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Indigenous Self-determination Claims and the Common Law in Australia

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A thesis submitted for the degree of Doctor of Philosophy of the Australian National University

April 1998
This thesis is my own original work

[Signature]

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Abstract

With the decision in *Mabo v Queensland [No. 2]* in 1992, the courts cemented their role in the self-determination strategies of Indigenous peoples in Australia. More than merely recognising a form of title to traditional lands, the tenor of the judgements in *Mabo's case* respected Indigenous peoples and offered the protection of the common law. However, the expectations of many Indigenous people for change have not since been met. This thesis examines the usefulness of the courts and the common law in particular for the self-determination claims of Indigenous peoples. I examine the theoretical and institutional limitations on the courts that have resulted in a doctrinal history which has generally excluded Indigenous peoples. I also analyse the potential for the common law to accommodate self-determination claims. I argue that the courts require familiar concepts upon which to base their decisions. I identify the notion of equality of peoples as a proper foundation for the courts to structure the relationship between Indigenous peoples and the state. Equality of peoples has roots in the fundamental principles of the common law and maintains the integrity of Indigenous peoples' claims.
Sacred areas and places of strong concern to Aboriginal people still exist . . . and what we're saying . . . the Aboriginal peoples . . . White Man will never clearly understand what it really means to us. I suppose that he can't because he's a White Man. He can only listen . . . Nationalities of people, where culture is concerned should never sit in judgement of one another's cultures.

No matter how much laws the White Man makes, no matter how much decisions he makes also and sits down and plans and talks about things . . . he can never shake us out of the Land. Because we in the Land, we in the running water, we in the air we breathe, we in the day and the night, the wind the rain, in each blade of grass, each grain of sand and all that represents the history and the chapters if you like, if you want to put in White Man's terms. But that's our way of looking at it and each Aboriginal person, be they male or female, are the carriers-on of this book that's put together, if you want to put it that way . . . a natural book, through human feeling, through human brains, human knowledge of how we pass through our generations. On the other hand the White man has all his records his rules and regulations. But ours is a continuation on of Sacredness that is with us all the time, there's mans, here's womans, there's a Sacredness . . . areas that are so important to us that if you destroy it all you will destroying us as human beings.

Robert Bropho, Nyoongar Elder
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Introduction

The relationship between Indigenous peoples and the Australian legal system reflects the violence and oppression of colonisation. Australian courts have failed to secure the collective or individual rights of Indigenous peoples. From the time of the assertion of sovereignty by the British, the courts refused to recognise the sovereign equality of Indigenous peoples or the rights and interests that have survived colonisation.

The denial of Indigenous sovereignty has had a profound impact upon Indigenous societies. Lois O'Donoghue argued that the long standing absence of recognition of Aboriginal law has had 'a detrimental effect on all facets of Aboriginal community development' and has substantially contributed to many of the social problems faced by Indigenous peoples today.¹ The impact of colonisation was to displace the authority and law of the Indigenous peoples with a foreign legal system. With its alien institutions and culture, the imposed legal system could not appropriately serve Indigenous peoples.

This has led some Indigenous peoples to reject the legitimacy of the courts as a forum for promoting self-determination. The culture, the institutional structure, and the history of responses by the courts appear to be inimical to Indigenous peoples’

self-determination. The purpose of this thesis is to examine whether the courts and the common law are nevertheless a useful tool for Indigenous peoples asserting self-determination claims in Australia.

The approach of the thesis

My approach to this thesis focuses on the claims that Indigenous peoples make as peoples; that is, claims against the state that assert a collective and distinctively Indigenous identity. At the outset I point out that claims to even the most fundamental individual human rights are often expressed as collective claims. The denial of these rights does not occur on an individual basis, but as a denial of human rights based on Indigenous identity. I have labelled these types of claims ‘self-determination claims’ through which the right to recognition and survival as distinct peoples is asserted.

The concept of self-determination has a context in international law where it is described as the right of peoples to freely determine their social, cultural, economic and political status. However, self-determination claims by Indigenous peoples, by virtue of their distinct identity, implicitly assert the true and rightful custody of the lands occupied by the colonising state. Both the meaning of self-determination in international law and in the Indigenous context import questions of sovereignty and can be seen as a challenge to the legitimacy of the state. It is therefore necessary to acknowledge the limitations of an approach based in the non-Indigenous legal system. The traditions from which I draw, and the institutions I examine, are part of the colonising structure itself.

I acknowledge here the added limitations of such a project being undertaken by a non-Indigenous person, educated in the non-Indigenous legal traditions. This is a question that I, like many non-Indigenous academics and commentators before me, have had to consider carefully. An exchange between two extraordinary women –
Oodgeroo Noonuccal and Judith Wright – captures the essence of my thoughts. In part, my reservations are articulated in Judith Wright’s poem *Two Dreamtimes*, written for Oodgeroo:

... over drinks at night
we can exchange our separate griefs,
but yours and mine are different.

*A knife’s between us. My righteous kin
still have cruel faces.
Neither you or I can win them,
though we meet in secret kindness.

*I am born of the conquerors,
you of the persecuted.
Raped by rum and alien law,
progress and economics . . .

*My shadow sister, I sing to you
from my place with my righteous kin,
to where you stand with the Koori dead,
“Trust none – not even poets.” . . .*

The poem is said to have moved Oodgeroo deeply and it was three years before she was able to reply:

*Sister poet, I answer you,
Where you sit with your "civilised" kin
Shadow sister, your high ideals
Compensate me for their sin...

But, my shadow sister, this I know,
Your dreams are my dreams
Your thoughts are my thoughts
And our shadow that made us sisters
That binds us close together,
Together with us
CRIES ...*

Oodgeroo often spoke about the role of non-Indigenous people in public and academic debate and in the Indigenous political movement. In 1969, speaking to the FCAATSI executive, Oodgeroo argued that:

White “goodwill” is a shaky foundation on which to build . . . Black Australians must strengthen themselves into a solid determined fighting unit and dictate their own terms for their own advancement. *They must*

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3 ibid., p. 96, edited version of ‘Sister Poet’, p. 97.
define what is best for their own advancement and then they can determine where white Australians can be of assistance.4

There was another consideration, one that was impressed upon me when I received my undergraduate degrees. Murdoch University awarded Lois O'Donoghue her first Honorary Doctorate. In her address, Dr O'Donoghue left us with this plea:

You are privileged by your education. Education in its broadest sense, should produce tolerance, fairness, a passion for equality, a hatred of injustice, and a willingness to imagine the position of others.

I urge that you participate in the process of reconciliation, and not regard it as some distant and abstract exercise.

The future of my people depends upon it.5

With these considerations in mind, the perspective from which I understand, construe and write about Indigenous issues seeks to be respectful of Indigenous visions and worldviews.6 Therefore, I have made every effort not to be prescriptive – not to say what or how Indigenous peoples should be arguing.

This approach affects the argument and the focus of this thesis. Therefore, I concentrate on the aims and aspirations of Indigenous peoples and examine the utility of the law to achieve such goals. I examine what Indigenous peoples can expect from the law, both the opportunities for recognition and the obstacles of culture, institution and doctrine. I do not suggest that the courts can provide all that Indigenous peoples demand. Nor do I suggest that the courts’ historically unsympathetic response to Indigenous peoples can be entirely overcome and I understand that many Indigenous people might reject the courts as a tool. However,

4 ibid., p. 81. (original emphasis) FCAATSI was the Federal Council for the Advancement of Aborigines and Torres Strait Islanders.
5 Lois O'Donoghue, Speech on the occasion of the award of Honorary Doctorate, Murdoch University, Perth, 19 March 1994, p. 5.
my argument is that for Indigenous peoples working within the colonising system, the courts can be strategically useful.

The scope of the thesis

The relative disadvantage of Indigenous peoples asserting claims against the dominant state has led them to utilise myriad different strategies and tools to achieve important self-determination goals. A handful of writers have examined how Indigenous peoples use the institutions of the state itself through direct participation in the political process, controlling or adapting bureaucratic structures and utilising the legal system for the recognition of self-determination claims. There are those, particularly Indigenous writers, of course, that reject engagement with the colonial state, some awaiting a full recognition of Indigenous sovereignty, others pursuing international recourse. I have a great respect for this refusal to compromise Indigenous sovereignty by acknowledging the authority of state institutions. At the same time, I place the courts within the broader political context and within a broader self-determination strategy that does not envisage the courts as the only focus of attention.

The possibility of legislative resolution of Indigenous peoples claims against the state is not considered directly in this thesis. As a result, current legislative structures for land rights, or the protection of cultural heritage and self-management,

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are not addressed nor is the possibility of constitutional change. These political outcomes require an analysis of the policies and practices of past and present governments that is beyond the scope of this thesis. The focus of the thesis remains the responsiveness of the courts to Indigenous claims. However, such an analysis does entail an examination of the relationship between the courts and the political institutions and their engagement with political ideology and philosophy.

The fact that Indigenous peoples continue to pursue claims through the courts in Australia is, of itself, a cogent reason for examining the courts’ response to these claims. The history of Australia’s disregard for the rights of Indigenous peoples provides the most compelling justification for pursuing the role of the courts in this history and their capacity and responsibility for rectifying such abuse. To this end, attention is paid in this thesis to the role of the courts, through past decisions, in supporting the assertions of the state and the denial of Indigenous peoples’ rights. In this context I have examined the institutional constraints on the utility of the courts.

This aspect of the relationship between Indigenous peoples and the courts in Australia has not yet been fully explored.

Commentary and debate on the relationship between Indigenous peoples and the legal system in Australia has, since 1992, centred around native title. The recognition of common law native title in *Mabo v Queensland [No. 2]* was a

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9 Calls for constitutional recognition and a renegotiation of Indigenous-settler relations have become more prominent as non-Indigenous Australia approaches the Centennial of Federation and contemplates the move toward a republican constitutional structure. For example, Frank Brennan argued strongly for constitutional resolution of some of the outstanding grievances of Indigenous peoples, in particular, for the recognition of Indigenous peoples as the original owners and prior sovereigns of these lands and for the constitutional entrenchment of the right against discrimination. See, for example, Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern Free and Tolerant Australia*, Constitutional Centenary Foundation (options paper), 1994, and *Agreeing on a Document: Will the Process of Reconciliation be Advanced by a Document or Documents of Reconciliation?*, Council for Aboriginal Reconciliation, Canberra, 1994.


11 (1992) 175 CLR 1 (also referred to as *Mabo’s case* or the *Mabo decision*).
significant reassessment of the legal rights of Indigenous peoples in Australia. Prior to 1992, there was much less written about the relationship between Indigenous peoples and the legal system.\textsuperscript{12} Even less again concerned rights over traditional lands, let alone extending to discussions of self-determination and sovereignty.\textsuperscript{13}

Since the High Courts decision in \textit{Mabo’s case}, there has been a great deal of discussion and consideration of the implications of native title for the political and legal status quo.\textsuperscript{14} The complexity and rapid change in the recognition, development and administration of native title lands is the central focus of much legal commentary on Indigenous peoples’ rights. Public debate too has placed native title at the centre of the relationship between Indigenous peoples and non-Indigenous society in Australia.\textsuperscript{15}

Research on native title is, of course, fundamentally important and I have relied on many sources from within this debate, including papers by Garth Nettheim, Frank Brennan and Henry Reynolds and particularly Aboriginal people such as Noel Pearson.\textsuperscript{16} However, I have also attempted to move beyond native title to look at other self-determination goals that have yet to be fully explored in the debate in Australia. In this respect I perceive native title as part of a coherent and


\textsuperscript{14} (1992) 175 CLR 1.

