The 'S' Word and Indigenous Australia: A New Variation of an Old Theme

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Introduction

According to the President of the ALP, Warren Mundine, Indigenous Australians have to 'earn' their sovereignty.[1] Similarly, the current conservative Federal government has labelled self-determination for Indigenous Australia a 'failed experiment' and the former Minister for Immigration, Multicultural and Indigenous Affairs, Senator Amanda Vanstone likened the existence of a separate Indigenous electoral structure as akin to apartheid saying, 'There was once a country we wouldn't play cricket with because they had separate systems'.[2] It is this tenor of public debate and discussion on Indigenous issues in Australia that makes *Indigenous Sovereignty and the Democratic Project* an important and timely reminder to Aboriginal and Torres Strait Islander communities that liberal democracies are capable of accommodating cultural difference, especially the Indigenous populations of settler states. It is an important reminder to Indigenous peoples that despite the conservative milieu, these kinds of ideas – the importance of revisiting and rebuilding public institutions to achieve the goal of reconciliation between black and white Australia – continue in the minds of academics and public intellectuals in Australia.

Any belated accommodation of Indigenous peoples in a postcolonial state requires institutional imagination and political will. Until now, minimal space has been provided for this by Australia's public institutions; and the importance of reconciliation as a legitimate and worthy pursuit for the Australian state waxes and wanes according to the political party of the day. Since the abolition of the Aboriginal and Torres Strait Islander Commission (hereafter 'ATSIC') and adoption of the concept of mutual obligation now underpinning the 'new arrangements' between the Australian state and Indigenous Australians, there is not much optimism

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1 D Bagnell, 'Warren Mundine', *The Bulletin* (Sydney), September 28, 2005.

2 M Grattan, 'PM jumps, ATSIC falls', *The Sydney Morning Herald* (Sydney), 18 April 2004.

among Indigenous communities that the important ideas expressed in Curry's detailed exploration of Indigenous sovereignty (known as the 's' word in Indigenous circles) within liberal democracies will either come to fruition or be publicly debated in the near future.

Indigenous peoples in Australia look with envy to Canada, for example, which in renegotiating its constitutional settlement, negotiated a specific constitutional provision for Indigenous peoples. Moreover the state has just announced a $3-billion health package to tackle Canadian Indigenous health problems. All hope, therefore, is not lost for the prospect of reform in Australia. Indigenous peoples are aware of the emancipatory potential of liberal democracies and the power of political leadership when dealing with Indigenous issues. These ideas will have their time and it is important that the conversation continues as it does in academia and among Indigenous scholars, aboriginal community organizations, reconciliation groups and at the local government level. *Indigenous Sovereignty and the Democratic Project* is an impassioned and finely constructed contribution to that ongoing conversation.

On the importance of terminology

It must be said from the outset that Curry's introductory explanation of his terminology is actually an extremely important qualification for many Indigenous peoples. So few academic writers and commentators provide explanations of what terminology they are using and in what context when it comes to Indigenous peoples issues. Indeed this has had severe resource implications for Torres Strait Islanders who more often than not fall under the nomenclature of *Indigenous*, thus neutralising and shielding some of the very serious issues that face Torres Strait Islanders at home and in the mainland.

In Australia, the Constitution has ensured that states rights have coloured Australian political history since Federation and as a result, the media, politicians and the community have embraced the notion of differing personalities and unique qualities of each state and territory and the people who inhabit these distinct areas. Yet when it comes to Indigenous peoples issues, the media and politicians adopt a one-size-fits-all approach. Indeed, the Federal government in its new policy approach has effectively decided that urban dwelling Aborigines are inauthentic aborigines and increasingly applies the term *Indigenous* to those aboriginal people who live in rural and remote areas. Any amateur student of Aboriginal history would know that Aboriginal and Torres Strait Islander communities are extremely diverse. It may seem like a minor point but the care Curry takes in his explanation of his use of terminology illustrates a deep sensitivity to Indigenous Australia that resonates throughout the entire book.

