

CONSTITUTIONAL PARADOXES: NATIVE TITLE, TREATIES AND THE NATION

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I would like to begin by acknowledging the traditional owners from this part of the country, the Ngunnawal people.

The two issues that I want to talk about are, firstly why we need a treaty, what kinds of arguments can be put for it from a philosophical and political-theoretical point of view; and secondly, in the latter part of the paper, what form such a treaty should take.

It is clear why many Indigenous people want a treaty. The case has been put forward many times by eloquent Indigenous spokesmen and women. Recent advocates see a treaty as necessary in order to entrench the rights of Indigenous people to self-determination and self-government, to protect rights to land, to ensure the preservation of culture and a capacity to acquire economic independence. They see it, moreover, as a means to put an end to discrimination and to allow Indigenous people to be citizens on an equal footing with other Australians, while remaining Aboriginal or Islander people with their own distinctive ways of life.

In his Vincent Lingiari Memorial Lecture in 1999, Pat Dodson outlined a proposal for what he called a comprehensive framework agreement which would address, as he put it, all of the 'unfinished business' in relation to the present conditions of Aboriginal existence within Australian society. This would address economic and social development through special measures relating to health, employment, education and training, as well as issues relating to the capacity of Aboriginal people to survive in keeping with their own languages, laws, customs, traditions and values. He wrote:

As a nation we must be prepared to recognise that there is unfinished business between us and that the only way that this can be resolved is through a formalised agreement between our peoples.¹

More recently, others have pointed out that there are good pragmatic reasons why non-Indigenous Australians should be well-disposed to a treaty. Geoff Clark, for example, mentions the prospect of greater certainty in economic and legal affairs, the diminution of the threat of Indigenous separatism on the basis of an appeal to sovereignty, the improvement of Australia's international image in respect of its human rights record.² But these are merely prudential considerations. The question I want to raise is whether there are, in addition, intellectually and morally compelling reasons why we – that is to say, non-Indigenous Australians – should take seriously the quest for a treaty. I want to suggest that there are and that both justice and logic provide reasons for a serious consideration of treaty proposals. Let me spell out what I think those reasons are.

Justice

I will begin with the issue of justice. One of the most frequently expressed aspirations in relation to the reconciliation process over the last decade has been the hope that this process will lead to the establishment of 'just' relations between Indigenous and non-Indigenous Australians – the hope that, as Paul Keating said in one of his speeches in 1993, we could establish relations on 'just foundations'.³ This aspiration raises the question of exactly what we mean by justice in this context. What would constitute a just settlement to the unfinished business of colonisation?

Contemporary political philosophy offers a number of elements for an answer to this question. I want to mention three. The first is the distributive principle of equality, according to which justice involves equal treatment for all. This requires not just the formal equality that comes with equal treatment before the law and the absence of discrimination or unjustified differential treatment but also substantive equality of access to public goods and services. It is this concept of substantive equality that underpins the idea that individuals and communities should be compensated for any 'undeserved disadvantage' which they suffer. The philosophical idea behind this is that all individuals are of equal moral worth and that no one should be disadvantaged, relative to others, through no fault of their own. This is the basis for compensation for undeserved disadvantage. Clearly, the current discrepancies between the Indigenous and non-Indigenous population in relation to health, education, employment, treatment by the criminal justice system and so on constitute undeserved disadvantage. The Indigenous population is disadvantaged in these and other ways as a result of colonial policies inflicted on them by governments. This aspect of justice – justice as equal treatment – is the only aspect of justice that is addressed in the current government's policy of 'practical' reconciliation.

Another widely accepted aspect of justice is the idea that justice should involve reparation or recompense for past injustice or wrongful actions. This is an accepted principle in law as well as in agreements between Indigenous peoples and colonial states in other parts of the world. There is, of course, scope for disagreement about the principles which should govern such compensation, just as there are difficulties in calculating and distributing appropriate amounts of such compensation. However, these are not insuperable difficulties and they do not justify the reluctance of Australian courts and governments to embrace the principle of reparative justice as fully as they could in relation to past injustices such as those suffered as a result of the forced removal of children.

Even if this principle of reparation were fully accepted alongside the principle of equality and compensation for undeserved disadvantage, this would not exhaust the present requirements of justice for colonised Indigenous peoples. What is missing from the considerations of distributive or reparative justice is respect for the other parties to the colonial relation. In particular, the concepts of distributive and reparative justice do not address the sense of injustice that flows from the belief that colonisation itself was a violation of the rights of Indigenous peoples. Even less do they address the sense of injustice that flows from the particular legal form assumed by colonisation in Australia, namely, the imposition of British sovereignty and law on the grounds that this country was a legal *terra nullius*. The colonial occupation of this country, unlike that in other parts of the world, took the extreme form of a refusal to acknowledge in any form the prior existence and authority of Indigenous law and custom. The sovereign authority of present Australian governments derives from that which

was imposed on Indigenous peoples without their consent and without regard for their laws and practices of government. Justice toward Indigenous people in the present requires recognition of the past injustice that resulted from the non-recognition of rights and duties associated with Indigenous law and culture.

This is not so much an argument for a treaty as an argument that justice requires the recognition of Indigenous peoples as fully capable of entering into a treaty relationship. The underlying intuition here is the idea that justice requires a certain kind of relation to others in which they are treated as parties of equal standing, as equally deserving of recognition and respect. Anything less amounts to the perpetuation of the attitudes which underpinned *terra nullius*. Pat Dodson draws on this intuition in his Vincent Lingiari Memorial Lecture when he refers to the ‘reconciliation of recognition’. He writes:

The sovereign position that Aboriginal peoples assert has never been ceded. Recognition starts from the premise that *terra nullius* and its consequences were imposed on the Aboriginal peoples⁴

In the colonial context, this intuition must also take into account the deep cultural differences which bear on what counts as recognition and respect in the eyes of the parties involved. In his Wentworth Lecture here at AIATSIS, Pat Dodson recommends a resolution to unfinished business which would put right the wrongs and injustices done to Indigenous people by carrying out, as he put it, ‘the proper protocols and practical arrangements’. But in the same breath he recognises that this is an impossible demand. He asks:

‘What are the protocols to provide the relief to the causes of the mourning and trauma flowing from the intertwined history?’ The problem persists precisely because there are no such protocols. As he puts it, ‘the cross-cultural learning hasn’t happened.’⁵

A treaty or a framework agreement cannot fill this cultural gap, but it could conceivably set in place the conditions under which the relevant cross-cultural learning could take place and new relations could emerge on just foundations.