\textsuperscript{15} For a review of the public attitude literature, see Margaret Robinson, From land rights to native title: Understanding the construction of community knowledge, attitude and opinion, Social and Landuse Unit, National Native Title Tribunal, unpublished manuscript, October 1997.

comprehensive concept of self-determination that can be asserted and argued before the courts.

Writers in Australia such as Irene Watson, who take a more critical approach to the legal system and colonialism, have been pivotal in developing my arguments. Also, the writings of Michael Dodson, including his reports as Aboriginal and Torres Strait Islander Social Justice Commissioner, have been useful as they place native title in the broader context of social justice and self-determination. I have pursued this broader approach, particularly in the first chapter, which reflects the way Indigenous peoples talk about native title.

As well as relying on Indigenous writers, I have found that North American research in this area provides both a useful comparative reflection and also a great deal of theory on the relationship between Indigenous peoples and the state, and with the law in particular. Indigenous writers such as Robert Williams Jr., Menno Boldt and J Anthony Long, as well as non-Indigenous commentators such as Patrick Macklem and James Tully, have engaged in a debate that focuses much more on Indigenous – non-Indigenous relations as relations between sovereigns, or between peoples. North American jurisprudence too provides interesting contrasts and, because it now receives much greater acknowledgment in Australian courts, is considered in


18 As well as the annual Social Justice Reports and Native Title Reports produced by the Aboriginal and Torres Strait Islander Social Justice Commission, see also Michael Dodson, ‘Towards the exercise of Indigenous rights: Policy power and self-determination’, Race and Class, vol. 35(4), 1994, pp. 65-76.

discussions about current doctrines and the future direction of the common law in Australia.\textsuperscript{20}

However, there is a danger in Australia of romanticising the North American situation, as has been the tendency in relation to land claims processes in Canada for example.\textsuperscript{21} Indigenous peoples in these countries suffer severe discrimination, deprivation of fundamental human rights and the erosion of their lands and way of life and are subjected to colonial control in ways similar to the experience of Indigenous peoples in Australia. For these reasons I have found that Indigenous writers from these jurisdictions provide a more critical assessment of developments in comparative jurisdictions.\textsuperscript{22} Frank Cassidy has warned that:

\begin{quote}

diversity does not yield easy generalizations and generalization is one of the building blocks in any field of study. Nevertheless, diversity and respect for diversity are at the core of aboriginal government.\textsuperscript{23}
\end{quote}

For this reason I have taken a cautious approach to developments elsewhere and have found the theory much more useful than the political and legal outcomes. In addition, I have relied on the experiences of Indigenous peoples in Australia to temper the influence of North American writers.

With this in mind, what does emerge from the North American literature is the clear identification, by all commentators, of the link between land and other social and cultural rights. Discussion of these links in Australia has been limited to

\textsuperscript{20} In the Mabo decision, attention was paid to decisions of the United States Supreme Court, particularly to foundation cases such as \textit{Johnson v M'Intosh} (1823) 8 Wheat 543 and Canadian cases such as \textit{Calder v Attorney General of British Columbia} [1973] SCR 313; (1973) 34 DLR (3d) 145, \textit{St Catherine's Milling and Lumber Co. v R} (1888) 14 App. Cas. 46; \textit{Attorney-General (Quebec) v. Attorney-General (Canada)} [1921] 1 AC 401; \textit{Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development} (1979) 107 DLR. (3d) 513; \textit{Guerin v R} [1984] 2SCR 335; (1984) 13 DLR (4th) 321. See generally, Richard H. Bartlett, \textit{The Mabo decision, with commentary}, Butterworths, Sydney, 1993. See also \textit{R. v. Symonds}, [1847] NZPCC. 387; \textit{In re Southern Rhodesia} [1919] AC 211; \textit{Amodu Tijani v. Secretary, Southern Nigeria} [1921] 2 AC 399; \textit{Adeginka Oyekan v. Musendiku Adele} [1957] 1 WLR 876; [1957] 2 All ER 785; and \textit{Advisory Opinion on Western Sahara} [1975] ICJR 12.

\textsuperscript{21} Many visitors have expressed concern at the 'rosy view' some Australians seem to hold about the position of Indigenous peoples in North America, particularly among non-Indigenous academics. For an example of a warning against such preconceptions, see Michelle Ivanitz, 'The Emperor has no clothes: Canadian comprehensive claims and their relevance to Australia, \textit{Land, Rights, Laws: Issues of Native Title}, Regional Agreements Paper No. 4, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, October 1997.

\textsuperscript{22} For example, Williams, op. cit. and Boldt and Long, op. cit.

marginalised Indigenous voices and a small group of academic commentators.\textsuperscript{24} Outside observers have suggested that Australia must prepare for a shift in emphasis by Indigenous peoples from land to sovereignty, self-government and jurisdiction.\textsuperscript{25} I argue that cases such as \textit{Mabo v Queensland [No. 2]}\textsuperscript{26} have recognised a base entitlement which will provide a degree of bargaining power and legitimacy in negotiations with the state and a level of respect in relations with the non-Indigenous community. In this way, arguments that have supported land rights may not be restricted to the sphere of property interests. Therefore, this thesis pursues the justification for recognition of rights in \textit{Mabo's case} in the context of sovereignty and self-government.

Concepts of equality, sovereignty and even self-determination, that are relied upon by Indigenous peoples in voicing their claims, are also often used to deny recognition.\textsuperscript{27} For example, the conflation of equality with universality provides a central theme for this thesis. Few theorists have examined the construction of these concepts in the context of claims for recognition by Indigenous peoples, particularly in Australia. James Tully, in the Canadian context, Robert Williams JR, from the United States, and to a lesser degree Will Kymlicka, provide a point of departure for my own analysis of the constraining assumptions of Western thought.\textsuperscript{28}

\textsuperscript{24} Irene Watson, op. cit., is notable in this respect. Compare the Canadian Royal Commission on Aboriginal Peoples and the reconciliation process and native title debate in Australia. See for example, James Tully, A fair and honourable relationship between Aboriginal and non-Aboriginal peoples: The vision of the Royal Commission on Aboriginal Peoples, paper presented to the Indigenous Rights, Political Theory and Institutions Conference, Humanities Research Centre, ANU, Canberra, August 1997.


\textsuperscript{26} (1992) 175 CLR 1.


In international law also, there is a large literature focusing on Indigenous self-determination within colonial states. The United Nations Working Group on Indigenous Populations has provided a forum for the expression of Indigenous peoples’ grievances on the international stage and has allowed Indigenous peoples to have unprecedented involvement in the workings of a United Nations body and to gain strength in their common experience. Michael Dodson, a regular participant at WGIP, observed that ‘[i]t is in our disadvantage and our struggle for the recognition of our rights that we are united’.29

Regular observers such as Russel Barsh, Douglas Sanders and Sarah Pritchard as well as Indigenous participants, have provided analyses of the barriers of statehood, and the state system, to Indigenous self-determination.30 This thesis seeks to bring the analysis of the state in these debates back to the courts to analyse the obstacles inherent in non-Indigenous conceptions of state sovereignty. Therefore, while the international developments are not dealt with exhaustively here, they are considered in the context of the courts’ use of international law and the theories of statehood in international law that are an indirect influence on doctrine.

The utility of the courts is often discussed in terms of the cultural barriers to participation and recognition in the courts. In order to discuss the issues of culture, I have predominantly drawn on literature concerned with Indigenous peoples’ engagement with the courts.31 There is a great deal of writing from critical theorists examining the exclusive culture of the courts, including a large feminist literature

and critical race theory.32 However, feminist and critical race theories are primarily concerned with discrimination and exclusion and relate to an experience that can only encompass part of the experience of Indigenous peoples.33 I have instead limited my analysis to a particularly colonial clash. By doing so, I am not suggesting that Indigenous peoples are somehow more oppressed, rather I point out that the experiences of Indigenous peoples is unique.

The thesis draws on existing literature to piece together an analysis that had not yet been undertaken. I have brought together non-Indigenous conceptions of society and placed them alongside Indigenous peoples’ aspirations for a new relationship with the state. I have focused on the paradox that the courts are a defender of rights and at the same time are a legitimating arm of the coloniser. I have also focused on the question of how useful the outcomes might be to the aims and aspirations of the Indigenous peoples themselves. Therefore, political and legal theory concerned with notions of sovereignty and self-determination, when contrasted with Indigenous understandings of these concepts, provide a basis from which to analyse the courts’ ability to accommodate Indigenous peoples’ demands, and to understand the relationship between Indigenous peoples and the Australian legal system. The academic and public debate surrounding the High Court’s decision in *Mabo’s case*, and the decision itself, provide a constant thread in this analysis. The thesis is therefore grounded in the current debates on native title yet reaches into new areas of concern, focusing more directly on the aspirations of Indigenous peoples for self-determination. The thesis takes on the courts as a central tool in Indigenous peoples’ self-determination and assesses whether the courts can truly achieve the goals set for them.

32 See for example, Mari Matsuda, ‘Voices of America: Accent, anti-discrimination law and a jurisprudence for the last reconstruction’, *Yale Law Journal*, vol. 100, pp. 1329-1407.

The structure of the thesis

In addressing the utility of the courts for Indigenous peoples, the thesis begins by establishing self-determination as the standard by which the courts should be assessed. The first chapter places the notion of self-determination and the assertion of sovereignty at the foundation of the claims against the state. This chapter presents Indigenous expressions of these claims in order to capture the meaning of self-determination claims. From this, self-determination claims can be understood as assertions of sovereignty, in the sense that Indigenous peoples demand recognition of their way of life, government and law. Indigenous peoples demand respect as equals whose authority and autonomy are equally legitimate in the constitution or construction of the state. This chapter also examines the link between the different sorts of claims made by Indigenous peoples, from social justice to claims for resources and lands, to self-government and sovereignty. I argue that all of these claims are part of the same process - the process of self-determination. The focus on the aspirations and aims of Indigenous peoples necessitates that the utility of the courts be examined in light of those aims. Therefore, the first chapter provides the context for the thesis and establishes a basis from which the approach of the courts is to be assessed.

Chapter two examines the essence of non-Indigenous understandings of self-determination and sovereignty through influential political theories of the modern era and the assumptions of statehood in the international law of self-determination. The chapter highlights the way these theories limit the capacity of non-Indigenous peoples, communities and institutions to recognise the legitimacy of Indigenous peoples' claims. This leads to the conclusion that these assumptions are a part of the institutional structures of the colonial state. They are part of the non-Indigenous ways of thinking about the questions raised by Indigenous peoples' claims.

Chapter three focuses on the utility of the courts for Indigenous peoples' self-determination strategies in a more concrete sense. The chapter draws on the political
theory discussion to illustrate the cultural as well as institutional constraints on the courts, which limit their capacity to accommodate self-determination claims. An overview of the strategic advantages and disadvantages of the courts points to two issues that require further discussion: first, the limits on enforceability of common law recognition of rights and, second, the clash of cultures that occurs when Indigenous peoples engage with the legal system.

