 1968: 139, agreed that the powers of government were a mere delegation, while taking a more extreme view of the power of the general assembly.

Indigenous peoples in Australia were excluded from the self-governing communities that came together to federate under a Constitution. The homogenous view of the nation-state created the imperative of assimilation. Diversity was obscured by construing the 'people' as homogenous. Consistent with the political theories that informed these events, the nation was built on institutional foundations where culture was perceived as either 'irrelevant, transcended or uniform'.²³

The modern political theories of sovereignty that underpin our institutions of governance, beginning with Locke and Rousseau, have generally focused on democratic government as the basis for assessing legitimacy. The colonial states with their assertion of an homogenous polity saw minority interests as being secured by the protection of individual rights.²⁴

182

This universal understanding of legitimacy focusing on citizenship has proved a difficult obstacle for Indigenous peoples, for whom self-determination means more than merely political rights of participation. Michael Dodson argued that self-determination is to peoples what freedom is to individuals, moreover, the enjoyment of all other rights depends on its observance.²⁵

Self-determination claims based on distinct, collective rights that are inherent in demands for a negotiated settlement are seen as a profound challenge to the established mythology of Australian nationhood because they appear to fragment the foundations of common citizenship.²⁶ There is a denial of the depth of the exclusion of Indigenous peoples from the construction of that common identity. Instead we continue to construct a sense of national identity and unity, but do so through exclusion and coercive universalism.²⁷

Justifying colonialism: the imperial roots of liberalism

At the same time as democratic states like Australia and the United States were being established from the colonial territories of the British Empire, these new 'nations' were imposing their own empires over Indigenous peoples. The respect for equality of nations that ordered the relations between the states at an international level was not extended to Indigenous peoples either in theory or in practice.²⁸

Non-indigenous societies sought moral and theoretical justification for the violence of colonisation from the outset. The political and legal theories of the time were not ignorant of Indigenous peoples. Quite to the contrary, they were often construed to deliberately exclude Indigenous peoples from the community of nations and justify colonial practice.²⁹

²³ Tully 1995: 63.

²⁴ Jefferson's inaugural address as President, 1795: 291, which articulated 'the creed of our political faith', exemplified this concern: 'Though the will of the majority is in all cases to prevail, that will to be right must be reasonable; that the minority possesses their equal rights, which equal law must protect.'

²⁵ Dodson, 1994: 68, referred to Ghazali 1984.

²⁶ Ivison, 1994: 25, and for an example of this argument, see Glazer, 1975: 197–8, 200, who argues that special treatment of one group will cause instability because others will also demand special rights. Kymlicka, 1995: 66–9, argues that such an approach is concerned more with instability than with justice.

²⁷ For a critique of objections to Indigenous claims that assert equality as their foundation, see Webber 1993: 149–50 and Dodson 1996: 7.

²⁸ Pufendorf, 1964, vol II: 367, argued that the equality of all peoples meant that peoples were entitled to prevent the thrusting of foreigners into their territories. For Vattel, 1964 vol III: 3, 5–6, 113, the state possesses the same rights as man. From equality of man Vattel deduced the equality of states. In the same way, states have duties to each other to promote society. These ideas persist in contemporary international law as the principles of respect for the equality of states, territorial integrity and exclusive jurisdiction. However, as Slattery, 1983: 37, points out, the law of nations was not certain because the powerful states did not have a settled practice consistent with it.

²⁹ For example, see Tully 1993: 137–78. Hendersen, 1985: 189, argues that theorists such as Pufendorf, Grotius and Gentilis and the concept of natural law were essential in this process.

The 'scientific' development view of human history in which the cultures of the world could be ranked according to their progressive stage of socio-economic development was devastating for Indigenous peoples. 'Modern' constitutions had been developed, it was said, in contrast to 'ancient' constitutions based on ad hoc custom.³⁰ These political and economic systems by which Indigenous peoples lived were equated with the ancient inferior constitutions of the social contract theory, who were therefore incapable of governing themselves, or of managing their own affairs.³¹

It was thought that as societies developed and converged, modern constitutions would establish uniform legal and political institutions, based on liberal democracy and the market economy.³² On this view, lower or backward cultures would benefit and improve from the implantation of European institutions.³³ Edward Said notes the importance of this view to the legitimacy of colonisation because it provided a justification apart from a purely profit motivation, which would allow settlers to accept that the Indigenous peoples '*should* be subjugated'.³⁴ The impression was of the benevolent and benign inevitability of colonisation and, moreover, an obligation on Indigenous peoples to accept it graciously.