The unexamined contribution of Indigenous peoples to sovereign states

Theories of sovereignty can be a bewildering field for many Indigenous peoples to navigate. To Indigenous scholars and students, the study of sovereignty can be distracting given that these technical theories, varied, malleable and endlessly contested, have, as Curry establishes early on, meant nothing more for Indigenous peoples than a justification for the dispossession of Indigenous lands, territories and resources and a state sanctioned disregard and disrespect of Indigenous cultures. The most dominant theory of sovereignty, which Curry labels a classical view of sovereignty, continues to bolster power structures that oppressed Indigenous peoples on invasion and continue to justify the legitimacy of settler states. This is despite the classical version of sovereignty having limitations for contemporary post-colonial liberal democracies whose power is dependent upon the people – more commonly referred to as popular sovereignty - and defined and limited by a constitution and the rule of law. (Though even the Australian High Court has been reluctant to describe the Constitution as underpinned by popular sovereignty as opposed to an Act of the British Parliament). Curry's discussion in *Imagining the People* is particularly interesting in this respect.

The Introduction and *We are only Demanding our Country* are spectacularly good reading, establishing the exigency of indigenous peoples' sovereignty claims and how Australia's continuing neglect of these claims affects 'our commitment to democratic governance'.[3] Curry's narrative of the battle at Wounded Knee and the clash of sovereigns is one of the best illustrations of how Indigenous peoples see themselves within the settler state. It's a powerful read revealing the utility of the Indigenous use of the word 'sovereignty' to communicate not only Indigenous demands in English but to capture the essence of the relationship between Indigenous peoples and the state. At Wounded Knee, it was a concept that 'provided the occupiers with grounds upon which to make a demand that other citizens of a state would normally feel powerless to make'.[4] Curry then goes on in *Long Live the King!*, to explore the many political and legal variations of the concept of sovereignty. This is a considered and well-written chapter that describes the origins of sovereignty and its historical utility in defining the power relationship between the state and its subjects. It provides a solid foundation upon which to better comprehend the epistemological and ontological difficulties of Indigenous peoples employing it in their political advocacy with the state.

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3 Ibid, 2.

4 Ibid, 19.

The changing construction of sovereignty consistent with historical developments in political theory is important because of the way in which sovereignty remains to be drawn by the state as it relates to Indigenous claims to sovereignty. As Curry observes, the classical view of sovereignty, despite having limitations in 'explaining or structuring other aspects of jurisprudence or the theory of government ... has played a very historical role in the relationship between Indigenous peoples and the colonial and post-colonial states that have presumed to govern them'.[5] This construction of sovereignty is entrenched in Australian public institutions despite the shifting and malleable notion of state sovereignty being acknowledged by states (and increasingly the subjects of these states) as it relates to issues of globalisation and trade law agreements. Some trade agreements represent the kind of intrusive incursion upon state sovereignty that may enable (in certain circumstances) supra-national institutions and foreign states to alter the laws and regulations of the sovereign Parliaments of a state. Yet this is an incursion that is rarely countenanced as fracturing the state because sovereignty is conveniently renovated to justify and further economic imperatives for the state, the private sector and ostensibly its people. Trade or freer and more open markets are perceived to be of unquestioned economic and social benefit to the governed. Human rights and Indigenous rights on the other hand are generally viewed as having no economic benefit to the state and its people.

New arrangements between Indigenous peoples and the state

This value system underpins the false dichotomy popularised by the Howard government between the symbolic and practical in Indigenous issues. It means that a treaty, an apology and compensation for the Stolen Generations, special electoral mechanisms or Parliamentary seats are viewed as symbolic, bleeding heart and wishy-washy. They are viewed as having no economic benefit particularly to impoverished and dysfunctional 'cultural museums' in rural and remote Australia. Practical measures are preferred, measures that involve Aboriginal participation in the economy and contribution to the real economy through expenditure and the tax system rather than an over reliance on the welfare state. This approach informs the new arrangements in Indigenous affairs since the abolition of ATSIC. The new arrangements are defined by the notion of mutual obligation and in practice mean the proliferation of shared responsibility agreements. These agreements see Indigenous peoples enter into agreements with the state for funding and basic services in return for behavioural change. In many circumstances these agreements require

5 Ibid, 52.

communities to enter into contracts for services and resources that other Australian citizens receive by virtue of their citizenship.