From the discussion of the courts as an institution, chapter four then examines the way in which the courts have responded to Indigenous peoples' claims through the development of common law. The discussion returns to the doctrine of discovery, first discussed in chapter two, to explore the way in which it was incorporated into common law throughout the British colonies to preclude recognition of Indigenous peoples. The approach of Australian courts in the development of the concept of 'peaceful settlement', or terra nullius, is examined in detail. The chapter draws together the limitations and inconsistencies in the recognition of Indigenous self-determination claims in Mabo's case to show the problems of further development of even the most recent doctrines.

Finally, chapter five explores an alternative approach to arguing self-determination that has the potential to overcome the limitations and inconsistencies in current doctrines. The chapter explores the need to provide familiar concepts upon which the courts can base their reasoning. This approach, in taking account of the nature of judicial reasoning, provides some explanation of the reticence of the courts to accept claims that assert sovereignty. Instead, I argue that equality of peoples provides a familiar basis for the courts and an appropriate way of structuring relations between Indigenous peoples and the state, yet at the same time maintains the integrity of the claims of Indigenous peoples.

In total, the strategic advantages and limitations of using the courts in self-determination claims must be considered with two principles in mind. First, the courts' responses to specific claims must be measured against the broader struggle
by Indigenous peoples for self-determination. Second, the limitations of the courts must be placed in the context of the philosophies or world view that inform the institutions and the decision-makers. It is only with an understanding of the context from which each of the actors come to the courtroom that mutual recognition can occur. This thesis will explore the outer limits of this recognition, where mutual respect can lead to a greater accommodation of Indigenous peoples’ claims. The first step in this examination is to understand the claims that Indigenous peoples make against the state and the context in which the courts are considered important.
The immediate task in this first chapter is to identify what I mean when I talk about Indigenous peoples' self-determination claims. My understanding of these concepts is informed by the statements of Indigenous peoples themselves. Therefore, this chapter presents Indigenous voices speaking of their relationship with the colonial state. This chapter is not an attempt to define or delimit Indigenous views for, as Michael Dodson argued, 'our distinct identity has for the last two hundred years been the subject of non-indigenous attempts to define, characterise and reshape it'. Instead, in this chapter, I have let Indigenous voices speak for themselves.

The importance of listening to Indigenous voices was emphasised by Marcia Langton in preparing *Too Much Sorry Business*, the report of the Northern Territory Aboriginal Issues Unit to the Royal Commission into Aboriginal Deaths in Custody in 1990. In that report, Marcia Langton argued that:

> Sovereign and autonomous authority in the midst of interconnectedness is the typical feature of the Aboriginal person, especially in the older generations who have the experience and knowledge to understand who they are . . .

---

This personal sovereignty is the product of a powerful cultural past, remembered in the sacred icons which surround us in the landscape, each one belonging to a person or to a family...

These are the sovereign voices of people who know who they are and what they want for the children and grandchildren.

The demands of Indigenous peoples provide the framework for my argument and approach in a number of important respects. The importance of issues such as equality, land, law and sovereignty to the relationship between Indigenous peoples and the state remain common threads. Also, this chapter illustrates that although there is great diversity of views on approaches to, and engagement with, the state, there is a core of ideas held in common that defines the relationship between Indigenous peoples and the state.

This chapter is divided into sections that group together particular claims against the state. Yet, at the same time, there is a continuity between the concepts of justice, land, law and sovereignty that makes the segmentation artificial. This tension in segmenting Indigenous peoples' claims will be explored further in relation to the treatment of these claims by the courts. For now, these different elements can be understood as parts of a continuum of claims that form a distinctive Indigenous struggle for self-determination. This struggle begins with the daily lives of Indigenous peoples fighting for the survival of their culture and their people.

**Social justice and the politics of survival**

Indigenous peoples have survived the process of colonisation despite suppression and subjugation by the structures of the state. But this survival has involved a struggle. Irene Watson explained the effect of this 'politics of survival' on the lives of Indigenous peoples:

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We are watching waves of our people dying. The waves are constant, leaving behind a generation of children dispossessed from their natural environment and culture. The pre-occupation for many Nungas has become survival – against oppression, depression, and death. The overall quality of life has deteriorated due to the pre-occupation with life and death issues. The right to life is at stake. That has become the extent of our reduction during these past 200 years of colonialism.

The daily experience of colonisation has prioritised the achievement of fundamental levels of justice and the equal enjoyment of life-sustaining services. The immediacy of the fight for social justice was explained by Michael Dodson, in the first report of the Aboriginal and Torres Strait Islander Social Justice Commissioner:

Social justice must always be considered from a perspective which is grounded in the daily lives of indigenous Australians. Social justice is what faces you when you get up in the morning. It is awakening in a house with an adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to a school where their education not only equips them for employment but reinforces their knowledge and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination.

However, Dodson warned that this is not merely an issue of disadvantage. In the context of claims against the state, the ‘facts of injustice’ should not be confused with the ‘reasons to remedy them’. Instead:

[a] decent standard of health and a life expectancy equivalent to others is an entitlement. Social justice is not primarily a matter of relief of suffering. It is a matter of the fulfilment of a responsibility.

To draw this distinction is not to deny that the facts themselves speak out for a remedy. Nor is it to deny that compassion is a proper response. But compassion is an insufficient foundation for the delivery of rights.

This statement makes clear that the claims made by Indigenous peoples against the state are not claims for special measures or special treatment but are asserted as entitlements. Moreover, the rationale for redressing injustice is not merely an issue

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4 Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report, AGPS, Canberra, 1993, p. 10.
5 ibid., p. 6.
of citizenship entitlements but 'should rest on the special identity and entitlements of indigenous Australians by virtue of our status as indigenous peoples'.

Even claims to fundamental goods such as the delivery of basic services and the enjoyment of a basic level of quality of life are expressed as collective claims. This recognition is an integral part of the claims against the state and is central to the legitimacy of the state itself. Irene Watson put these issues in context:

The recognition of Aboriginal sovereignty should be acknowledged as being fundamental to the survival of Indigenous peoples. To ignore and deny Aboriginal peoples their laws and culture whilst other nations freely practise theirs without fear of recrimination, is to condone racism and the continued colonialism of Indigenous peoples. If Indigenous peoples are to remain colonised peoples, we will inevitably witness the continued decline of the first nation peoples of this country. And finally, a society that fails to take action in healing itself of racism will discover that the passing of Nunga peoples will mark the decline of all humanity.

In similar terms Les Malezer spoke of the relationship between Indigenous peoples and the state:

Reconciliation is widely regarded as the opportunity for Aboriginal people to obtain and enjoy true equality. But it is more than that. It is the opportunity for the nation to heal its deepest wound, to develop its own identity, and to correct the most obvious flaw in its constitutional makeup.

The non-Aboriginal people of Australia are likely to suffer at the hands of the world unless the most fundamental rift in our coexistence as peoples is directly addressed.

The failure of the state to recognise Indigenous peoples and to respect their status as such, is seen as a fundamental flaw in the constitution of the Australian state.

The fight to be recognised as distinct peoples is tied to the struggle to be treated equally, and with equal respect. The importance of equality to the claims of Indigenous peoples cannot simply be understood as demanding to be the same as

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6 ibid., p. 9.
8 Les Malezer, on behalf of the Foundation for Aboriginal and Islander Research Action (FAIRA), Speech on the Occasion of the Palm Island Award Wages Win 1997, 5 April 1997, p. 6.
non-indigenous Australians or as the rights of citizenship within 'one nation'.

Pura-lia Meenamatta argued that:

many Australian Indigenous people see white Australia as being diametrically different in its spiritual, social, political and sovereign ideologies. Therefore, from the crucial question of Australian citizenship flow many questions that need attention by Australian Indigenous peoples . . .

Failure to address this sensitive question will undoubtedly see Aboriginality assimilated into a nationalism that totally rejects the rightful status Aboriginal nations should be accorded in our own land.\(^9\)

To confuse the concept of equality with sameness is to use equality and freedom from discrimination as a 'guise for assimilation'.\(^{10}\) Again, the claim for equality must be understood as a demand to be recognised as peoples. Barry Fewquandie, giving evidence to the Joint Parliamentary Committee on Native Title explained:

If equality is about making me have the same values and the same priorities, then I do not want it. I want access and equity. If the end result is being exactly like you whitefellas, then I do not want it. I do not believe that is what our people want.

We have a separate identity . . . We want to be able to do the right thing. The right thing is not destroying the land. It is not destroying the culture. It is not replacing it.\(^{11}\)

To understand equality as encompassing respect is to understand the importance of difference and maintaining a distinct identity. In turn, Oodgeroo explained that change should not and cannot be forced upon Indigenous peoples:

We are different hearts and minds
In a different body. Do not ask of us
To be deserters, to disown our mother,
To change the unchangeable.
The gum cannot be trained into an oak.
Something is gone, something surrendered, still
We will go forward and learn.
Not swamped and lost, watered away, but keeping
Our own identity, our pride of race.\(^{12}\)

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Indigenous people understand that demands based in an assertion of separate and distinct identity will be perceived as a threat to the unity of the constructed nation. The resistance does not even need to be articulated, as Lois O’Donoghue poignantly observed:

We succeed largely where we do not threaten, where we can be accommodated into the mainstream – as artists, as sportspeople, as bureaucrats. However, we threaten when we set out to succeed on our own terms, where the mainstream has to adjust itself to accommodate us, and our cultural norms.

The demand for social justice is tied to an understanding of equality that seeks not only the equal enjoyment of rights but, also, equal respect as peoples. This conception of equality underpins collective claims for land, and for the recognition of law and sovereignty.

**Land, law and sovereignty**

Within the core demands that Indigenous peoples make against the state, land has generally taken prominence. Demands extend to the recognition of ownership of lands currently occupied, as well as the return of lands, compensation and control over decisions concerning lands of significance. The centrality of land to Indigenous demands is often found to be difficult to communicate to the commodity culture of non-Indigenous Australia. Galarrwuy Yunupingu attempted to do so in his ‘Letter from Black to White’:

The land is my backbone. I only stand straight, happy, proud and not ashamed about my colour because I still have land. The land is my art. I can paint, dance, create and sing as my ancestors did before me. . . . I think of land as the history of my nation. It tells of how we came into being and what system we must live. My great ancestors who live in the times of history, planned everything that we practise now. The law of history says that we must not take land, fight over land, steal land, give land and so on. My land is mine only because I came in spirit from that land, and so did my ancestors of the same land . . . My land is my foundation.

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13 Lois O’Donoghue, Speech on the Occasion of the Award of Honorary Doctorate from Murdoch University, Perth, 19 March 1994, p. 4.
For many Indigenous people land claims are not an issue of asking for something new, or even asking for something back. It is a demand for recognition of what has always been. Oodgeroo recounted a story that reiterates this sentiment:

This is my land: I have always said that, even as a child. The white people used to say to dad: 'That girl walks this land as though she thinks it's hers'. Dad wouldn't say anything. He'd just walk home and tell me, 'Mrs So-and-so said you walk this land as though you think it's yours'. 'It is mine, isn't it?' I would say. And he'd say: 'Yes, girl. Don't ever forget it.'