Therefore, while the ideas of equality and respect among nations formed the basis of modern international law, the influential principles for the government of subject peoples that served to justify colonialism were carried through to the legal and political structures of the new colonial states.³⁵ The continued assertion or assumption of the benign universality of existing institutions in contemporary debates about sovereignty, whether because they are assumed to be superior or to somehow transcend culture, make challenge difficult and obfuscate the imperial culture embedded in them.

Self determination and statehood: competing sovereignty

From these early roots in colonial practice, the conventions of modern political theory and international law have both developed in ways that assert the primacy of statehood and have excluded the collective claims of Indigenous peoples.

Barry Hindess argues that, in early theories of sovereignty, the fact of power was intimately tied to the conception of power as a function of consent. Hindess suggests that, although this understanding of power has fallen out of fashion since the Second World War, modern conceptions of statehood and sovereignty remain rooted in these same values.³⁶

The strong nexus between the legitimacy of government and the international system has led Indigenous peoples, frustrated by the exclusion and denial of Indigenous sovereignty within the state, to challenge the authority of the state through the system of international law. Many Indigenous peoples remain hopeful that the international system will provide the tools for the recognition of Indigenous rights to self-determination and, indeed, self-rule.

³⁰ 'Modern' societies in constituting the state were seen to go through a process of critical reflection on their customs to create a uniform system of institutions with a central locus of sovereignty: see Tully 1995: 59.

³¹ Locke [1690] 1956: 9.

³² Tully 1995: 67. The debate then centred around whose model was the most superior. For example, Kant's 'republican constitution' was put forward as the method of achieving moral progress.

³³ Mill [1874] 1975: 382, 384–5. For a comment on Mill, see Thornberry 1989: 869.

³⁴ Said 1993: 10 (original emphasis). See also Russell 1996: 5 in agreement.

³⁵ Williams 1990b: 13, 92–3, 96–107. He argues, 1990b: 98, that one of Vitoria's primary motivations in the lectures 'on the Indians Lately Discovered', in 1532, was to find a justification for the Spanish aggression against the South American peoples that was not wholly based on ecclesiastical assertions of jurisdiction.

³⁶ See Hindess 1996: 12.

In the face of competing claims from states to their territory and their resources, it would be significant for Indigenous peoples to have an internationally recognised right to self-determination and all that that may entail, with its roots in concepts of sovereignty and consensual government.³⁷

International law debates, not surprisingly, however, reflect the same two conceptions of power identified by Hindess in relation to political theory. One, the statist view, is concerned with the fact of power and the preservation of existing states' territory; the other is concerned with the legitimacy of government. As Paul Coe once argued, 'while one group has dominant power and the means to implement it, that does not necessarily give that group the *right* to sovereignty and the exercise of power'.³⁸ Michael Dodson also criticises international law for giving greatest weight to the 'power to have power'.³⁹ Dodson suggests that Indigenous peoples seek a recognised 'right' to have power, with support at a 'moral, legal and political level'.⁴⁰ Power construed in this way is a question of legitimacy.⁴¹

184

The core concepts of self-determination apply to all independent states, in their right freely to choose and develop their political, social, economic and cultural systems, just as these elements should be enjoyed by all peoples. Thus it has been suggested that self-determination is a claim against the self-determination of another socially, politically and legally constituted 'people'. The opposition from the state is not a statement of anti-self-determination or non-self-determination, rather, it is an assertion of the legitimacy of the authority of the state to represent an homogenous and indissoluble whole.⁴² The principle that Indigenous peoples rely upon to support their claims to autonomy and independence and the right to enter into a treaty, for example, is one of the central tenets underlying state sovereignty. As a result, the demands of Indigenous peoples are confronted with the ideas of territorial integrity and autonomy that dominate the international, statist sphere and give legitimacy to the states to order their own affairs.

Part of the difficulty for the claims of Indigenous peoples seeking to question this legitimacy and reassert a place within the constitution of the state through concepts of self-rule such as self-determination and sovereignty is that the incorporation of these ideas into international law through the process of state building assumed an indissoluble connection to statehood, even assuming these concepts to be synonymous with the expression of statehood.