Abandoning Terra Nullius

The gist of my argument so far is that the establishment of just relations between Indigenous and non-Indigenous Australians requires a complete break with *terra nullius* thinking and the attitudes that sustain it. The second part of my argument is that the logic of recent efforts to distance Australian law and the institutions of government – including the Constitution – from the principles of *terra nullius* draws us inexorably in the same direction.

For example, in the *Mabo* decision, Justice Brennan explicitly rejected the ‘unjust and discriminatory’ view that the Indigenous inhabitants of Australia had no legal rights to their land as a result of their supposedly primitive level of social organisation. Brennan rejected this principle, both on the grounds that it did not accord with the facts of Aboriginal society and on the grounds that it was unacceptable in principle. He wrote in his leading judgment:

The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the Indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.⁶

Although sovereignty was not an issue in the *Mabo* case, Brennan’s argument poses an implicit challenge to the official view that Australia was a settled colony. Insofar as it relies

on the so-called extended doctrine of *terra nullius*, this official view involves a version of the same 'barbarian' or 'absence of law' principle. According to the extended version of the *terra nullius* doctrine, a civilised power could claim territory occupied by native peoples considered so primitive as to be without laws and without a sovereign.⁷ In rejecting the basis of this view as false and unacceptable, Brennan's argument revives the possibility that the Indigenous inhabitants were in fact sovereign at the time of settlement.

This interpretation of the consequences of his argument draws added support from the manner in which he relied on the critical examination of the doctrine of *terra nullius* by the International Court of Justice in its 1975 advisory opinion on Western Sahara.⁸ In that opinion, the International Court condemned the modern extended notion of *terra nullius* and reaffirmed the more restrictive notion which applied only to land truly empty of inhabitants. Brennan refers to this opinion in order to argue that if international law no longer upheld the principle that inhabited land could be considered 'empty' for legal purposes, then neither could the common law maintain a version of the same principle. By invoking the International Court's rejection of a Eurocentric and racist doctrine with regard to sovereignty, in order to support his own rejection of the equally racist 'barbarian' principle that had become entrenched in Australian common law, Brennan established a link between the argument for common law recognition of native title and the International Court's views on the acceptable bases for a claim to sovereignty. But if the abandonment of extended *terra nullius* in international law can be used to support the case for the Australian recognition of native title, it is difficult to see why, in turn, the recognition of native title does not raise questions about the legitimacy of the British claim to sovereignty.⁹

In a more positive sense, too, the recognition of native title grounded in Indigenous law and custom implies recognition of prior Aboriginal legal, and therefore political, autonomy. The majority opinion in *Mabo* that native title has its origin in and derives its content from the traditional laws and customs of the Indigenous peoples implies the existence of autonomous legal traditions prior to the introduction of the common law. Moreover, the judges point out that these Indigenous legal traditions cannot be supposed to have been frozen at the time of colonisation. Rather, they must be allowed to have evolved since then, with the result that it is contemporary law and custom which determine the content of native title. It follows that the common law's recognition of native title necessarily involves the ongoing acceptance of what Jeremy Webber has called 'a measure of normative autonomy', at least until it has been extinguished by a valid exercise of the Crown's authority.¹⁰ Again, if such autonomous legal orders existed at the time of the arrival of the First Fleet, how is it possible to maintain the fiction that the British Crown acquired sovereignty over its Australian territories by acts of settlement rather than conquest or treaty?

This is the central paradox with regard to the constitutional status of Australian Indigenous peoples at the beginning of the 21st century. Henry Reynolds, in his *Aboriginal Sovereignty*, suggests that this is 'the fundamental problem at the heart of Australian jurisprudence'. He writes:

The doctrine of the settled colony only works if there literally was no sovereignty - no recognisable political or legal organisation at all - before 1788. And that proposition can only survive if underpinned by 19th century ideas about primitive people.¹¹

It is worth noting that the elaboration of native title jurisprudence has led to similar paradoxical consequences in other jurisdictions. Canadian scholar Michael Asch points out

that the 1973 decision of the Canadian Supreme Court in *Calder*¹² gave rise to a similar incoherence in constitutional doctrine, insofar as it held that Aboriginal rights under Canadian law derived from the fact that Indigenous peoples occupied the land and lived in organised societies at the time of settlement, while at the same time *terra nullius* was supposed to provide the basis for the imposition of British sovereignty.¹³ When the Canadian Supreme Court finally addressed the problem of reconciling the basis of Aboriginal rights with the grounds for the acquisition of sovereignty in the 1996 case of *Van der Peet*,¹⁴ it sought to resolve the underlying contradiction by two means: first, by imposing a restrictive definition of Aboriginal rights which construes them as derived from practices and traditions specific to Aboriginal cultures, rather than as general and universal rights; secondly, by defining Aboriginal rights, particularly as these are protected by s.35(1) of the Constitution Act, as ‘means by which prior Indigenous occupancy is reconciled with the facts of Crown sovereignty’. Asch comments that, even if Aboriginal rights included fundamental political rights, when they are described in this manner they could not challenge Crown sovereignty. Once they were defined as a means to ‘reconcile’ prior Indigenous occupancy with the facts of Crown sovereignty, Aboriginal rights could not, by definition, ‘also challenge the nature of those facts’.¹⁵

It appears that efforts to provide justice for colonised Indigenous peoples in common law countries like Canada and Australia sooner or later are blocked by the legal and political requirements of their own claims to sovereignty. In more general terms, one might describe the paradox as follows. On the one hand, these are societies founded on the dispossession of Indigenous peoples, the expropriation of their land and the destruction of their ways of life. Their establishment as colonies by acts of state was a stark expression of the external power of sovereign European states, whether this involved settlement, secession or conquest of territory. The absence of equivalent forms of state and the perceived backwardness of the Indigenous populations were considered sufficient justification for the imposition of sovereign power.