Recognition of Indigenous peoples' claims within the colonial legal system must also be understood from the perspective of Indigenous peoples and their law. While the colonial legal system has come to recognise Indigenous law with respect to land, there is a concurrent justification for the acknowledgment of Indigenous law more generally. For Indigenous peoples, their law remains an integral part of their life experience, though its reality, let alone validity, is largely denied by the state. Lois O'Donoghue identified the importance of acknowledging law, for the survival of Indigenous peoples:

I believe that the long standing absence of meaningful official recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and that it has substantially contributed to many of the social problems and varying degrees of lawlessness present today...

Not only is the recognition of Aboriginal Customary law an issue of pride, heritage and custom. It can also be, to some communities, an issue of survival.

The refusal of the Australian state to recognise these claims has not resulted in the diminution of the importance of land and law in the lives of Indigenous peoples. Michael Dodson observed the commitment of Indigenous people to maintain their law:

If the existence of the laws of Indigenous Australians depended on active government recognition, they would not exist. We have kept our laws and cultures. Given the almost total vacuum of government initiative...

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15 Kath Walker (Oodgeroo), in Terry Lane (ed.), As the Twig is Bent: Childhood Recollections of Sixteen Prominent Australians, Dove, Melbourne, 1979, p. 33.

The maintenance of our laws and cultures is likely to remain a matter purely for us.\(^{17}\)

Nungat Mumunbullawilak, in welcoming a conference group to his traditional lands, took the opportunity to impress upon his audience the significance of land issues for the Nyoongar peoples in their approach to the non-indigenous people:

My Nyoongar name is Mumunbullawilak . . . [T]his land is the land Derbal Yerigan, which is the Swan River area . . . We, as a people, own all the Swan River area, all the banks along the Swan River itself. Today, we all live miles away from it because we have been pushed away. We do not own one building on the Swan River or a bit of land . . . Nyoongar people, as a group, cannot say or even think about reconciliation until such time as the State Government and the Federal Government are prepared to listen to the Nyoongar people.\(^{18}\)

Matilda House, Chair of the Ngunnawal Local Aboriginal Land Council, who speaks for lands including the area now housing the Commonwealth Parliament, expressed a similar perspective:

The honour of Australia lies not only in negotiating a treaty with the indigenous people of the nation but also in recognising the civil, political and human rights of a people whose physical possession and sovereign rights over their country were violated. Until this occurs there will be no contemporary justice for indigenous Australians and there will be no reconciliation without justice . . . How can we as nations of peoples reconcile ourselves, our sovereign position, to a relationship with the Australian Government who are cheats, thieves and liars? Are we to reconcile to the detriment of our own culture and sovereignty? . . . How can we the Ngunnawal people be compensated for the loss of our nation when the Federal government itself is physically situated on it . . . Due to dispossession alienation and cultural deprivation I am unable to comment on customary law other than acknowledging that native title to the Australian Capital Territory is Ngunnawal country, my country.\(^{19}\)

The assertion of custodianship or traditional ownership of lands that have been usurped by the non-Indigenous society remain as important as claims to occupied lands.


\(^{19}\) Matilda House, Chair, Ngunnawal Local Aboriginal Land Council, Welcome and Introduction to Council for Aboriginal Reconciliation and Constitutional Centenary Foundation Conference on the Position of Indigenous Peoples in National Constitutions, Canberra, 4-5 June 1993, pp. 3-4.
The basis for questioning the relationship between Indigenous and non-Indigenous people on the issue of land can be stated simply. Michael Dodson said that, in responding to opposition to Indigenous claims:

we must continually return to an immovable conviction that our human rights to our lands cannot be compromised. The non-Indigenous community must come to accept this. . . . [T]he well being of a community cannot depend on the dispossession and denial of the human rights of a minority. 20

Claims for land are not distinguished from the law and social structures that tie the people to the country. The recognition of rights to land is also the test of the relationship between Indigenous peoples and the colonial society.

**Recognition of Indigenous sovereignty**

Many Indigenous people have argued that any relationship with the state will depend on the state’s recognition of Indigenous peoples as first owners and first sovereigns of the lands. However, this is not necessarily presented as an ultimatum. Charles Perkins, speaking about *Mabo’s case* and the rejection of *terra nullius* argued that:

The Mabo judgement should be seen as [a building block]. By doing away with the bizarre concept that this continent had no owners prior to settlement by Europeans, Mabo established a fundamental truth, and establishes the basis for justice. . . . the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, of the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. 21

Others have taken a stronger line in questioning the basis of Australian sovereignty. However, positions such as that of the Aboriginal Provisional Government should not be dismissed. To radicalise the APG and its members overstates the difference in approach. The challenge is to the state’s claims of legitimacy in excluding Indigenous sovereignty. Yalarutja explained that:


In 1990 I was asked by some elders to be the president of an Aboriginal Government to create a real inspiration and a real self-determination agency of our own. I am not really a witness to things like the constitutions and legislation; I am a victim of it . . .

There is an assumption by the colonial invaders that this was their land . . . They know it is not their land. Thieves do not have rights equal to the owner of property . . . It is a problem because they have not been prepared to pay their way - to pay the rent to be here.\(^{22}\)

These questions are at the heart of even the most 'moderate' statements of Indigenous peoples' claims.

Noel Pearson, who is not generally considered a radical Aboriginal voice, commented on the nature of the self-determination struggle in terms that may be alarming to people in the non-Indigenous community:

"We are in political guerilla war, in a colonial circumstance which is powerful and against which we infrequently prevail. People in situations like ours must make do with the tools which are on hand."\(^{23}\)

At the same time, these tools must be understood for what they can and cannot provide. Pearson cautioned against using these tools blindly:

"In devising these [political] strategies we need to be realistic about the following: first about the content and nature of the tools which are available to us; second about what these tools can positively achieve. They are limited tools and to optimise results we must use them wisely and skillfully. Third we have to confront the motivation of those people who we think might listen to us and recognise the circumstances in which they may be prepared to respond to our cause. Fourth we need to be realistic about achieving the full effect of our strategies and about maximising the prospects for reaching the most desirable outcomes for us."\(^{24}\)

Pearson suggested that both radical and moderate strategies must be implemented to secure results.\(^{25}\) Indigenous peoples use all the tools available without necessarily accepting the legitimacy or authority of the various institutions, but understanding their limitations and advantages.

\(^{22}\) Yalarutja (Clarrie Isaacs), Provisional Government of Australia, Evidence given to the Senate Standing Committee on Legal and Constitutional Affairs, *Parliamentary Debates* [Proof Copy], 3 December 1993, pp. 462, 463.

\(^{23}\) Noel Pearson, 'Aboriginal law and colonial law since Mabo', in Fletcher, op. cit., p. 157.

\(^{24}\) ibid., p. 158.

\(^{25}\) ibid., p. 157.
A fundamental rethinking of the legitimacy of the state is required in order to understand the claims of Indigenous peoples. Irene Watson explained the conflict:

In general, Nunga rights from a Nunga perspective differ from the Anglo-Australian view of what Nunga rights should or should not be, and are as different from the view of the rights of Anglo-Australians from an Indigenous perspective. The use of Anglo-Australian law to decide what are the rights of Indigenous people is the same as using Aboriginal law to decide what are the rights of non-indigenous Australians. From both camps there is denial of the other's sovereignty . . . Justice and equality of rights will not flourish in this situation. The right to be indigenous and the right to be non-indigenous are competing rights with conflicting interests. The resolution of conflict should be one of peaceful co-existence, replacing the processes of domination, subjugation and genocide; this will only be achieved through mutual respect for each other's right to self-determination.

The refusal of the state to recognise the traditional owners of lands is a denial of Indigenous peoples' claims to status as first peoples. Therefore, this distinction between Indigenous identity as recognised or constructed by the state and the reality for Indigenous peoples is inextricably linked to assertions of sovereignty. Les Malezer asserted the continuity of this ancient sovereignty in contrast to the assertions of the state:

This centenary [of the first Queensland 'Protection' Act] brings many thoughts to mind, but . . . the most important message is the actual short period of time which has elapsed since the Queensland government dispossessed our people, removed them from their traditional lands and adopted forced settlement administration upon us to 'assimilate' us.

This short period of time is insufficient to deny our tradition rights, our common law rights. It is not an adequate period to say that our associations with our land and with our laws has been completely severed. It is not sufficient time for a Federal Government or the Queensland Government to claim that the present generation does not bear the guilt of the past or have a responsibility to restitution. The injustice of the past 100 years has to be addressed. There can be no way forward for the Australian nation without such redress.

However, as time passes and the effects of assimilation continue to have an impact on Indigenous society, Pura-lia Meenamatta argued that Aboriginal traditions of knowledge and social structure should inform the way claims are asserted:

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26 Irene Watson, Nungas in the nineties, op. cit., p. 2.

27 Les Malezer, op. cit., p. 5.
We, the Aboriginal people of Australia, must explore our sovereignty to define nation and state so as to achieve indigenous definitions that emanate from traditional indigenous societal structures.

From an Indigenous context, the demands made against the state are expressed in terms of sovereignty, and made as peoples with all that implies. For Michael Dodson:

our distinct and collective identity makes our classification as peoples inescapable. Accordingly, we are entitled to fully exercise our right to self-determination in the same manner as all peoples.

This claim is made not only in the domestic sphere but also, increasingly, in international fora. Asserting these claims in the presence of the international community can invigorate Indigenous peoples in their struggle, particularly as they share their experience with other peoples engaged in similar struggle. However, Indigenous peoples have also found the process frustrating at times, often withdrawing from discussions with the states. In 1988, Geoff Clarke, on behalf of the National Coalition of Aboriginal Organisations of Australia reminded the International Labour Organisation that:

we are peoples and demand to be treated as such. We are not asking for that status, we have already have it. It is what we are in fact, and no twist of language can deprive us of our identity . . . we define our rights in terms of self-determination . . . it is our birthright. We are ancient people and we remind you that it was you who came to us. You came to take and you are still taking, although we are not asking for this right which we already possess as peoples, we insist that our relationship with you be based on the recognition of respect for that right.

On this analysis self-determination forms the basis from which claims can be asserted and constructed. Michael Dodson explained the nature of self-determination as the process underlying Indigenous claims:

Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self determination. The reason for this lies on the fact that self determination is a process.

28 Pura-lia Meenamatta, op. cit., p. 5.
29 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report, op. cit., p. 72.
The right of self determination is the right to make decisions. These decisions affect the enjoyment and exercise of the full range of fundamental freedoms and human rights of indigenous peoples.

From land, health and community issues to self-government and sovereignty, the demand is for greater autonomy in relations with the Australian state and more control over the factors that are central to their identity as Indigenous peoples.