Since the Law of Nations of Vitoria and Vattel, international law has been concerned predominantly with external sovereignty, independence and relations between states. In this context, the ideas of sovereign equality and sovereign independence have taken on an exclusively statist character.⁴³ Sovereignty is often considered in the context of the requirements for recognition of new states.

The barriers to renegotiating the colonial relationship between Indigenous peoples and the states have moved from overt racism and the legitimacy of colonisation, to rest on a conception of the supremacy of the state. Russell describes this as the 'sovereign idea of sovereignty', that is, a notion of absolute and incontrovertible power of the state.⁴⁴

³⁷ Williams 1990a: 668–9.

³⁸ Coe 1988: 141.

³⁹ Dodson 1994: 70.

⁴⁰ Dodson 1994: 71.

⁴¹ Dodson 1994: 73.

⁴² Thornberry, 1989: 375, construed the right of peoples entitled to self-determination as the right to independent statehood itself, to which all the principles of territorial integrity and non-interference apply equally. For this reason, Pomerance, 1982: 73, stated that the determination of 'which self is entitled to determine what, when and how, remains the central question'.

⁴³ See Hannum 1990: 14–15.

⁴⁴ Russell 1996: 17. Watson, 1997: 54, argues that 'we have devolved from racism, to a fear of states dis-integrating and collapsing. As though the basis upon which colonial states exist is an honourable and justifiable one that should be preserved.'

The international community may well be increasingly concerned with the internal aspects of self-determination, that is, to ensure that 'the people' freely determine their political structures and are therefore truly represented at the state and, concomitantly, at the international level. In the end, however, the United Nations is constituted by states, although many of them are themselves decolonised nations.⁴⁵ The limitation of the international system remains the preference for maintaining the status quo of state sovereignty.

The limitations of the international statist sphere as a forum for renegotiating the legitimacy of British colonisation of Australia should not determine the internal ordering of power and autonomy. It is important to recognise that Indigenous peoples often operate outside the statist conceptions of international law. Michael Dodson argues that:

When we become disheartened by the apparent monopoly which states have on power, it is crucial that we remember that, despite their claims to the contrary, states are not sovereign. Peoples are sovereign. States do not have rights. Peoples have rights.

And when people are not free they will fight for that freedom. And they will continue to fight for that freedom until it is theirs.⁴⁶

The desire for control over decision making in Indigenous communities does begin and end with arguments over statehood.

Conclusion

The response to the claims of Indigenous peoples reveals the realities of power in the current statist world order and the limits of its founding theories. The jealously guarded authority and territory of existing states is supported by the international system. However, Indigenous peoples' claims do not, of necessity, demand concessions in this statist sphere. The conflation of sovereignty and statehood feeds the resistance to Indigenous peoples' claims, as a threat to the ideal of an homogenous national identity.

Theories of sovereignty need not be completely jettisoned in order for a dialogue to occur between Indigenous peoples and the state. The political theory of sovereignty provides useful ideas in the current treaty debate. First, it clearly locates the nature of internal sovereignty as the source of authority within a community. Second, self-determination, as it is currently understood, is a reflection of the notions of popular sovereignty, which posits the ultimate authority of government in the people. Sovereignty also has an external aspect, which respects the autonomy of other sovereign peoples. These are the aspects of sovereignty that Indigenous claims appeal to.

The simplistic view of sovereignty that emerged from modern theory is based on a fiction of homogeneity that cannot be sustained in the context of multi-nation societies. The impact of these assumptions on Indigenous peoples is the lived experiences of coercive assimilation and genocide.

On a more fundamental level, however, the idea that 'the people' are sovereign and entitled to self-rule can accommodate Indigenous peoples' assertions of authority and autonomy. An absence of domination demands recognition of the interests of Indigenous peoples. Internally,

⁴⁵ Russell 1996: 5. ⁴⁶ Dodson 1994: 75.

the ability of a people to determine the political and other structures that will facilitate distinct survival is the measure of self-determination. Freedom from internal domination in the enjoyment of self-determination is an important measure of the legitimacy of the exercise of power within a state.

An understanding of the workings of power in a federal system of shared sovereignty can provide a theoretical and practical basis for a more pluralist approach which recognises the sovereignty of Indigenous peoples. Federalism, or the association of self-governing territories, which exist in Australia, Canada and the United States, for example, provides for mutual recognition and power sharing.⁴⁷ The characteristics of sovereignty are more complex in a federal system, where authority is shared between distinct communities.