These new arrangements seek to redefine the relationship between Indigenous peoples and the state – indeed, some have referred to them as mini-treaties. This definition of the relationship between Indigineous people and the state is, of course, wishful thinking but it is distracting and clever because it would ideally dispense with the need to negotiate a real treaty agreement between the state and Indigenous peoples. It dispenses with the reality of acknowledging the power imbalance between the two parties and encourages avoidance of Indigenous claims to sovereignty and the right of self-determination. Thus, Curry's foreground on the history of sovereignty clearly demonstrates how the enduring power of a classic view of sovereignty means that Indigenous attempts to establish a belated agreement or settlement with the state (such as a treaty) are continually scuttled, despite the continuing push by Indigenous peoples as evidenced by the seminal Indigenous political documents such as the *Barunga statement*, the *Eva Valley statement* and the *Council for Aboriginal Reconciliation, Roadmap for Reconciliation*. It explains why they have been devalued and forgotten by the Australian polity.

The characteristics of state and nation

Of particular note is Curry's exploration in *State and Nation* of the way in which the colonisers have characterised "nation" to exclude Indigenous claims to sovereignty. This chapter is important because of what is actually required to view indigenous nations and indigenous sovereignty in a different light. Prior to the colonisation period, trade was integral to Indigenous cultures. Indeed Russel Barsh has argued that there was an 'aboriginal world system' in North America predicated upon international trade between aboriginal tribes.[6] In North America Indigenous groups engaged in trade between Indigenous nations, particularly South American indigenous groups. Indigenous groups also began trading with nations, such as England, Spain and South America, who wanted to 'secure alliances and ensure the perpetuation of trading relations for mutual benefit'[7] and 'states competed with one another for access to Indigenous trade and took steps to

6 R. L. Barsh, 'Indigenous Peoples and International Order: The Aboriginal North-American World System' (2001) 3 *Balayi* 87.

7 M Colchester and F Mackay, 'Indigenous Peoples, Collective representation and the Right to Free, Prior and Informed Consent' (Paper presented at the 10th Conference of the International Association for the Study of Common Property ,Oaxaca, August 2004) <http://www.danadeclaration.org/text%20website/fpic_ips_may04_eng_dft.pdf> at 12 April 2005.

insure that their relations with Indigenous Nations were tranquil'.[8] Of course, most of these trading relationships including Indigenous trade relations across borders were eventually dishonoured.

In Australia, the most popular account of international trade is that of the Yolgnu and other aboriginal groups in far north Australia who established a long standing trading partnership with the Macassans from Indonesia in trepang. These trading links lasted until they were statutorily prohibited in particular by South Australia and thus 'Indigenous trade routes and concentrations of Indigenous power were inadvertently refocused by the imposed patterns of exploitation and settlement'.[9] Apart from international trade, the Australian continent had also been a site of extensive trading activity between aboriginal nations in goods such as spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells,[10]

> Generally trade routes lay like fine mesh over the land, representing a network of interaction which traditionally linked many differently oriented cultural and language groups. Goods moved initially within the range of recognised kin and then to defined partners living in adjacent territories and then farther afield, travelling clockwise or anti-clockwise according to convention.[11]

Even the story of 'nation' building largely ignores the contributions of Indigenous peoples to the establishment of infant industries in colonies like Australia whose domestic economies now dominate the global economy. In Australia, for example Indigenous peoples are rarely recognised for their achievements in establishing infant industries such as the cattle, dairy and sugar industry, though Prime Minister Paul Keating recognised this contribution to Australia in his now famous *Redfern speech,* 'Where Aboriginal Australians have been included in the life of Australia

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8 R. H Berry III, 'Indigenous Nations and International Trade' (2003) 24 *Brooklyn Journal of International Law* 239 , 255.

9 See, eg, C Moore, 'Refocusing Indigenous Trade and Power: The Dynamics of Early Foreign Contact and Trade in Torres Strait, Cape York and Southeast New Guinea in the Nineteenth Century' (2000) 17 *Royal Historical Society of Queensland Journal* 289, 298.

10 Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135, 154.

11 K Akerman Material Culture and Trade in the Kimberleys Today in RM & CH Berndt (eds) Aborigines of the West: Their Past and Present (Perth: University of Western Australia Press, 1980) 243, 250 cited in John Toohey, Background Paper 5 on Aboriginal Customary Laws Reference - An Overview Background Paper, Western Australia Law Reform Commission at <http://www.lrc.justice.wa.gov.au/Aboriginal/BackgroundPapers/P94-5_background-Toohey.pdf> at 12 April 2005.

they have made remarkable contributions, economic contributions, particularly in the pastoral and agricultural industry'.[12] The Stolen Wages history – in which Indigenous peoples working wages were held in trust and mostly never returned – has also been largely ignored.