The struggle for self-determination

Small gains in the process of self-determination can have both substantive and symbolic importance. Charles Perkins noted that successes in the courts, for example in achieving recognition over land, are, ‘also about self-determination – giving Aboriginal and Torres Strait Islander peoples the space and resources to enjoy our culture, to work out our own solutions and control our own lives’.32

Similarly, Les Malezer, speaking of the Palm Island Award wages success, expressed the importance of these achievements to the self-determination movement:

These people and their struggle for justice have struck a blow against the historical oppression of Aboriginal and Islander people in this State, a blow that could and should give hope and encouragement to all the thousands of Aboriginal and Torres Strait Islander people in Queensland desperately waiting for, and deserving of, overdue restitution and compensation.33

In this address, Malezer specifically acknowledged the personal sacrifice of individuals such as John Koowarta, Eddie Koiki Mabo, and the ‘magnificent five’ of the Palm Island claim, particularly those who never saw justice in their individual cases. However, these remain small victories in a struggle for much greater recognition. For Olga Havnen, from the National Indigenous Working Group on Native Title:

31 Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report, op. cit., p. 41.
32 Charles Perkins, op. cit., p. 41.
Resistance to colonialism and the nation state by Indigenous people is as old as the historical process itself and, in Australia, the strength of Aboriginal and Torres Strait Islander societies today is a tribute to over 200 years of struggle against the dominant society.\footnote{Olga Havnen, ‘The whole world is watching us: Globalisation of Indigenous rights, Proceedings of the Northern and Central Land Councils Conference, Land Rights - Past Present and Future, Canberra, 16-17 August 1996, p. 47.}

From the perspective of groups such as the Aboriginal Provisional Government, Pura-lia Meenamatta has maintained, ‘[w]hether Aboriginal people choose to join in with white Australia or seek Aboriginal nationalism and sovereignty, a hard road into the future is assured’\footnote{Pura-lia Meenamatta, op. cit., p. 13.}.\footnote{ibid.}

Unless Indigenous communities are able to take the time and space to discuss the principles of Aboriginality, informed by Aboriginal knowledge and thinking, then Aboriginality too will become another colonial construct.\footnote{ibid.}

From a different perspective, Michael Dodson also highlighted the importance of Indigenous people being given the time and the opportunity, not only to reaffirm their identity, but also to determine their relationship with the Australian state and community.\footnote{Michael Dodson, Interview, 19 October 1997, Canberra.}

The claims of Indigenous peoples against the state have been set out in detail at various times, exploring Indigenous peoples’ relationship with the state. Gallarwuy Yunupingu told the story of the Bark Petition sent by the Yolngu people to the Commonwealth Parliament demanding that their land rights be respected. These rights were not respected, and the Yirrkala lands were taken for a bauxite mine. Gallarwuy reminded us that ‘[t]he bark petition is still sitting in the new Parliament House, a proud but sad symbol of my peoples’ fight for their land’.\footnote{Gallarwuy Yunupingu, From the Bark Petition to native title: 20 years of land rights, Proceedings of the NLC/CLC Conference, op. cit., p. 112.}
Another important example is The Barunga Statement, presented to the Hawke Labor government nearly a decade ago. The Barunga Statement contained the following demands:

We the indigenous owners and occupiers of Australia call on the Australian Government and people to recognise our rights:

- to self-determination and self-management including the freedom to pursue our own economic, social, religious and cultural development;
- to permanent control and enjoyment of our ancestral lands;
- to compensation for the loss of use of lands, there having been no extinction of original title;
- to the protection and control of access to our sacred sites, sacred objects, artifacts, designs, knowledge and works of art;
- to the return of the remains of our ancestors for burial in accordance with our traditions;
- to respect for and promotion of our Aboriginal identity, including the cultural linguistic, religious and historical aspects, including the right to be educated in our own languages, and in our own culture and history;
- in accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All forms of Racial Discrimination, including rights to life, liberty, security of person, food clothing, housing, medical care, education and employment opportunities, necessary social services and other basic human rights.

We call on the Commonwealth Parliament to pass laws providing:

- a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander Affairs;
- a national system of land rights;
- a police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

We call on the Australian Government to support Aborigines in the development of an International Declaration of Principles for Indigenous Rights, leading to an International Covenant.

And we call on the Commonwealth Parliament to negotiate with us a Treaty or Compact recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms.\(^{39}\)

While the Barunga Statement, with the original Bark Petition, hang in Parliament House in Canberra, few of these claims, even those concerning fundamental issues such as non-discrimination before the legal system, have been realised.

\(^{39}\) The Barunga Statement, presented to Prime Minister R. J. L. Hawke by the Central and Northern Land Councils in 1988.
For Indigenous peoples, this failure is a hurtful reminder of their relationship with the state, which remains a relationship of subjection and oppression, reinforcing the relations of power. Marcia Langton identified the effect of this refusal on Indigenous peoples:

Aboriginal people want a demonstration of acknowledgment and commitment from Australia. The level of disappointment and cynicism in the Aboriginal community is high and further discouragement amongst Aboriginal leaders and workers, mostly the result of this constant disappointment in government inaction on known problems with known solutions, leads more and more to their inability and unwillingness to continue in the thankless task of rectifying the many serious problems that were not of their making.

This disappointment has never resulted in Indigenous peoples backing away from their struggle. In 1993, in the context of the drafting of the Native Title Act, a national meeting of Aboriginal and Torres Strait Islander peoples was held at Eva Valley in the Northern Territory to again present their demands to the Australian Parliament:

We Demand that:

. . . the Commonwealth agrees to a negotiating process to achieve a lasting settlement with and for the benefit of all Aboriginal and Torres Strait Islander peoples. Since time immemorial we have owned, occupied, used and enjoyed this continent and its islands in accordance with our Laws and Customs to the exclusion of the whole world. Since the arrival of non-indigenous people our political and territorial integrity has been violated and that violation continues. This settlement process must recognise and address these historical truths. It must also address the impact of our dispossession, marginalisation, destabilisation and disadvantage including financial and material recompense.

Perhaps the Working Party for Aboriginal Self-Government meeting in Waramungu lands expressed Indigenous peoples claims in their simplest form: ‘Wake Up, Australia – Aboriginal Self Government Always Was and Always Will Be!’

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40 Langton, op. cit., p. 292.
41 Eva Valley Statement, National Meeting of Aboriginal and Torres Strait Islander Peoples, Eva Valley, Northern Territory, 3-5 August 1993.
Tracker Tilmouth warned:

We will not sit silently while our rights are being so single mindedly attacked. We will fight to achieve justice, to rectify wrongs . . . we will continue the struggle until justice prevails and we are treated with equality and dignity.  

Tracker cited Long Pwerle, chair of the Central Land Council in 1991:

Every fight we take up and every success that we win has come to us through years of struggle, and those years add up to the lives of Aboriginal people who are fighting to protect their land and their culture.

Indigenous peoples continue to seek to come to terms with the dominant society, seeking reconciliation and inclusion as well as recognition and autonomy. Successes such as the Gurindji walk off for equal pay and the recognition of common law native title in *Mabo v Queensland [No. 2]* remain symbolic victories. To this Peter Yu argued:

Recognition of our native title rights offers government the opportunity to overcome its disgraceful and undignified behaviour towards Aboriginal people. We all now have the opportunity to forge a new relationship, based on respect and mutual accommodation.

**Conclusion**

This chapter has identified a number of themes that inform the discussions and arguments presented in the thesis. In particular, I rely on the conceptions of self-determination and the interconnected claims that Indigenous peoples make as peoples. These claims are not based exclusively upon current disadvantage, although that remains a source of legitimate continuing grievance. Nor can Indigenous claims be explained simply by reference to the historical aspect of the claims, for example to the return of traditional lands. Indigenous claims must be understood from their

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44 ibid.
source, as claims made by peoples who continue to be subject to oppression from a colonial state. Indigenous peoples claim greater autonomy in determining their own futures and the opportunity to negotiate their relationship with the state and the non-Indigenous society. Importantly, Indigenous peoples demand equal respect as peoples.

The claims vary from non-discrimination, to land, as well as recognition of sovereignty and self-government. In the European language of politics and international law, these claims translate as self-determination, a recognised right of all peoples. Indigenous peoples have embraced this terminology as well as other concepts from European political theory such as sovereignty and self-government as the best way to express their demands in the language of their oppressors. Despite their power, these claims continue to be opposed not merely by might but also by theory. In the next chapter, I examine the politics of self-determination to indicate some of the obstacles that have prevented recognition of the claims of Indigenous peoples in the political theory, international law and the discourse of rights.
Chapter 2

Self-determination and Sovereignty

There is continued resistance to the self-determination claims of Indigenous peoples. The conventions of modern political theory and international legal discourse contribute to this.¹ Both have developed in a way that asserts the primacy of statehood and has excluded the collective claims of Indigenous peoples. The previous chapter examined how Indigenous peoples have used the concept of a right to self-determination to express various claims against the state in Australia. In this chapter, I explore the tension between the claims of Indigenous peoples to self-determination and the sovereignty of the colonising state. The political theory from which the concept of self-determination emerged will be discussed, with specific reference to notions of sovereignty and governance that underpin debates in the legal sphere. Also, this chapter analyses the status of self-determination in rights discourse and in international legal doctrine.

¹ In using the term 'modern theory', I have grouped together theorists from the broad liberal democratic traditions that underpin the modern state. It also reflects a time period that is considered the modern period and includes theorists from the sixteenth century on to contemporary theorists. Modern theory in this sense does not include critical theory from Marx to post-modern literature although I acknowledge that those schools also share many traditions of thought with the modern theories. See Barry Hindess, Discourses of Power: From Hobbes to Foucault, Blackwell, Oxford, 1996, p. 13. See also, F. H. Hinsley, Sovereignty, Watts, London, 1966.
The chapter focuses on the impact and the usefulness of the political theory and international law for the purposes of Indigenous peoples. Understanding the theoretical debates is important because the way Indigenous peoples present their claims may be affected by the language they adopt. For example, Indigenous peoples have taken up the language of 'inherent rights', in particular, the inherent right of Indigenous peoples to self-determination under international law. Such an approach is understandable given the power of rights discourse in both the domestic and international sphere. The difficulty, however, is in the invocation of political ideologies and theories of governance that are assumed to be universal. I argue that the underlying assumptions of all these conceptions of sovereignty have posed obstacles to the full recognition of Indigenous claims.

Part I examines the assumptions and ideology that shape non-Indigenous perceptions of Indigenous claims. In particular, social contract theories and theories of individual rights are examined because these are often considered to be the most influential philosophies in the Western world. Part II examines the place of Indigenous peoples in the international human rights regime. A discussion of international law is important for this thesis because Indigenous peoples have increasingly sought satisfaction of their claims in international fora. At the same time, international law, and human rights debates in particular, have an influence in domestic law and policy. An examination of the utility of international rights discourse also helps to explain the limits of the language adopted by Indigenous peoples. While there is a disjunction between international law theory and political theory, many of the unquestioned assumptions re-emerge to be addressed in the context of the state system. Part III returns to the language that Indigenous peoples use to voice their claims, particularly the concepts of self-determination and sovereignty. This discussion highlights the attraction of concepts such as self-determination and sovereignty but raises some of the concerns over the use of

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language which, at its roots, has been used to exclude Indigenous peoples from recognition.

I. The limiting assumptions of modern political theory

A discussion of political theory in the context of the relationship between Indigenous peoples and the courts is important in two respects. First, when Indigenous peoples voice their claims in the language of self-determination and sovereignty, there are a number of assumptions within those terms that are not necessarily shared between Indigenous and non-Indigenous peoples. Second, those same assumptions, while rarely examined, inform the institutions within which Indigenous peoples make their claims. Therefore, they form the context within which those claims will be understood by decision-makers. In this part, I identify the core assumptions in the theories of sovereignty that limit the ways in which non-Indigenous people understand the language of self-determination.

*Popular sovereignty and the social contract*

The concept of sovereignty incorporates theories of internal authority as well as external relations. The location of power and authority in a society and the legitimacy of its exercise are central to understanding conceptions of sovereignty. The theory of sovereignty is not a purely philosophical creation but a creature of the political context in which it was first developed. The story of sovereignty in modern political theory places authority with the people, in name at least, providing legitimacy to the democratic state.