On the other hand, these former colonies founded on the European idea of an indivisible sovereign power, have since become liberal and democratic states, inheritors of the ideals of justice and the concepts of legal and human rights, which have evolved behind the borders of the so-called civilised world. These ideals, along with the failure of attempts to assimilate and/or eliminate Indigenous populations, have compelled them to acknowledge the injustice of past treatment and ultimately of colonisation itself. But the efforts to redress that injustice, the efforts to re-establish relations on just foundations, to recognise Indigenous rights to land and self-determination, lead inevitably to contradictions. As the Canadian example that I have just given suggests, these contradictions are often resolved in favour of the existing colonial structures of authority in ways that seem desperately ad hoc.

The Legal Path to Sovereignty

What are the other possible responses to this paradox? One way to resolve the contradiction might be to challenge to the legitimacy of Crown sovereignty. The fact that doubt is cast upon the basis of the British claim by the High Court in *Mabo* might suggest the possibility of a legal challenge to the legitimacy of Crown dominion. Indeed, some historians and lawyers have argued that the British claim is open to question, in view of the manner in which sovereignty was claimed in 1770 and in view of the extent and timing of effective British control over the vast stretches of territory included in that claim.¹⁶ It is also true that the

legality of the British assertion of sovereignty has never been examined by an international tribunal. Nevertheless, it is widely accepted that, even supposing a case could be heard, the principles of international law would mitigate against the recognition of continued Indigenous sovereignty.

The Senate Standing Committee on Constitutional and Legal Affairs, which considered this issue in 1983, concluded in its report:

It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at the time. However ... as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all the peoples of the Commonwealth of Australia.¹⁷

In support of its conclusion, the committee pointed to two principles of international law: first, the inter-temporal law, according to which an assessment of the validity of a claim to sovereignty must be undertaken in terms of the law prevailing at the time of the original claim; second, the rule of prescription, according to which sovereignty is established when the territory in question has remained under the continuous and undisputed sovereignty of a state for so long that this situation has become part of the established international order of nations.

Of course, there are factual questions in relation to both the rule of prescription and the inter-temporal: it is a matter of fact whether sovereignty over the Australian territories has been exercised in an undisputed fashion and whether the judgments made at the time about the existence of law and degree of civilisation of the Indigenous inhabitants were correct. On both points, the effect of these principles in relation to the Australian situation is open to question. Indeed, Henry Reynolds argues in *Aboriginal Sovereignty* that it would have been possible to consider Aboriginal tribes as sovereign in the terms of 18th century philosophy and international law. Contrary to the widespread belief that international law at the end of the 18th century provided clear justification for colonisation, Reynolds points to more enlightened strands of 18th century thought which, when combined with knowledge of Aboriginal law and society, would have justified the view that they lived in sovereign societies, deserving of fair and equal treatment. 'Had the law been applied with more impartiality,' he writes, 'it would have been possible to accord to the Aborigines both land ownership and sovereignty.'¹⁸

Reynolds' counterfactual argument shows that the 18th century concept of sovereignty is flexible enough to accommodate the social and political life of hunter-gatherer peoples. Moreover, this demonstration is undertaken by Reynolds not just as an exercise in the history of political thought but in order to think through the implications of the retreat from injustice begun by the High Court in *Mabo*. His larger argument is that, if we abandon the 19th century prejudices about primitive people, then justice and logic require recognition of the sovereignty of the Indigenous peoples.

There are of course formidable procedural and political obstacles to mounting any challenge to the legitimacy of the Commonwealth's claim to sovereignty. As has often been pointed out, in the international arena there is the problem of gaining access to relevant forums such as the International Court of Justice, where only states have standing and where, even supposing that Australian Indigenous people could gain standing, perhaps with the support of some third

party state, disputes may only be brought before that court with the support of the parties involved. It is unlikely that any Australian government would agree to having its sovereignty adjudicated by the International Court.

In the domestic legal arena, even though there are precedents in other jurisdictions for the examination of the conditions and consequences of sovereignty,¹⁹ Australian courts have preferred to entrench the common law rule that acts of state are not subject to challenge in the municipal courts whose authority derives from that state. This principle dates at least from a 1906 decision of the British court of King's Bench, which declared that the extension of territory was essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. 'Its sanction,' the court said, 'is not that of the law but of sovereign power, and whatever it be, municipal courts must accept it as it is, without question.'²⁰

Legal academics have suggested that this principle provides a morally questionable defence of judicial passivity in the face of injustice toward Indigenous peoples.²¹ It has nevertheless been reaffirmed by the Australian High Court in the *Seas and Submerged Lands* case and again in *Mabo*.²² In *Mabo* the judges were careful to reaffirm the principle that the validity of acts of state cannot be questioned in domestic courts and to point out that their decision related only to what follows from the acquisition of sovereignty with regard to the law of property. In theory this does not rule out the possibility that a form of dependent or domestic sovereignty may still reside in some Australian Indigenous peoples, perhaps along the lines of the US doctrine laid down in the Marshall decisions. However, the court has been notoriously reluctant to follow this path. In *Coe v The Commonwealth No.2*, in 1993, then Chief Justice Mason said:

Mabo No.2 is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. It is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a domestic dependent nation entitled to self-government and full rights.²³

Since decisions such as this appear to have been based on Eurocentric judgments about the political organisation of Indigenous societies, they also may be open to question in future cases. Nevertheless, at present it seems that the weight of authority strongly suggests that any legal path to establishing the sovereignty of Australian Indigenous peoples is blocked.