While the notion of Indigenous peoples' contribution to the wealth of the modern Australian state has had little traction among most Australian people, recognition of the sacrifice Indigenous culture involuntarily made to the establishment of the economy may transform the Western neo-liberal perception, so popular in Australia, of Indigenous peoples as merely unproductive recipients of welfare. After all this economic contribution is what is valued in neo-conservative capitalist societies like Australia who 'prefer material to spiritual values, profits to human beings, pasturage to Sundances'.[13] It exemplifies the unfairness of the way in which our post colonial state has been constructed and highlights the insidious nature of the 'history wars' that seek to diminish the unfairness of that construction in favour of mythologies of frontier achievement, initiative and pioneer adventure. It is true, as Curry writes, that:

> there is a tension in the conflation of state with nation, especially when we consider the position of minority cultures within multicultural states possessed of a definite historical founder culture and a public culture derived from this to which latecomers are expected to conform I have raised these thoughts here because they suggest good reasons to be cautious about celebrating nationalism as a basis for successful constitutionalism.[14]

And in *State and Nation*, Curry astutely draws attention to the contradiction here of the false bifurcation in which self-determination has been predicated as an 'exclusivity of nations' that isolates the "indigenous sphere", which is also expected to develop parallel to the 'host society', yet expected to engage with the broader public sphere to finance that development 'without any reference to the legal, political and social contents of these spheres'.[15] The alternative to this, as Curry rightly acknowledges, is assimilation that 'empties indigenous culture of its national flavour and leaves only the cultural baggage: language (if it can

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12 Prime Minister Paul Keating, Redfern Park speech cited in Indigenous Law Bulletin (2001) 57 <http://bar.austlii.edu.au/cgi-bin/disp.pl/au/journals/ILB.20050121/2001/57.html?query=%5e+redfern+speech> at 12 April 2005

13 Curry, above n 3, 171

14 Ibid, 76.

15 Ibid 81.

survive), arts and crafts, and rituals'.[16] Curry perfectly sums up Indigenous communities since the abolition of ATSIC with the slow and ad hoc implementation of the benignly labelled "new arrangements", the federal policy to privatise Aboriginal land and new proposals to close down remote outstations which are labelled as 'cultural museums' – as Curry calls is, the 'surrender of all claims'.

Reforming our public institutions: excising race

It is difficult to comprehend how the patriotic, warlike, race-divided Australia of today can even begin to think in earnest about what principles underpin a liberal democracy or to seriously consider reform of our public institutions - constitutional reform, for example is virtually impossible without bipartisan support. This aspect of Curry's work regarding the rebuilding or revisiting of public institutions is the most engaging. Curry does an exceptional job of drawing together these ideas including where those ideas may have been put into practice in other states such as in Canada (Nunavut and the Nisga'a Treaty, for example) to provide a vision of how this can be achieved. It is no easy task because Curry, like Indigenous peoples, has a lot of obstacles or forces working against him in fashioning these ideas. One conundrum of such an exercise is that most Australian citizens do not readily understand their public institutions. The 1999 Republic Referendum campaign was evidence of the confusion in the community regarding our civic institutions. Another emerging and disturbing trend is the tendency of contemporary campaigns for institutional reform – such as the campaign for a Bill of Rights (*New Matilda*, ACT or Victoria) or for an Australian Republic – to retain the convenience of Indigenous peoples' misfortune, manifest in health and criminal justice statistics and in institutional exclusion, to bolster their advocacy campaigns for institutional reform. Yet when it comes to the detail of that reform, Indigenous peoples' specific demands are eschewed in favour of 'pragmatism' and minimalism.[17] For example, in relation to an Australian Republic, engagement with Indigenous peoples and reconciliation are viewed as so controversial that they could possibly derail a future referendum. Therefore Indigenous issues must be viewed in a minimalist light so as to be 'pragmatic'. This means that after Australia becomes a

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16 Ibid.

17 See, generally, M McKenna, This Country: A reconciled Republic? (1st ed, 2004); 'Reservations were expressed about the wisdom of identifying one group within the ACT community for special treatment in relation to a Bill of Rights' in 'Towards an ACT Human Rights Act' Report of the ACT Bill of Rights Consultative Committee, 101 <http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf at 25 July 2005>

republic (without mentioning the word "Indigenous") the Indigenous issue/problem is ostensibly revisited later - down the track. This approach has been criticised by Mark McKenna, in his excellent book on an Australian republic and Indigenous peoples.