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In the sixteenth century Jean Bodin argued, in support of the French monarchy, that there must be some supreme and absolute authority which is itself not subject to the laws, but is maker and master of them. The emerging theories of ‘popular sovereignty’ and ‘representative government’ eventually replaced the absolutist view. Theorists such as John Locke and Jean Jacques Rousseau located the legitimacy and scope of authority in the purpose for which individuals come together to form a society and the fiction of a social contract emerged. Authority, it was argued, derived from agreement among the people and vested in, or was delegated to, a representative government. In a sense, however, these theories have yet to be ‘unmonarched’, in that conceptions of a unitary, hierarchical and supreme authority persist. Unable to disengage with the old idea of a supreme authority, the revolutionary, rhetorical quality of popular sovereignty was coupled with companion theories of governance that legitimised the exercise of sovereign power by governments.

The theories of sovereignty construct a consenting polity from an elaborate mythology. Social contract theories are premised on the notion that individuals freely enter into civil society through a compact to better protect their natural

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The constitution of a society is seen as a deliberate self-determining act. The 'people' are seen as emerging from a theoretical state of nature, who choose self-rule and deliberate on a new constitution or who come together to articulate their conception of the common good. Social contract theories also created the fiction of the 'founding moment', that reinforced the idea of consent. Through this mythical agreement between the people, the authority of government is a delegation of powers for the limited purpose of securing the freedom of the individual. Sovereignty remained with the people.

The idea that the right to govern rests on consent has influenced many styles of political theory. As a result, theories of modern democratic statehood share a number of assumptions; namely, that the state is constituted by an homogenous, sovereign people who agree to be governed by uniform legal and political institutions. Moreover, this is assumed to be a universal theory of society. These are the key features of sovereignty and statehood that form what James Tully called 'the empire of uniformity'. Little attention was paid to the conception of 'the

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8 Locke, op. cit., p. 49 and Rousseau, op. cit., p. 60. For discussion, see Macpherson, op. cit., p. 247. Kant, op. cit, p. 161 [ss.43, 44], explained this as the need to regulate mutual influence when people come into reciprocal contact. On the more ancient origins of the notion of the compact, see Mattern, op. cit., pp. 22-3.

9 For Locke, op. cit., pp. 50-1, there was a presumption that individuals have the capacity to govern themselves and therefore give up only so much of their freedom as is necessary for their better protection in society. This presumption relies on a view of the pre-civic state of nature as one of natural equality and freedom. Compare Hobbes, op. cit., p. 76, whose argument for strong government assumed a state of nature in which life was 'solitary, poor, nasty, brutish and short'. See also, Nicolo Machiavelli, The Prince [1640], Scolar, Yorkshire, 1969. Other theorists saw the purpose of government to provide for a common conception of Right or a common will, for example, Kant, op. cit., p. 163, [s.44]. For G. W. F. Hegel, Philosophy of Right, [1821], Oxford University Press, Oxford, 1967, e.g. p. 155, the state is committed to the promotion of higher ideals, in direct contrast to the minimalist view of the state adopted by liberal thinkers.

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


12 See Hindess, op. cit., pp. 13, 22, for further discussion of this point.

13 For Tully's account of the modern constitution, see op. cit., pp. 41, 59. Compare Hindess, op. cit., pp. 13, 22. See also, Immanuel Kant, The Philosophy of Law [1887], Augustus M. Kelly, New Jersey, 1974, p. 161 [s.43].

14 Tully, op. cit., p. 58. See also p. 62.
people' in the sense of how they are to be defined, or how they should define themselves. These theories obscure diversity by construing the 'people' as homogenous. Tully explained that:

The first way the empire of uniformity is established in theory is the premise that the sovereign people who establish the constitution are already culturally indifferent members of one society who aim to set up a regular constitutional association with a single locus of sovereignty.15

More specifically, culture is perceived as either 'irrelevant, transcended or uniform'.16

The ideal of the nation-state as uniform and homogenous has never reflected the interactions, interrelations and constitutional arrangements existing amongst peoples.17 Federation, confederation and various forms of association have been much more the norm throughout the history of societies. Yet, the assumption of uniformity became so predominant, based on these early theorists, that basic concepts such as 'the people' and 'popular sovereignty' have been defined in agreement with it.18 The theories of Hobbes, Locke and other modern theorists have become weapons of resistance to Indigenous peoples' claims because they expressed ideas that continue to inform contemporary debates about political power and government'.19 The application of these theories to multi-nation states, or states constituted by different peoples, has in the past resulted in the blanket denial of Indigenous claims to self-determination and sovereignty. This denial has occurred on two fronts, both in the way rights are construed and in the way the legitimacy of government is determined.

15 ibid., p. 83.
16 ibid., p. 63.
18 Tully, op. cit., p. 9.
Equality, freedom and the rights of citizenship

The theories of social contract draw heavily upon the idea that there are natural rights that each individual is capable of bringing to society, and therefore capable of surrendering to government. For Locke, the rights to life, liberty and estates, which together are their property, could guarantee human freedom. The social contract was entered into for the better protection and preservation of these inherent rights, thus defining the minimal role of government.

Locke’s approach forms the basis of much modern state practice and international law. For example, Thomas Jefferson was influenced by Locke’s view of the nature of the individual and the nature of civil society. These views were expressly incorporated into the American Declaration of Independence:

We hold these Truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable Rights; that among these are life, liberty and the pursuit of happiness; that to secure these Rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

The ideology that propelled the revolutions of France and America evolved around the assumption of uniform, or homogenous, states where a common notion of the public good existed. Minority interests, it was thought, could be secured by the protection of individual rights. More specific rights that are enumerated in law and

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20 Locke, op. cit., p. 63.
21 It is not, Kant assured, that the individual has sacrificed a part of their freedom. Rather, each gives up their personal freedom ‘in order to receive it immediately again as Members of a Commonwealth’, in the form of a regulated order or Civil State regulated by laws of Right. Kant, op. cit., pp. 169-70 [s.47]. See also Locke, op. cit., p. 64.
22 Umozurike, op. cit., pp. 6-7.
25 Jefferson’s inaugural address as President, which articulated ‘the creed of our political faith’, exemplified this concern: ‘Though the will of the majority is in all cases to prevail, that will to be
theory are often traced to the idea of individual freedom. For example, Kymlicka argued that even the recognition of Indigenous self-determination claims, including self-government and jurisdiction, can be justified to promote the freedom of the individual.26

Despite the focus on the individual, Indigenous peoples and many jurists have utilised the idea of ‘inherent rights’. Specifically, they argue that self-determination is an inherent right of peoples which derives from the right to govern themselves.27

The idea of inherent rights is attractive because it suggests that the right exists outside any state structure and does not depend on recognition by the state. However, the traditional body of inherent rights theory may also pose obstacles to Indigenous peoples’ claims. The individualist nature of the dominant rights regime and contract theory does not adequately accommodate claims for groups rights.28

The source of rights, and who defines them, is an important consideration in determining the nature of the rights, and hence, whether Indigenous claims are recognised in them. Criticisms of ‘inherent rights’ theory emerged very early, from within liberalism itself. For example, utilitarian theorists, such as James Mill and Jeremy Bentham disputed not only the notion of the inherent rights of individuals but also the legitimacy of the legal system imposing a system of rights.29 A utilitarian would suggest that no paternal body could best determine the ‘right’ choices for any

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26 Kymlicka, op. cit., pp. 69, 107.
27 For example, see ATSIC, Australian Contributions to the Working Group on Indigenous Populations, annually. Contrast Boldt and Long, op. cit., p. 337.
individual. Other theorists rejected the assumption of self-interest, arguing instead that natural law and the pursuit of what is right regulate the choices of individuals. From different perspectives, these theorists placed the individual in a social context. In short, there is conflict in political theory about the source and content of rights and indeed about human nature itself.

The utilitarian view has some similarities to arguments from jurists who view a legal right as meaningless without first assuming the existence of a legal system within which a doctrine of rights can operate. For example, Brian Slattery argued that an individualist approach, whether viewing the individual as essential community-minded or essentially self-interested, fails to give sufficient regard to the historical development of rights doctrines. While vested in individuals, inherent rights stem from membership in socially defined groups. Slattery argued further that moral reasoning can both draw upon tradition and practices particular to certain societies and strive for universality to have persuasive force for the inhabitants of other moral traditions. There are, of course, contrasting views. For example, MacIntyre recognised that rights reflect communal practices and traditions that are not universal.

Both MacIntyre and Slattery agreed that rights depend not so much on a legal system but on a sense of community. That is, rights do not precede community, as in the traditional view of inherent individual rights, but emerge from it. Only from a sense of community do feelings of obligation arise which, in the presence of a system of

30 The rules of society should therefore be those that offer ‘the greatest happiness of the greatest number’. Bentham, ibid., p. 309.
31 Kant, op. cit., p. 164 and Hegel op. cit., p. 86.
34 Slattery, op. cit., p. 463. This ‘evangelical’ style is similar to that of Kymlicka, op. cit., pp. 152-72, who, in seeking to accommodate Indigenous peoples demands, still assumed the universal value of liberalism in a way that is reminiscent of Kant’s language of moral progress. In particular note the discussion of ‘illiberal minorities’ and the use of persuasion to encourage the use of liberal democratic institutions if self-government is to be ‘tolerated’.
enforcement, can translate into the language of rights. This conception of rights does not necessitate a universality of content. Rights that differ from one community to another are not invalidated nor limited by a dominant conception of the inherent rights properly attributable to an individual under liberal theory.

This view holds some attraction in the struggle by Indigenous peoples for recognition of their communities within the rights discourse. The key for appropriating rights discourse to claims for community rights is to reject the claims of universality in the doctrine as currently construed. Instead, where rights are understood to take their form from the community, then it makes sense that rights can be communal, and can be exercised in relations between communities. This reassessment is imperative because unless the doctrine is modified to include the rights of distinct communities that associate with one another, it may continue to legitimise oppression.

Where the state consists of distinct peoples an homogenous view of the nation state creates the imperative of assimilation. Duncan Ivison suggested that self-determination claims based on distinct, collective rights pose a profound challenge to liberal theories of justice, because they appear to fragment the foundation of common citizenship.36 However, the exclusion of Indigenous peoples from the construction of that common identity and the constant economic and political pressure to assimilate are resisted by Indigenous peoples because the notion of 'common citizenship' fails to recognise and accommodate Indigenous identity. It is therefore arguable that this concept seeks to construct a sense of national identity and unity through exclusion and coercive universalism.37 The idea of equal treatment,

36 Duncan Ivison, ‘Aboriginal rights and political theory’, Research School of Social Sciences Annual Report, Australian National University, 1994, p. 25. For an example of this argument, see Nathan Glazer, Affirmative Discrimination and Public Policy, Basic Books, New York, 1975, pp. 197-8, 200, who argued that special treatment of one group will cause instability because others will also demand special rights. Kymlicka, op. cit., pp. 66-9, argued that such an approach is concerned more with instability than with justice.