The Treaty Path to Sovereignty

This brings us to an alternative path out of the paradox surrounding the constitutional status of Indigenous peoples, namely the attempt to obtain recognition of Indigenous sovereignty via a political process, perhaps through some form of treaty or negotiated agreement. As I suggested at the outset, treaty proposals have been a constant feature of Aboriginal political debate since the 1970s. In its examination of the Treaty issue, the Senate Standing Committee on Constitutional and Legal Affairs in 1983, while denying the legal plausibility of the claim to Aboriginal sovereignty, nevertheless took the view that:

If it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.²⁴

With equal constancy, however, governments have been reluctant to endorse any proposals which, as it is often asserted, 'divide the nation'. The argument that a treaty is an agreement between sovereign political bodies, and as such threatens to divide the nation, has been a standard response to treaty proposals since the 1970s. Non-Indigenous political leaders from both Left and Right have been reluctant to endorse the idea that Australian Indigenous peoples were organised into self-governing political societies, either at the time of settlement or in the present.

The present Coalition government remains committed to the view that Indigenous peoples are fully assimilated into the nation, and that the nation cannot make a treaty with itself or part of itself. In 1988, when he was Leader of the Opposition, John Howard wrote that the Liberal and National parties were 'utterly opposed' to the idea of an Aboriginal treaty. He argued that:

It is an absurd proposition that a nation should make a treaty with some of its own citizens. It also denies the fact that Aboriginal people have full citizenship rights now.²⁵

As Prime Minister, Howard is no more sympathetic to the Council for Aboriginal Reconciliation's recommendation for further discussion towards a treaty or some other form of agreement which would address the unfinished business of reconciliation – even if he is careful to put the case in more circumspect terms by insisting, for example, on the need to focus on, as he wrote, 'what unites us as Australians rather than what divides us'.²⁶

Does this response suggest that the treaty path to recognition of Indigenous sovereignty is also blocked? I want to suggest that it does not, at least if we take a broad view of what is meant by 'treaty' in this context.

There is considerable bad faith in the argument put by Howard and others about the impossibility of a nation forming a treaty with itself or part of itself. In the first place, it begs the question of whether the present constitutional arrangements do not amount to an illusory and indefensible form of unity, achieved without the consent of and without consultation with the Indigenous people of this country – this is how the present Constitution was achieved.

Second, it fails to consider the possibility that the Constitution might be altered in ways that could accommodate some form of ongoing residual Indigenous sovereignty. There are models for this approach. One possibility is the idea of shared sovereignty recommended by the Canadian Royal Commission into Aboriginal Peoples. The Commission suggested that the Aboriginal inhabitants of Canada be regarded as partners in the sovereignty of the nation on a par with the federal and provincial governments – that they should be considered a third tier of sovereign government.²⁷

Third, the 'dividing the nation' argument proceeds on the assumption that the only possible form of agreement would be a treaty of the kind entered into by internationally recognised sovereign states. Again, other models for a form of compact or agreement have long been available. In its 1983 report, the Senate Standing Committee on Constitutional and Legal Affairs argued that little was to be gained by relying too heavily on the precedent of treaty-making in North America and elsewhere for at least two reasons. One is that the term 'treaty' did not have, in the 18th and 19th centuries, the precise meaning that it has today in international law. The other reason is that those treaties signed in earlier periods generally have no status as instruments of international law today.²⁸ On that basis, the committee

recommended that the government give consideration to the implementation of a compact by altogether different means, namely a constitutional amendment which would give a broad enabling power to the Commonwealth to enter into an agreement with representatives of the Aboriginal people. In particular, the committee recommended a constitutional amendment along the lines of s.105A, which was inserted into the Constitution in 1929 in order to give the Commonwealth power to enter into financial agreements with the states. This section provides, in particularly strong form, for the protection of all such agreements against other laws, both state and federal, and all other sections of the Constitution.

A provision of this kind, giving the Commonwealth power to make agreements with Indigenous peoples, would provide similarly strong protection for the rights laid down in any future agreements. This is an approach which also has the obvious advantage of allowing flexibility with regard to the details of such agreements, while avoiding the legal and political difficulties that might accompany any attempt to formulate a single, exhaustive compact or treaty and to have this ratified at a referendum.

Current proposals by Indigenous political leaders adopt a similarly pragmatic approach to the language and the means employed in order to obtain what might be expected to flow from the acceptance of ongoing sovereign status within the larger nation-state –such things as the acceptance of special rights, self-government, control over land, resources and the allocation of services and infrastructure needed for economic and social development. Although in his Vincent Lingiari lecture Pat Dodson did not advance specific proposals with regard to the legal form that a framework agreement might take, he did call for ‘a formal agreement that recognises and guarantees the rights of Indigenous Australians within the Australian Constitution.’²⁹ In the same period, in his speech to the Institute of Commonwealth Studies in London in 1999, Gatjil Djerrkura canvassed the history and current state of treaty negotiations and suggested that the primary unfinished business which remained to be addressed in Australia related to ‘the need for substantive constitutional reform to ensure the protection and justiciability of Indigenous rights.’³⁰ He went on to outline means by which constitutional reform might provide protection for present and future Indigenous rights, based on the 1983 recommendations of the Senate Standing Committee. Specifically, he recommended the insertion into the Constitution of a section analogous to s.105A, as well as a mechanism to ensure serious discussion and future negotiation with regard to specific rights.

Canada is clearly one source of inspiration for elements of this approach. Section 35(1) of the Constitution Act provides protection for Aboriginal and treaty rights in Canada, including rights acquired as a result of land settlements or regional agreements entered into by governments and First Nations. Section 37 of that Act also embodies a commitment to ongoing constitutional discussions with First Nations. Certainly, inspiration for this approach comes from other sources as well, such as the Draft Declaration on the Rights of Indigenous Peoples currently being considered by the UN Commission on Human Rights. Article 36 of that draft declaration provides that

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements.³¹

In his speech, Djerrkura drew particular attention to the importance of the notion of a constructive arrangement, understood as any legal relationship entered into with the

participation and consent of the parties concerned. On the one hand, this notion points to the importance of not being bound by narrow conceptions of treaties or treaty-making. On the other hand, it encourages recourse to arrangements in keeping with the particular legal and constitutional history of the countries concerned. Australia has no history of making treaties with regard to the protection of specific rights for Indigenous peoples. However, it does have a tradition of amendments to the Constitution, and in particular the precedent of the 1967 referendum as a constitutional means to the recognition (or, in this case, the non-exclusion) of Indigenous peoples. In this sense, a constitutional amendment along the lines of s.105A would be entirely in keeping with Australia's unique institutional and political history.