In the case of a Bill of Rights, the inclusion of an Indigenous specific right is eschewed in favour of a broad non-discrimination clause which is considered more pragmatic and politically palatable to a 'racist' electorate who, as in the case of the ACT Bill of Rights inquiry, 'would feel as if they did not have a stake in the rights regime' if Indigenous peoples were specifically protected and any ensuing debate derailed the process.[18] The Victorian committee came to the same conclusion, even going so far as to argue that there were not any substantive internationally-recognised rights in law upon which to base any specific Indigenous right. Of course this selectively ignores emerging norms at international law that have been recognised by the Inter-American Court on Human Rights and subsequently recognised by municipal legal systems with large Indigenous populations. The concern for many Indigenous peoples would be that those agents of change who are traditionally aligned with the movement for reconciliation and Indigenous rights are also abandoning advocacy for Indigenous issues because of the volatile nature of the debate it engineers in the public realm, and because aligning a movement with such rights may jeopardise their own ambitions for rebuilding the Australian state.

Beaten down by the conservative milieu and armed with the language of 'pragmatism', both the left and the right in politics are ignoring Indigenous peoples issues. Reformers too have become victims to the power of the state and the 's' word. Despite their distaste for the argument - clearly they wouldn't be advocating institutional change if it were true – nevertheless they implicitly support the idea that Parliament is the best protector of peoples' human rights. This is a resilient and appealing argument because it buys into the popular culture of 'democracy' and 'freedom'. The Prime Minister once argued at a Commonwealth Law conference that Australia's myriad of state and Commonwealth human rights legislation, our inquisitive media, incorruptible judiciary and robust parliamentary debate negates the requirement for an Australian Bill of Rights.[19] Yet Indigenous Australians remain the statistical irregularity to each element of this argument.

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18 'Towards an ACT Human Rights Act', Ibid 102.

19 Prime Minister J Howard, 'Address at the Opening of the 13th Commonwealth Law Conference' (Speech delivered at the opening of the 13th Commonwealth Law Conference, and 33rd Australian Legal convention, Melbourne Convention centre, Melbourne, 14 April 2003) http://www.pm.gov.au/news/speeches/speech89.html.

The mixed messages of current public law reform are that not only should you not expect an entrenched and judicially enforceable right to non-discrimination because judges are 'undemocratic' etc, but you shouldn't expect democracy to work for you either. Parliament won't legislate because you are perceived to be asking for something above and beyond what ordinary Australians are entitled to. These messages inform the implacable sense of detachment and mistrust among Indigenous communities with Australian public institutions and explain why inclusive measures, even minimalist measures such as an apology or even an amended preamble, would have an enormous psychological impact upon Indigenous Australians, who long ago disposed of the fiction of the universality of human rights and the fiction that Parliament can be trusted to protect the rights of a powerless and unpopular minority. This point brings me to the most powerful argument in Curry's book:

> Majoritarianism is widely recognised as a threat to liberal rights, and to essential individual freedoms. If democracy means something deeper, richer and more moral than simple majority rule then it cannot be built up on doctrines that deny the ability of persons to take action in defence of their own interests and rights. As a rule we have become accustomed to arguments that repair this apparent defect by basing our commitment and obligation to majority rule in our shared interests. [20]

The authentic and the non-authentic Aborigine

The final comment I would make on Curry's book is that the most insidious challenge to ideas like Curry's is the idea that Indigenous culture no longer exists and that it has been washed away by the tide of history. The importance of Curry's book in a temporal sense is to counter the seeping argument in Australian public discourse about what constitutes aboriginality and what constitutes aboriginal sovereignty. Curry writes:

> First Indigenous sovereignty can be revived. It is not, as Brennan's comments might suggest a matter of the contiguity of tradition but of the survival of a distinctive Indigenous identity, one which is sufficient to base a separate political identity on, coupled with the nature of this identity. Along with Indigenous traditions and languages we must also acknowledge the persistence of an identity based in part on racial distinctions, dispossession, shared histories of oppression and contemporary experiences of an outside

[20] Curry, above n 3, 141

> status foisted on Indigenous people by their place in a colonial order.[21]

Curry is well ahead of his contemporaries in really capturing the changing construction of aboriginal culture. It seems very clear and obvious to Indigenous peoples; but Curry's point is very difficult to articulate to the broader community whose opinions on aboriginal culture (2% of a 20 million population) is shaped by popular culture and notions of the authentic and unauthentic aborigine and the deserving and undeserving.