37 ibid., pp. 64, 73. Kymlicka, p. 74, expressed concern over the ethnocentric assumptions, over-generalisations and the 'conflating of contingent political strategy with enduring moral principle' that these approaches epitomise.
when linked to individual rights thus becomes a source of oppression rather than freedom.\textsuperscript{38}

\textbf{Democratic government and institutional uniformity}

The concept of popular sovereignty has been described as little more than a ‘fiction’ used to justify the government of the many by the few.\textsuperscript{39} While modern theory no longer asserts that authority is absolute, hierarchy remains an inextricable part of it. Boldt and Long noted that modern theorists assume that the sovereignty of the people cannot be wielded by the people themselves.\textsuperscript{40} Contrary to the ideal of popular sovereignty, the fiction is overwhelmed by the institutional nature of sovereignty that assumes the value of uniformity, through uniform institutions, hierarchical government (or supreme authority) and an homogenous polity.

The rationale for vesting sovereign authority in a representative government in social contract theory is to temper individual self-interest in relations between people.\textsuperscript{41} This provides legitimacy for the powers exercised by government and provides a basis for defining the limits of that power.\textsuperscript{42} Therefore, even where the powers of government are not set down in an actual contract or constitution, the extent to which government legitimately impinges on individual freedom has theoretical limits.

\textsuperscript{38} For a critique of objections to Indigenous claims that assert equality as their foundation, see Jeremy Webber, 'Individuality, equality and difference: Justifications for a parallel system of justice', in Royal Commission on Aboriginal Peoples, \textit{Aboriginal Peoples and the Criminal Justice System: Report of the National Round Table on Aboriginal Justice Issues}, 1993, pp. 149-50. See also Michael Dodson, ‘Assimilation versus self-determination: no contest’, North Australia Research Unit, Australian National University, Discussion Paper No. 1/1996, p. 7.

\textsuperscript{39} Morgan, op. cit., pp. 13-15.

\textsuperscript{40} Boldt and Long, op. cit., pp. 335-6, pointed to common language such as ‘political leaders’, ‘decision-makers’, and ‘governments’ that are all influenced by notions of hierarchical authority.

\textsuperscript{41} This view of human nature was not necessarily shared by all theorists at the time. Rousseau, op. cit., p. 72, for example, viewed the collective as capable of acting outside the interests of the individual, for the benefit of the whole, including minority interests. Later theorists tended to distance themselves from the idea of a common will, emphasising the dangers of unrestrained democracy, or the ‘tyranny of the majority’. See for example, Tocqueville, op. cit., p. 258.

\textsuperscript{42} Rousseau, ibid., p. 139, agreed that the powers of government were a mere delegation, while taking a more extreme view of the power of the general assembly.
Contemporary understandings of sovereignty, beginning with Locke and Rousseau, have generally focused on democratic government as the basis for internal self-determination. Therefore, the enjoyment of political participation determines whether self-determination is being effectively exercised. Umozurike summarised this view:

A people within a metropolitan territory who enjoy these rights cannot make a case that they are denied the right of self-determination even though there may be political agitation for a particular status, such as independence. The situation will be different if they are denied human rights and are not free to participate in government.\(^{43}\)

However, it is inaccurate to suggest that where the members of a state are able to participate in the democratic system of government, with majority rule and minority protection, all citizens, regardless of their membership of a distinct people within the state borders, are exercising internal self-determination. As Michael Dodson observed, ‘[i]t is a fallacy all too evident to indigenous peoples that belonging to a democratic state guarantees to all peoples an equal voice and fair representation in government’.\(^{44}\) In the case of Indigenous peoples, this undifferentiated notion of citizenship has been shown to be either inadequate or ineffective to protect even their most fundamental rights as citizens.

For many, group representation is seen as a model for achieving self-determination in states that do not share a sense of nationhood.\(^{45}\) It is thought that this kind of representation could afford the pluralism required to provide an equitable relationship between distinct groups.\(^{46}\) Michael Asch argued that group representation overcomes ‘the crisis of community’ that occurs when a minority is

\(^{43}\) Umozurike, op. cit., p. 58.


subject to the rule of the majority but provides an alternative between the status quo and separation.\textsuperscript{47} However, in most instances, and certainly in Australia, this idea is rejected, because it offends the all-pervasive norm of uniformity.

In contrast, federalism, or the association of self-governing territories, which exists in Australia, Canada and the United States, for example, provides for mutual recognition and power sharing.\textsuperscript{48} The characteristics of sovereignty are more complex in a federal system, where sovereignty is shared between distinct communities. An understanding of the workings of power in a federal system of shared sovereignty can provide a theoretical and practical basis for a more pluralist approach, which recognises the sovereignty of Indigenous peoples.\textsuperscript{49} The notions of meaningful participation and self-rule must be assessed outside the theoretical limitations imposed by the liberal democratic norm. Peter Russell argued that:

Aboriginal societies like all enduring human societies are fundamentally political in nature – political that is in the Aristotelian sense. They are communities in which the distinctive social genius is expressed in the way they render justice to one another and order their internal affairs. To deny a people the opportunity to make laws for the internal ordering of their own society is to deny them to exist as enduring political societies. Such a denial is the very essence of Imperialism.\textsuperscript{50}

Demands for self-government, self-determination and equal respect as peoples underscore Indigenous peoples’ claims. Therefore, the idea of sovereignty and of inherent rights remains attractive if they are imbued with equal respect for Indigenous peoples. However, at the same time as democratic states were being established from the colonial territories of the British Empire these new ‘nations’

\textsuperscript{47} Asch, op. cit., p. 466, noted however that in the context of the Canadian constitutional structure, ‘we have not accepted the principles of direct consociation on an intellectual level and have not found the will or the way to resolve the matter of Aboriginal self-government through principles of indirect consociation’. See also p. 469.

\textsuperscript{48} For example, the \textit{Commonwealth of Australia Constitution Act 1901} (Imp) brought together the colonies into a mutually agreed federation. Section 51 reserves certain powers for the Commonwealth and the states to share, the plenary remains for the states. The Canadian Royal Commission on Aboriginal Peoples, \textit{Report of the Royal Commission}, \textit{[6 vols]}, Ottawa, 1996, recognised the ways in which federation can accommodate the same power sharing and mutual recognition of Indigenous peoples. In particular, see vol. 1, pp. 677-91, which outlines ‘the four principles of a renewed relationship’: mutual recognition, mutual respect, sharing, and mutual responsibility.


\textsuperscript{50} Russell, op. cit., p. 17.
were imposing their own empire over Indigenous peoples. While Indigenous peoples' claims may reflect the same principles of consent and self-rule, they challenge the legitimacy of that nation building. This historical aspect of the relationship has a profound impact on the non-Indigenous reactions to self-determination claims.

**Political theory and colonisation**

The assumptions of modern political theory lie at the base of the relationship between Indigenous peoples and the colonial state. That relationship is also affected by the translation of theory into practice. These two things combined in the denial of respect for Indigenous peoples as equal sovereigns in the process of colonisation. Non-Indigenous people have sought moral and theoretical justification for the violence of colonisation from the outset. It is this moral aspect, of being first peoples, that Irene Watson suggested 'pinches at the balls of the colonising state'.

The notion of the equality of nations was an important element of the theories of sovereignty. This external aspect of sovereignty implied that every polity should be seen as equal, enjoying unlimited and exclusive sovereignty over their territory. At the time, it was thought by the likes of Hobbes, Locke and Pufendorf that uniform, unitary legal and political structure was the solution to political instability in

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51 Peter Russell, Aboriginal Nationalism: Fourth world decolonisation in English settler societies, Hugo Wolfschon Memorial Lecture, La Trobe University, Melbourne, 31 October 1996, p. 3.
53 For example, Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* [1688], translated by C. H. and W. A. Oldfather, Oceania, New York, 1964, vol. II, p. 367, argued that the equality of all peoples meant that peoples were entitled to prevent the thrusting of foreigners into their territories. The theories of social contract had an influence on the international law theorists of the time, for example, see Pufendorf, pp. 330, 364-70, 381. See also, Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* [1764], translated by Joseph H. Drake, Oceania, New York, 1964, vol. II, pp. 15-16. For Emmerich Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct of the Affairs of Nations and Sovereigns* [1758], translated by Charles G. Fenwick, Oceania, New York, 1964, vol. III, pp. 3, 5-6, 113, the state possesses the same rights as man. From equality of man Vattel deduced the equality of states. In the same way, states have duties to each other to promote society. These ideas persist in contemporary international law as the principles of respect for the equality of states, territorial integrity and exclusive jurisdiction.
Europe. The respect for equality was not extended to Indigenous peoples either in theory or in practice. It is important to note that these theories were not ignorant of Indigenous peoples. Rather, they were often construed to deliberately exclude Indigenous peoples from the community of nations and justify colonial practice.

Legal scholars have begun to re-examine the writings of theorists such as Locke, Emmerich de Vattel and Fransiscus de Vitoria. For Vitoria, the Indians of the Americas ‘undoubtedly possessed true dominium, both in public and private affairs’. Many commentators have focussed on this aspect of Vitoria’s writings to illustrate a position in the earliest international law that respects the equality of Indigenous peoples. While the ideas of equality and respect among nations formed the basis of modern international law, the most influential principles that were to carry through to the political theories and practices of colonialism were those that served to justify the process.

Vitoria was writing at a time when European involvement in the Americas was predominantly for trade, before the onset of more invasive colonisation. However, Vitoria was not necessarily the humanist or egalitarian that many commentators have suggested. While Vitoria argued that the Indigenous peoples were to be respected in

54 James Youngblood Hendersen, 'The doctrine of Aboriginal rights in Western legal tradition', in Boldt and Long, op. cit., p. 189, argued that theorists such as Pufendorf, Grotius and Gentilis and the concept of natural law were essential in this process.

55 Werther, op. cit., p. 39. However, as Slattery, op. cit., p. 37, pointed out, the law of nations was not certain because the powerful states did not have a settled practice consistent with it. See also Brian Slattery, 'Aboriginal sovereignty and Imperial claims', Osgoode Hall Law Journal, vol. 29, 1991, p. 685 and, generally, Boldt and Long, op. cit.

56 For example, see James Tully, An Approach to Political Philosophy: Locke in Contexts, Cambridge University Press, New York, 1993, pp. 137-78.


59 See, for example, Nettheim, op. cit., pp. 33-4 and Youngblood Hendersen, op. cit., p. 188.

60 See Robert A. Williams Jr, The American Indian in Western Legal Thought: The Discourses of Conquest, Oxford University Press, New York, pp. 13, 92-3, 96-107. Williams, p. 98, argued that one of Vitoria’s primary motivations in the lectures 'on the Indians Lately Discovered', in 1532, was to find a justification for the Spanish aggression against the South American peoples that was not wholly based on ecclesiastical assertions of jurisdiction.
their possession, they were obliged to comply with the duties set forth in the natural law of nations.61 The effect was to judge relations with Indigenous peoples, and in particular their response to encroachments from European powers, against an unknown alien standard. Moreover, any transgression of the 'universal' norms of the Law of Nations would justify conquest and colonisation.62 Williams described Vitoria's legacy for Indigenous peoples in less positive terms than many commentators, describing the Law of Nations as 'an instrument of empire'.63

To this end, M.F. Lindley, in 1928, concluded that on the issue of Indigenous peoples' sovereignty, the preponderance of writing supported the view that 'backward races' possess 'a title to the sovereignty over the territory they inhabit which is good against more highly civilised peoples'.64 However, the assumptions implicit here were more explicitly stated in terms of political institutions to hold that 'lands in the possession of any backward peoples who are politically organised ought not to be regarded as belonging to no one'.65 Assumptions of superiority and hierarchy had placed peoples on a developmental timeline.66 The 'scientific' development view of human history in which the cultures of the world could be ranked according to their progressive stage of socio-economic development was devastating for Indigenous peoples. Modern constitutions had been developed in contrast to 'ancient' constitutions based on ad hoc government by custom.67 'Modern' European cultures were thought to be the highest and most developed in the hierarchy. On this view, lower or backward cultures would benefit and improve from the implantation of European institutions.