It should also be noted that the 1999 version of this proposal differs from the 1983 version in several subtle respects. For example, it suggests that the enabling power be such as to give the Commonwealth power to enter into a range of agreements with the Indigenous peoples, rather than simply a power to enter into a single compact with, as the Senate Committee report put it, 'representatives of the Aboriginal people'. So in its currently proposed form such an amendment could underwrite a series of regional agreements of the kind recently developed in Canada. As such, it could offer a possible path to self-determination and the protection of rights based in the culture, law and spiritual traditions of the Indigenous peoples, and to that extent provide at least the content if not the form of a recognition of continuing Indigenous sovereignty. At the same time, since it is modelled on an earlier episode in the evolution of the federal Constitution, it does suggest a distinctively Australian means toward resolving this paradox of Indigenous sovereignty.

Finally, with regard to my earlier remarks about the requirements of justice for Indigenous people. Would such a constitutional amendment satisfy those demands of justice? Would it provide a basis for relations on just foundations, in the terms that I spelled them out? Clearly, such an amendment by itself would not. It would provide an enabling power which could underwrite further agreements addressing areas of unfinished business. In that sense, it could provide a framework within which the requirements of distributive justice might be met and substantive equality as Australian citizens properly achieved. Agreements entered into under such a provision could also address issues of compensation.

That leaves the third requirement that I mentioned, the requirement of recognition. Here too, it seems that such an amendment would not, in and of itself, provide sufficient recognition. It could provide a framework within which particular agreements might establish rights to self-determination and the recognition of Aboriginal law and culture. The content of these agreements in turn could provide the kind of right that Pat Dodson refers to, namely the right to be Aboriginal Australians in accordance with their own specific laws and cultures. But the constitutional amendment might still require the supplement of something like a preamble which would include explicit recognition of prior occupation, ownership and Indigenous self-governance. Arguably, these two things together, might provide an acceptable form of recognition that this was not *terra nullius* but a country already occupied by sovereign Indigenous peoples. As such, they might enable the establishment of a distinctively Australian form of just relations between Indigenous and non-Indigenous citizens.

Discussion Session

Jilpia N Jones: I recall a story in the media about some artists going up to the Kimberleys and forcing an old woman to go down to the art gallery to sell her work. So to me I feel that the attitudes of the white Australians need to be changed, because they still want to see real blackfellas in their art centres so that the tourists can come in and maybe spend extra dollars.

Paul Patton: I think you're absolutely right that those sorts of attitudes are what need to be changed. It is part of what is at issue in saying that real reconciliation or establishing relations on just foundations means getting beyond *terra nullius* thinking in all its forms and dimensions. There are many respects in which that still has to happen. I thought the debate about the closure of Uluru after the death of one of the traditional owners was another example of the distance we still have to travel in public recognition of Aboriginal custom.

Richard Davis: Paul, this is in some respects a speculative question about some of the principles of your argument. What if an Indigenous group wanted to secede from this grand state? Would some of the general principles still be applicable? Why it is not entirely speculative is that in 1989 some prominent Torres Strait Islander leaders did call for secession. It is debatable whether it was used as a kind of rallying cry to get more resources from the state and Commonwealth, but nevertheless it was seriously considered.

Paul Patton: I think the key underlying issue here is Indigenous sovereignty and I take seriously the arguments that suggest that that is not a foregone conclusion. That is to say, I believe there are good reasons for maintaining that there was sovereignty at the time and that, to that extent, the imposition of British sovereignty was not legitimate in the form that it was carried out. I think there is an equally strong argument for the continuation of that sovereignty. Part of the problem, though, is that we need to distinguish what can be argued as an historical, legal and political-theoretical case from the question: what might reasonably follow from that case, politically speaking, in the present?

I presented the argument in the context that none of the recent calls for treaty negotiation have been of a separatist kind. The possibility of such separatism is implicit in the argument for Aboriginal sovereignty, and indeed sovereignty is sometimes relied upon in arguing against any form of treaty arrangement which would imply giving up that possibility. The irony of this position is that if any form of secession is going to be proposed for any part of the country, then if it does not involve complete cessation of relations, it is going to imply the need for a treaty of the strong international kind. So yes, I do take the conceptual argument seriously, but I am more cautious about the political logic of arguing for that kind of secessionist consequence of recognising Indigenous sovereignty.

The other thing to say is that this secessionist consequence arguably relies upon an implausible conception of what sovereignty entails in the modern world. It is often pointed out that understanding sovereignty as necessarily involving an independent, autonomous and self-governing state is increasingly out of touch with the realities of state sovereignty – with the level of interconnection and the varieties of interdependence to which even so-called sovereign states like Australia are subject.

This way of thinking about sovereignty is also one of the conceptual blockages to thinking of Aboriginal sovereignty as something that might be continuing and ongoing within the Australian state. A lot of legal thought in particular, but also some constitutional thought, takes the view that sovereignty must be unique, that there can only be one sovereign and that

you cannot have a form of constitutional arrangement with more than one. But that seems unduly restrictive – why not? There are models of shared sovereignty in other parts of the world. There are also recommendations for state sovereignty shared with Indigenous peoples, such as those put forward by the Canadian Royal Commission. So the idea that there must be a unique and indivisible sovereignty is one of the blockages to thinking creatively about forms of accommodation.

Christa Scholz: I take your last comments to indicate that the problem is not what we adopt as generally shared sovereignty, but the problem here is conceptualising how different views of citizenship could exist under a state. It is not just divided sovereignty but we have different packets of rights or responsibilities that citizens carry in this type of federal or sovereign structure. It is not so much sovereignty that creates this problem but our ability to conceive of different types of citizens within the state.