In the area of aboriginal law and religion there is an emphasis upon the repulsion of commentators to payback spearing or child marriage that then obfuscates the organic nature of aboriginal law and the shifting course of aboriginal law. Aboriginal law, like all legal systems, is complex and is not frozen in time but evolves and adapts. As the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner has observed:

> Attempts to consign customary law to the time when Aborigines wore lap laps, used spears and stood on bended knee will result in the strengths of many Aboriginal communities being excluded from devising solutions to difficult, intransigent problems.[22]

Public misconceptions about aboriginal law have been an obstacle to achieving reform in the way Aboriginal law is considered by the Australian legal system. As the Northern Territory Government remarked in the preamble of its inquiry into Aboriginal customary law:

> Aboriginal law is commonly misunderstood as relating primarily to issues of punishment and payback....this is simply untrue. Aboriginal law encompasses an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.[23]

What about the women?

While on the topic of aboriginal customary law, I would have been fascinated to see how Curry engages with the problems that arise if one

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21 Ibid, 170.

22 B Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Aboriginal customary law and international law' (Paper presented at the Human Rights and Equal Opportunity Commission/International Law Association Seminar on Aboriginal Customary Law, Sydney, 2004).

23 Preamble, Northern Territory Law Reform Committee (NTLRC), Towards Mutual Benefit: Report of the Committee of Inquiry into Aboriginal Customary Law (2003).

considers Indigenous Australia and gender issues. The neutral use of "Indigenous" often shields inquiry of the gendered impact of colonisation upon Indigenous communities. For example only 11 of the 99 cases investigated during the Royal Commission into Aboriginal Deaths in Custody were women. Aboriginal Legal Services have been found to have formal and informal policies of representing men over women in domestic violence cases. And in the case of ATSIC, after the Minister ceased making appointments, women's election to political positions dropped dramatically, and aboriginal women were not 'successful in being elected...nor in attaining higher elected ATSIC office'.[24]

Indigenous peoples do identify the reception of Western liberal electoral structures as a possible problematic contributor to the oppression of indigenous women. There already existed a healthy scepticism within the indigenous community toward ATSIC as it was seen as a colonising tool. However what was important for aboriginal women was that even colonising tools have differing impact on men and women, as can be identified with the male composition of Indigenous politics. Deborah Bird Rose has argued that, 'Colonising practices embedded within decolonising institutions must not be understood simply as negligible side effects of essentially benign endeavours but rather the embeddedness may conceal, naturalise or marginalise continuing colonising practices'.[25] Indeed, when Howard was first elected and ATSIC suffered severe budget cuts, the first programs to go were women's programs. How do we begin to think about how to redesign institutions to ensure that Indigenous women are given an equal standing in legal and political structures? I would think that Steven Curry would have some interesting insights into how Indigenous peoples should grapple with this too often overlooked issue.

Conclusion

Steven Curry would do well to attend a session of the annual United Nations Commission on Human Rights inter-sessional working group elaborating a Draft Declaration on the Rights of Indigenous peoples. The current status of the Draft Declaration after a decade is that the member states and Indigenous observers participating at the Working Group have reached an impasse on the text of the declaration. The concern of some states is predicated upon the notion of collective rights (given the individual nature of the international human rights law system) and in particular the

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24 W. Sanders, J Taylor and K Ross 'Participation and representation in ATSIC elections: a ten-year perspective' No. 198/2000 Centre for Aboriginal Economic Policy Research Australian National University at 16-17.