186

Self-determination, as a collective right, attaches to a group whose goals 'transcend the ending of discrimination'.⁴⁸ The group is not joined simply by external discrimination but by internal cohesiveness. More than equal participation, Indigenous peoples seek distinct group survival and the freedom to determine their relationship with other groups, nations and states.⁴⁹

The notions of meaningful participation and self-rule must be therefore assessed outside the theoretical limitations imposed by the liberal democratic norm. Peter Russell argues that to deny Indigenous peoples' right to exist as enduring political societies is the very essence of imperialism.⁵⁰ This distinct identity must find expression in Australia's national identity.

It could be argued that recognition of the right to self-rule through negotiated self-government arrangements may provide a greater sense of stability and thus provide the foundations for a negotiated state structure, that is representative of the cultural and political diversity of Indigenous and non-Indigenous sovereignty.⁵¹

The call for a treaty process in Australia is not new. It is not a response to the failure of the native title process to deliver native title outcomes or even a response to the failure of 'practical reconciliation' to deliver practical outcomes in health, housing and employment for Indigenous people. It is a recognition that even if these processes had been successful, there would still be an essential element that is missing.

Recognition of Indigenous peoples' claims to self-government will require a fundamental shift in thinking and in the assumptions upon which previous approaches have been based. This would appear to be a difficult task when, as we have seen, the exclusion of Indigenous peoples from recognition has its roots in the earliest principles of international law and political theory.

Dr Mamphela Ramphele, South African academic, suggests that the challenge of the twenty-first century is to find ways to create new social contracts that recognise the competing claims

⁴⁷ For example, the *Commonwealth of Australia Constitution Act 1901* (Imp) brought together the colonies into a mutually agreed federation. Section 51 reserves certain powers for the Commonwealth and the States to share, the plenary remains for the States. The Canadian Royal Commission, 1996, recognised the ways in which federation can accommodate the same power sharing and mutual recognition of Indigenous peoples. In particular, see vol 1: 67791 which outlines 'the four principles of a renewed relationship': mutual recognition, mutual respect, sharing, and mutual responsibility.

⁴⁸ Sanders 1991: 368–9. See also Falk 1988: 585–6.

⁴⁹ De Lupis, 1987: 15, argues that there is juridical support for this interpretation of self-determination in the International Court of Justice's advisory opinion: see 1971 *ICJ Reports* 16 at para. 56. De Lupis notes the Court's use of the term 'peoples', referring to the people of the territory as a 'jural' and injured 'entity', who have a right under international law to progress toward independence.

⁵⁰ Russell 1996: 17.

⁵¹ For example, United Nations, 1970, general part, para 3, recognised self determination as the basis of friendly relations.

of peoples with separate myths and conflicting historical narratives. She emphasises the responsibility of political leaders, as nation-builders, in this never ending challenge to weave the state together from its fragments.⁵²

There is a general imperative to address Indigenous peoples' grievances, apart from all other injustices, with regard to their unique histories.⁵³ Falk distinguished Indigenous peoples through their deprivation of sovereign rights and a lack of participation or representation in prevailing political arrangements.⁵⁴ Michael Dodson expresses a similar view:

Because the non-indigenous state was founded on the basis of non-recognition of pre-existing indigenous rights and laws, indigenous peoples and the non-indigenous state lack an agreement about the basic principles of nationhood, the structure of government, the source of law, and the shaping and sharing of power, wealth and national resources.⁵⁵

187

These fundamental grievances result in a variety of encroachments, deficient social services and constant pressure on lands and resources. Essentially, however, Indigenous peoples' claims are centred on their collective identity based upon inherent sovereign rights to government by consent and a history of denial by internal domination.

The change that is required can only come from dialogue between Indigenous peoples and the state, where equality and respect are truly practised and Indigenous voices heard. International law and native title, even with the support of a recognised right of self-government cannot meet the demands from Indigenous peoples for a response to their claims against the state. The implementation of a domestic treaty process may prove the most appropriate mechanism to renegotiate the relationship between Indigenous peoples and the state.

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⁵² Ramphela 2001.

⁵³ Werther, 1992: 34–6, argued that this historical and moral claim has been the source of their unique advances in the direction of self-determination thus far. See also Crawford 1988: 14.

⁵⁴ Falk 1988: 591.

⁵⁵ Dodson 1994: 73.

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- 188
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