Paul Patton: In terms of how it can be managed in the future, yes, you can describe the situation in those terms. It is a question of how we can understand and accept forms of differential citizenship. That is what notions of special rights for Indigenous people amount to, and that is why they are so offensive to liberal political thought which insists that rights should be uniform and the same for all.

At the same time, it seems to me that the issue in Australia is an issue of colonisation and its history. I think that, in terms of our institutional history and our legal history, that history is affected by both the way that sovereignty has been understood and the way that it has been implemented. So I don't think that the issue of Indigenous sovereignty is a red herring. It is not clear-cut, for the sorts of reasons I was suggesting; there are questions about how Indigenous sovereignty should be understood and what might follow from it in the present. It seems to me that if one is going to engage seriously with that history and, to refer back to my remarks at the beginning, with the question of justice – what is the injustice here? – then a primary and important aspect of injustice is the failure to recognise Aboriginal law and culture and the failure to recognise Aboriginal peoples as potential parties to a treaty or any kind of agreement. Again I think that that requirement of justice as recognition will not be addressed until there is some kind of formal agreement.

Barry Hindess: Paul, I enjoyed the talk, as always. But again as always I find myself looking for problems and awkwardnesses. I have two points. One is to ask an apparently simple question, and the other is to make a comment about the relation between the first part of your talk and the latter part.

The apparently simple question is: could you spell out what you mean by the content of *terra nullius* thinking? It seems to me that that is something that can be interpreted in very different ways. At one extreme, for example, you could say *terra nullius* thinking is something which distinguished the activities of the British administrators in Australia from those in, say, West Africa or India. We find even with those other cases that there is a clear recognition on the part of the British that there is an established system of law, and established custom or polity, so that's not *terra nullius*. Conversely, in colonial Australia the administrators had the idea that there was no system of law and really no structure at all.

Or do you interpret *terra nullius* in a quite different sense, as simply one extreme version of the more general doctrine of civilisation which the British took with them wherever they went in the world? The way we treated Australian Indigenous peoples was the consequence of an

extreme version of this thinking. It seems to me that simply referring to ‘*terra nullius* thinking’ is a bit too easy, because it might allow people to avoid recognising that they are wrong in saying Aboriginal ways are less than British ways, that they weren’t a civilised people and that their particular way of life is bad for them simply because they are not British, which is at the heart of the unjust treatment currently evident.

The second part of my comment is this. I think there is a tension here between your opening discussion of the issue of justice and your later discussion of a political process. When at the end of the talk you came back to the relationship between those two and suggested that the political process itself might be seen as something which could lead to resolving the problems of justice, my sense is that that is not what the political process is like. All political processes do is reach accommodations which are for the time being acceptable to the negotiating parties. While it might well be that accommodations are the best we can hope for, it seemed to be misleading to present a process of reaching accommodation as a process for achieving just reparation for past injustice. I just think they are different kind of games, and we should not confuse searching for accommodation which people can live with and accept with truly just relations.

Paul Patton: Thanks, Barry. They are both helpful questions. On the first question about *terra nullius*, I agree with you about the difference. I would develop the way I was using the term in the direction of the latter, broader sense. I have argued in other contexts that one should say that *terra nullius* is not just a narrowly confined legal doctrine but something more like the organising principle of colonial Australian society. I mean that in the most general sense to encompass all of the ways in which Aboriginal society, law and culture were and are regarded as inferior. We see an example in the kind of response that does not recognise a request to close Uluru as legitimate in the way that requests based in other forms of spirituality or European religions would be legitimate. This broader sense encompasses the ways in which the history of the country was written, the ways in which Aboriginal society and culture was for a long time described and sometimes still is. So yes, what I mean by *terra nullius* thinking is an organising principle of a certain colonial society of that broader sense.

In relation to the second point, I think that is an interesting question. The tension probably is there in the disorderly way that these thoughts were thrown together. In response to the comment, I would say that one could equally ask what function, if any, does philosophical or political theorising serve in relation to political process. I guess what I would want to say there is that while I agree with you that the political process is about accommodation, it is also true that the process is always conducted in some language or other – some language of justice, some language of equality. What political theorists and others can do by elaborating the content of justice in this context is, if you like, to set the bar a little bit higher and to say justice requires more than equal treatment before the law. It requires even more than practical reconciliation and substantively equal citizenship. It requires attention to these other concerns as well. I think one can say such things without expecting that the political process will satisfy those demands. This still seems to be one useful thing that political theory can do in this situation.

Tim Rowse: There is no doubt that you can point at instances of what you call *terra nullius* thinking as a barrier to the kinds of process towards social justice as you have defined it, but I think that there is another barrier which is in some ways more formidable because it comes from our side of politics and not just from the other side. This barrier is an alternative

conception of social justice which focuses on the outcomes of delivery of public programs. I think that at the moment this is the disturbingly dominant conception of social justice in Australia. It is the one that is helping to cancel out traditional differences between Right and Left. You can have a very seasoned advocate of Aboriginal rights like Peter Sutton being understood by those who are not impressed by the Right's arguments as someone who is at last talking the language that needs to be talked, a language which depicts social justice in terms of the measurable deficits that Indigenous people suffer on certain agreed social indicators. To give you an instance of the power of that argument, I think that is the dominant conception of social justice in the latest report of the Aboriginal and Torres Strait Islander Social Justice Commissioner for 2001.

It seems to me, if I am right in saying that this is the politically dominant conception of social justice, that an argument about a treaty needs to make its case in terms of that theory of social justice. It is not history that needs to be addressed because there are so many different ways of addressing it and what counts as a successful addressing of history is so controversial. What is relatively uncontroversial is the sense that there are concrete, measurable deficits and they are unjust. What is your response to that observation?

Paul Patton: I agree with you entirely that that is the dominant language in which justice is discussed, and I agree with you that that predominance is across the political spectrum. That was in large part the language in which the Keating government justified the Native Title Act. It is the language that the current government uses to justify its overwhelming concern with practical reconciliation. But to repeat what I said at the beginning, I think that this language is not sufficient. It does not exhaust the concept of justice, and more importantly in the context here, it does not address a large part of what many Indigenous people say and call for.