25 D B Rose, 'Land Rights and Deep Colonising the Erasure of Women' (1985) 3 *Indigenous Law Bulletin*

articles defining Indigenous rights to land, territories and resources. But for the United States, Australia, New Zealand and Canada (known as CANZUS), the right to self-determination is viewed as impinging upon their sovereignty and giving credence to Indigenous sovereignty outside of municipal legal systems. Until now international law has undoubtedly hampered Indigenous peoples attempts to seek redress, as Anne Orford posits:

> Historically, the refusal to recognise non-European peoples as 'sovereign' greatly constrained their capacity to shape the development of rules of international law. This brings into question the capacity of international law to achieve justice today. The ongoing struggle by Indigenous peoples to be recognised as peoples entitled to self-determination and as subjects of international law is one of the contemporary manifestations of this history.[26]

Curry's treatment of the often ill-defined and inconsistent theories of sovereignty which have been used to justify the dispossession of Indigenous peoples within settler states, are in fact played out every day during the two-week Draft Declaration working-group meeting. Questions such as what constitutes sovereignty? Has sovereignty changed? What is self-determination? Is the state legitimate? There are essentially two competing views which are encapsulated well Curry's book – the classic view of sovereignty versus Indigenous peoples' sovereignty melded with the middle-ground articulation of Indigenous peoples' sovereignty as variations on the 'in-vogue' multi-cultural theories of Kymlicka and Anaya – the cosmopolitan approach to sovereignty.

The success of a United Nations Declaration on the Rights of Indigenous Peoples reaching the General Assembly rests wholly upon the Indigenous right to self-determination and the insistence of states, such as the US, Australia, New Zealand and United Kingdom, that the recognition of the Indigenous peoples right to self-determination threatens their territorial integrity and thus the sovereignty of their state – the kind of arguments that Curry effectively discharges in his book.

The future of reconciliation in Australia seems so achievable and the arguments for it seem so obvious and logical after reading Curry's book. The hallmark of a great thinker. But there remains the ambiguity of the 's' word – its lack of definition is its power and its strength. Curry illustrates that it has a panoply of conceptual flaws but that its contemporary

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26 A Orford, 'Custom, Power and the Power of Rules: International Relations and Customary International Law' in M Byers (ed); Positivism and the Power of International Law' (2000) 24 Melbourne University Law Review 502.

manifestation – popular sovereignty – successfully inscribes passivity in people. Thinking back at my time during the past eight years drafting and debating at the United Nations working group on the Draft Declaration, one realises that maybe we have been too optimistic about the importance of human rights and how it has transformed the notion of state sovereignty. The commentators on the sidelines tell us it's been transformed and we argue that the state is not legitimate but the majority maintain that the principle remains, intact and unchanged as it extends to Indigenous peoples. It's the victor who gets to write the story of the state. Which in my mind means that in the end, as in all great changes in history, the issue rests upon political leadership and political will.

It has always been the case, as in the agitation for a treaty, land rights, native title or the existence of separate electoral structures, that Indigenous Australians are regarded as asking for or receiving something which other Australians are not entitled to. As Howard argued during the Native Title Act Amendment debates, 'We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group'.[27] Curry does a good job of explaining why this is a flawed way of viewing Indigenous peoples issues. It would be a challenge for most Australians to consider Curry's approach – that the state cannot move forward, that the state remains illegitimate, that it diminishes us all as Australians to configure the first peoples into a limited, utilitarian structure. Again he appeals to Australians that without even trying to settle the issue, it gives the 'lie to our most cherished democratic ideals'.

The failure to deal with the complex issues of Indigenous peoples sovereignty in Australia has not, in a popular sense, as Curry asserts it must, called into question our commitment to democratic governance nor has it, in the eyes of most Australians 'cast doubt on the ideals of human rights and popular sovereignty upon which democratic societies are supposed to be built'.[28] Of course it should and Curry is right that we face a simple choice, as Australians to:

> either accept the fact of Indigenous sovereignty and work to achieve a rapprochement with it, or we must abandon everything of real value we claim for ourselves. This means in practice taking the institutions of the settler state apart.[29]

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27 J Howard, 'The Liberal Tradition: The Beliefs and Values which Guide the Federal Government', Sir Robert Menzies Lecture, 18 November 1996 cited in Kingston, Margo. 'Racing Towards an Election'. *Sydney Morning Herald* 11 April (1998): 29.

28 Curry, above n 3, 1.

29 Ibid 171.

In the fashionable era of "popular sovereignty", Curry presents a new variation on an old theme which, for most Indigenous peoples, is more inviting than the Australian government's new arrangements – which are a new variation on the old themes of paternalism and assimilation. The new agreements in a decade will no doubt be chalked up to a failed experiment and one can only hope that in that decade, appeals like Curry's to justice and our better democratic ideals have greater traction than they do in the hostile environment that Indigenous peoples have to grapple with today.

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