From my own perspective, it is an interesting juxtaposition that the other sense of justice that I was calling recognition or concern for others is one that is pre-eminent in the writings of some Continental philosophers. This notion of justice as a certain kind of relation to others or to the 'Other' is the concept of justice relied upon by Derrida and Levinas. On the other hand, the sense of injustice grounded in the lack of recognition, the lack of response, is voiced in the demands and the statements of Aboriginal people. We hear it from those who insist that the question of ownership is one that, from the perspective of Aboriginal law, was always clear and settled – from the perspective of traditional owners the problem is why that was not understood and why their entitlement could not be recognised – right through to current demands for an apology, for recognition of religious custom and ritual as well as law.

I guess my response to your observation is to say that we should insist on the importance of this other dimension of justice.

Ernst Wilhelm: I also enjoyed your presentation. In your answer to the question before this one you advocated 'setting the bar high'. You also talked about the political process being one of accommodation. My question is what if you set the bar too high, if you set it so that the political process can't accommodate? I can perhaps illustrate this. The more that a treaty has constitutional status which establishes real rights, the greater the risk that opponents of the process will successfully be able to mount a scare campaign. One has already seen how the current Prime Minister rejected the concept out of hand. I think most people expect that the next Prime Minister, of which ever party, will be much more sympathetic, but would there be advantage in thinking of a two-stage process: first, an initial arrangement which deals more

with abstract principles, perhaps, concepts of justice, recognition, and then in the contemplation of that a more formal, constitutionally entrenched solution?

Paul Patton: That is an interesting suggestion. It is a question that I feel barely competent to answer. I would have thought that it is part of the appeal of the proposal taken from the 1983 Senate Committee report. Proposing a constitutional amendment that simply has the form of a broad enabling power has the attraction of potentially avoiding some of the grounds for a scare campaign, because the details of any particular agreements with Aboriginal peoples or communities are not included and are to be determined at a future date. But, as you say, it still involves a constitutional amendment, and that requires a referendum. I am not sure of the political pros and cons. I was suggesting at the end of my talk that there is the precedent of the 1967 referendum to appeal to. There is an obvious attraction in a referendum that might not be in itself an object of fear but might have the potential to generate the same sort of public support as the 1967 referendum, perhaps in conjunction with a referendum on a constitutional preamble that might address some of the symbolic issues.

At the same time, such a method is not immune to a scare campaign. In fact the argument could just as well be used the other way, that, because of the open-ended nature of such a power and because of its strength, it does raise the prospect of agreements that would be unacceptable to many. I would be interested to hear what others have to say on the politics of such a proposal. It is not clear to me whether the case for it is compelling or whether it is too risky a strategy.

Lisa Strelein: I guess the only danger if you are going to go for that s.105A proposal is tying it with a preamble that has actual content, for exactly the reason that tying them together you would lose one because of the detail and the other because of the lack of detail.

Paul Patton: Yes, that is true. The difficulty of getting agreement is increased if it has to include agreement about the wording of a preamble. I would have thought that part of the argument about a preamble is that it does not necessarily have the consequences in terms of rights that an actual provision would.

Lisa Strelein: In terms of the electorate, though, they would be as concerned with the words in a preamble as with the words anywhere else. In fact, the symbolism to the electorate may be more important than the actual legal power to make laws in relation to a particular matter, because it represents them probably more so.

Damien O'Leary: Continuing with notions of just recognition, does it not in some sense rely on a prior act of reconciliation and not simply reconciliation with the other but a reconciliation with the history or the narrative of the self as well. It seems to me that the debates about recognition assume a sense of humility or goodwill that is lacking, and that this is the problem with talking about justice and political processes. You end up by assuming a sense of goodwill that is not there. So how do we structure reconciliation into arguments for recognition?

Paul Patton: I am not sure what you are asking. It seems to me that you can just as well describe the problem of reconciliation as a problem of recognition, of how do you achieve it. I agree, it does require goodwill. I don't think it necessarily implies agreement. Others have argued that recognition of a cultural autonomy and a history does not necessarily imply agreement on a common story. Indeed, it has been pointed out that part of reconciliation and recognition in a context like Australia might involve recognising that there isn't one story

here. There are more than one. That in itself requires a level of goodwill, but not as strong as it might sound, and not as impossible as it is often suggested.

Christa Scholz: Isn't the colonial experience simply the imposition of law on one sovereign nation by another sovereign nation?

Paul Patton: That is another way of describing what colonisation is and what it involves. It is a consequence of what I was suggesting about Indigenous sovereignty. In other words, if you take seriously the arguments for saying that Indigenous peoples were sovereign in Australia at the time of settlement, then what that implies is that the story of colonisation by settlement, the imposition of sovereignty by settlement, does not work. It implies that, more truthfully described, it was a process of conquest, of the kind that you describe. But that still leaves the question of how to deal with the consequences of that conquest, and that is the problem we face. The consequences of colonisation are pretty much the same in most parts of the world; what varies is the particular legal and institutional form that that took. The particular legal and institutional form affects crucially the ways in which the consequences are played out. That is why the process in Australia is different from that followed in Canada and the US. Again, it seems to me important to take seriously the particular colonial, legal and institutional history that we confront in trying to deal with that past. I think that describing the imposition of a British law as conquest does not change the situation in that respect.

Lisa Strelein: I have been reminded all the way through this paper that the exercise of sovereign power during colonisation does not necessarily fit in with how we see ourselves as a democratic liberal state – that the right to government comes from power and from legitimacy, and the search for finding legitimacy when you exercise that power.

Paul Patton: Yes. And the problem of reconciliation or establishing relations on just foundations is properly described as a problem about the legitimacy of the colonial state. To refer back to the argument about constitutional paradox, it does seem to me a compelling argument in the present context to point out that there is an incoherence in Australian constitutional arrangements at present by virtue of the partial and limited recognition of Aboriginal law or what Jeremy Webber calls 'autonomous legal orders'. That incoherence is implied by the jurisprudence of native title. There is this obvious inconsistency in recognising native title on the one hand, and refusing to recognise any form of sovereignty on the other. Resolving that inconsistency, that paradox, is what needs to be done in order to restore legitimacy.

Notes

- ¹ Dodson, P. 'Lingiari – Until the Chains are Broken', *4th Annual Vincent Lingiari Memorial Lecture*, in Grattan M. ed *Essays on Australian Reconciliation*, Black Inc Books Melbourne 2000, p.270.
- ² Clark, G., 'From Here to a Treaty', Hyllus Maris Lecture at LaTrobe University, 5 September 2000, pp.7-8.
- ³ Keating, P. J., 'The H.V. Evatt Lecture - New Visions For Australia', unpublished typescript, Sydney, Evatt Foundation, 1993, p.6.

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- ⁴ Dodson, P., in Grattan ed p.266.
- ⁵ Dodson, P., 'Beyond the Mourning Gate – Dealing with Unfinished Business', The Wentworth Lecture 2000, AIATSIS, pp.8-9.
- ⁶ *The Mabo Decision*, Sydney, Butterworths, 1993, p.41. See also pp. 26-7 where Brennan J describes the basis of the 'barbarian' theory as 'false in fact and unacceptable in our society'.
- ⁷ 'Ex hypothesi, the indigenous inhabitants of a settled colony had no recognised sovereign, else the territory could have been settled only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation', *The Mabo Decision*, p.24.
- ⁸ *Advisory Opinion on Western Sahara* (1975) 1 ICJR 12.
- ⁹ Patton, P. (1996) 'Sovereignty, Law and Difference in Australia: after the Mabo Case', *Alternatives*, Volume 21 Number 2, April-June, pp.149-70.
- ¹⁰ Jeremy Webber, 'Beyond Regret: Mabo's Implications for Australian Constitutionalism', Ivison D., Patton P., Sanders W. eds *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press Melbourne 2000, pp. 62-3.
- ¹¹ Reynolds, H. *Aboriginal Sovereignty*, Allen & Unwin Sydney 1996, pp. 13-14.
- ¹² *Calder v Attorney General of British Columbia* 1973 SCR 313.
- ¹³ Asch, M. 'From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-6' in Havemann P. ed *Indigenous People's Rights in Australia, Canada & New Zealand*, Oxford University Press Auckland 1999, 428-446.
- ¹⁴ *Van der Peet v The Queen* (1996) 137 DLR (4th) 289 (SCC).
- ¹⁵ Asch, as above p.440.
- ¹⁶ Reynolds, H. *The Law of the Land*, Penguin Books Melbourne 1988, pp.7-29; Wallace-Bruce, N.L. 'Two Hundred Years On: A Reexamination of the Acquisition of Australia', (1989) 19:1 *Georgia Journal of International and Comparative Law* at 90, 110.
- ¹⁷ Senate Standing Committee on Constitutional and Legal Affairs Report on the feasibility of a compact, or 'Makarrata' between the Commonwealth and Aboriginal people, *Two Hundred Years Later...*, p.50.
- ¹⁸ Reynolds, *Aboriginal Sovereignty* p. 54.
- ¹⁹ John Borrows points out that the Canadian Supreme Court examined the act of state doctrine in *Calder* and found that in cases dealing with Aboriginal title it did not prevent the Court from 'reviewing the manner in which the Sovereign acquires new territory' in 'Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism' in *Speaking Truth to Power: A Treaty Forum*, Law Commission of Canada, 2001, pp.43-4.
- ²⁰ *Salaman v Secretary of State for India*, 1906, 1 Kings Bench at 639.
- ²¹ Brian Slattery has argued that 'When it comes to reconstructing the legal history of their own countries, courts cannot take refuge in the act of state doctrine without forfeiting

their moral authority and acting as passive instruments of colonial rule’, in ‘Aboriginal Sovereignty and Imperial Claims’, Hodgens B.W. et al *Co-Existence? Studies in Ontario – First Nations Relations*, Trent University Press Trent Ontario 1992, pp.158-9. Cited in Reynolds, *Aboriginal Sovereignty*, p.xvi.

²² *New South Wales v Commonwealth* (1975) 135 CLR at 388. *The Mabo Decision*, p.20.

²³ *Coe v Commonwealth No.2* (1993) 118 CLR at 200. Similarly, in *Walker v New South Wales* (1995) 126 ALR at 322, Mason CJ rejected the suggestion that the application of Commonwealth or state laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent on the grounds that ‘such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people’.

²⁴ Senate Standing Committee on Constitutional and Legal Affairs Report on the feasibility of a compact, or ‘Makarrata’ between the Commonwealth and Aboriginal people, *Two Hundred Years Later...*, p.50.

²⁵ Howard, J. ‘Treaty is a Recipe for Separatism’ in Baker K. ed *A Treaty With The Aborigines?* Institute of Public Affairs, Policy Issues No.7, 1988, pp.6-7.

²⁶ Howard, J. ‘Practical Reconciliation’ in Grattan M. ed *Essays on Australian Reconciliation*, p.96.

²⁷ Royal Commission on Aboriginal Peoples (Canada), (1996) Report Volume 1 *Looking Forward Looking Back*; Report Volume 2 *Restructuring the Relationship*; see also Tully, J. ‘A Fair and Just Relationship’, (1998) *Meanjin*, 57:1, pp146-67.

²⁸ Senate Standing Committee on Constitutional and Legal Affairs Report on the feasibility of a compact, or ‘Makarrata’ between the Commonwealth and Aboriginal people, *Two Hundred Years Later...*, p.58

²⁹ Dodson, ‘Lingiari – Until the Chains are Broken’ in Grattan ed p.269.

³⁰ Djerrkura, G. ‘Indigenous Peoples, Constitutions and Treaties’
<http://www.treatynow.org/docs/gatjil.pdf> p.11.

³¹ UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56. At 105 (1994). Reprinted as an appendix in Anaya, S. J. *Indigenous Peoples in International Law* Oxford University Press Oxford, 2000, pp.207-16.