61 Vitoria, op. cit., pp. 278-84. For a discussion, see Williams, op. cit., p. 97.
62 Vitoria, op. cit., pp. 282-91. For discussion, see Williams, op. cit., pp. 104-5. Williams, p. 105, argued that the erasure of cultures and beliefs was the 'unseen by-product of a discourse of conquest enforcing a vision of the world focused on one right way of life for all mankind.'
63 Williams, ibid., p. 108.
65 ibid., p. 20 (emphasis added).
66 Tully, Strange Multiplicity, op. cit., pp. 64-5.
67 'Modern' societies in constituting the state were seen to go through a process of critical reflection on their customs to create a uniform system of institutions with a central locus of sovereignty. ibid., p. 59.
International law theories affecting Indigenous peoples were greatly influenced by John Locke, who directly addressed the assertion that Indigenous peoples were already constituted, self-determining and sovereign peoples deserving of respect. The political and economic systems by which Indigenous peoples lived were equated with the ancient inferior constitutions of the social contract theory.

With increased trading activity and competition among European powers for territory, ideas of private property were of great influence, particularly in legal doctrines. Locke believed that people had no property except in their bodies, and as a consequence, in land in which they had mixed their labour, in particular through agriculture. The introduction of private property and the market economy were a central justification, as much as an impetus for colonisation. All systems of government came to be measured in commodity terms - the exploitation of resources, cultivation of soil and use of markets. It was argued that the Indigenous peoples had 'no reason to complain' when Europeans encroached on their lands, so long as there was enough remaining in common for them. The corollary, of course, was that no person, or people were entitled to more land than they required for sustenance under agriculture.

Echoing the ideas expressed by Locke, Vattel justified colonialism on familiar bases:

Every nation is . . . bound by the law of nature to cultivate that land which has fallen to its share. There are others who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase. Now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labour, and they may not complain if other, more industrious nations, too confined at home, should come and occupy parts of their lands.
The impression was of the benevolent and benign inevitability of colonisation and, moreover, an obligation on Indigenous peoples to graciously accept it.

Even though the nation was perceived as the natural political unit, modern theorists approved of expansion and the assimilation of ‘backward peoples’, supported by the progressive view of human history. Edward Said noted the importance of this view to the legitimacy of colonisation because it provided a justification apart from a purely profit motivation:

a commitment that allowed decent men and women to accept the notion that distant territories and their natives should be subjugated...[and] the almost metaphysical obligation to rule subordinate, inferior, or less advanced peoples.75

Plurality and diversity are more difficult to conceive if the progressive development view of societies is taken for granted. This view of history and culture also underscored the assumed universality of modern theory. The influence of the economic argument in justifying colonisation and coercive assimilation cannot be overestimated. Indigenous peoples were thought to be better off for the arrival of Europeans and the imposition of a commercial system. It was thought that as societies developed and converged, modern constitutions would establish uniform legal and political institutions, based on liberal democracy and the market economy.77

Locke, argued that the Earth belonged to all in common and as such, no one could ‘take to themselves more land than they have need or can inhabit and cultivate’. See Vattel, op. cit., p. 85.

74 John Stuart Mill, Three Essays, Oxford University Press, London, 1975, pp. 382, 384. Mill, p. 385, argued that ‘... it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race, the absorption is greatly to its advantage’. For a comment on Mill, see Patrick Thornberry, ‘Self-determination, minorities, human rights: A review of international instruments’, International and Comparative Law Quarterly, vol. 38, October 1989, p. 869.


76 Said, op. cit., p. 75. For Kant, this would go so far as a duty to spread commerce and republican constitutions. Kant’s position is discussed in Tully, Strange Multiplicity, pp. 67, 80-1.

77 Tully, ibid., p. 67. The debate then centred around whose model was the most superior. For example, Kant’s ‘republican constitution’ was put forward as the method of achieving moral progress.
Conclusion

The social contract theories embody two important elements that influence contemporary understandings of the state and sovereignty. First, political authority is vested in government by agreement between the people. Second, the state exists by and for the freedom of the people. These have become the sources, and the measures, of legitimate political power. Thus performance of the obligation to protect the accepted inherent rights of individual citizens has become the sole measure of legitimate government.

Assertions or assumptions about the universality of existing institutions, whether because they are assumed to be superior or to somehow transcend culture, make challenge difficult and obfuscate the imperial culture embedded in them. It is not simply that these theories were written by European male elites, but that they were written specifically to exclude Indigenous peoples. Unless these hidden assumptions are acknowledged and open to question then Indigenous peoples face an impossible situation. Indigenous peoples are forced to present their claims in the institutions and in the language of the coloniser. Here, Tully noted, ‘the injustice of cultural imperialism occurs at the beginning, in the authoritative language used to discuss the claims in question’. Indigenous peoples’ claims may be difficult to express in these alien terms, or they may be distorted by the limits of language they are forced to use.

Edward Said has warned that modern theorists should be approached with ‘an acute embarrassed awareness of the all pervasive, unavoidable imperial setting’. The crisis of legitimacy for modern theories in this respect cannot be resolved simply by amending the theory to include Indigenous peoples. These theorists share certain

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78 Tully, *Strange Multiplicity*, op. cit., pp. 41, 58. See also p. 7.
79 Tully, ibid., pp. 34 and 39, argued that to respond justly to the claims of Indigenous peoples requires the questioning of often unexamined conventions, ‘inherited from the imperial age’. See also pp. 47-8, 53.
80 Boldt and Long, op. cit., p. 343.
81 Said, op. cit., p. 66.
conventions of thought so that a narrow range of familiar uses of terms has come to be accepted as the authoritative traditions of interpretation.\textsuperscript{82} These concerns are imperative given the adoption by Indigenous peoples of so many terms from modern theory.

Indigenous peoples often do not speak from a 'conventional' theoretical perspective. They have borrowed from the liberal tradition in the use of rights discourse, from post-modern conceptions of difference, from nationalist ideas of culture and nationhood, as well as Marxist understandings of oppression. The unique experience of Indigenous peoples in the history of the world gives rise to a distinctive, critical Indigenous politics. Together with critical race theory and critical feminist theory, this alternative perspective shares a fundamental criticism of contemporary modern theorists, in the essential European, masculine, imperial origins and biases of the modern theoretical framework.\textsuperscript{83}

The remainder of the chapter more closely examines the accepted regime of rights under international law to which Indigenous peoples have appealed, in particular the emerging right of Indigenous peoples to self-determination. From the discussion so far there are a number of issues that carry through to the discussion of international law. The idea of a universal truth, the value attached to uniform institutions and the assumption of supreme unitary sovereignty have all had an impact on the nature and content of international law.

\textsuperscript{82} Tully, \textit{Strange Multiplicity}, op. cit., p. 36.

\textsuperscript{83} ibid., pp. 47-8. Tully, p. 53, grouped Indigenous peoples with other groups demanding cultural recognition, calling this broader collection 'interculturalists': including 'Aboriginal peoples, members of suppressed and divided nationalities, linguistic and visible minorities and citizens who seek Constitutional recognition of international cultural relations among peoples'. While I understand that minorities share many grievances with Indigenous peoples, I continue to draw a distinction between the unique experience of oppression suffered by Indigenous peoples and their distinct claims to traditional custodianship, ownership and sovereignty in their lands.
II. Self-determination in contemporary international law

In the last decade, with some access to the United Nations mechanisms, Indigenous peoples have turned to international law and human rights to assert their claims to self-determination.\(^{84}\) Collective rights have gained recognition in the international arena to a large extent by the efforts of non-state actors, including Indigenous peoples, to alter the traditional state-based order.\(^{85}\) Continued dissatisfaction with progress domestically and the promise of developments in the international arena have bolstered support for a global resolution to the problems faced by Indigenous peoples around the world.

Since the Law of Nations of Vitoria and Vattel, international law has been concerned predominantly with the external sovereignty, independence, and relations between states. The *Charter of the United Nations*, too, provides that states have an obligation to respect the territorial integrity and political independence of other states.\(^{86}\) In addition, the United Nations is excluded, under the *Charter*, from interfering in the domestic jurisdiction of the state.\(^{87}\) The ideas of sovereign equality and sovereign independence have taken on an exclusively statist character.\(^{88}\)

However, the international community is increasingly concerned with the internal aspects of self-determination. That is, to ensure that 'the people' freely determine their political structures and are therefore truly represented at the state and,

\(^{84}\) For a personal account of the genesis of this interest, see Helen Corbett, 'International efforts', in *Voices from the Land*, ABC Books, 1993, pp. 76-88. Even prior to the formation of the United Nations, North American Indigenous peoples sought inclusion in the community of nations. See, for example, the Iroquois petition reproduced in the judgement of *Logan v Styres* (1959) 20 DLR (2d) 416, at pp. 422-4. See Douglas Sanders, 'Aboriginal rights: The search for recognition in international law', in Boldt and Long, op. cit., pp. 192-203.


\(^{86}\) Article 2(4).

\(^{87}\) Article 2(7).

concomitantly, at the international level. While self-determination has always been considered central to international law, many issues previously regarded to be within the domestic jurisdiction of a state have come to be considered issues of international concern.\textsuperscript{89} Peter Russell suggested that at the core of this change is the wavering of support for the 'conviction of inherent superiority' that served to justify colonisation.\textsuperscript{90} The ideological commitment to non-discrimination among peoples brings the hope of a more positive response to the claims of Indigenous peoples.

It would be significant for Indigenous peoples to have an internationally recognised right to self-determination, and all that may entail, in the face of competing claims from states to their territory and their resources.\textsuperscript{91} The implication of formulating self-determination claims in the language of rights is primarily its assertion of entitlement. The involvement of Indigenous peoples in international fora has focused on broadening this authoritative influence in an appeal to an inherent right of Indigenous peoples to consensual government.

In the end, however, the United Nations is constituted by states, although many of them are themselves decolonised nations.\textsuperscript{92} Irene Watson expressed scepticism of the international system constituted in such a way:

\begin{quote}
We face a state that shares a membership at the United Nations with others who likewise have created their identities upon the spoils of colonialism. And they act together as though their act of togetherness somehow legitimises the conspiracy and reluctance to end colonialism and genocide.\textsuperscript{93}
\end{quote}

Collective rights embodied in a claim to self-determination are seen as a threat to the sovereignty of the dominant state. This tension between Indigenous self-determination and the state's assertion of sovereignty is a recurrent theme throughout

\textsuperscript{89} Pritchard, The significance of international law, op. cit., pp. 8-9.
\textsuperscript{90} Russell, op. cit., pp. 5-6.
\textsuperscript{91} Williams, Encounters ..., op. cit., pp. 668-9.
\textsuperscript{92} Russell, op. cit., p. 5
\textsuperscript{93} Watson, Indigenous Peoples' law-ways, op. cit., p. 45. The control that states have over the debate in international fora means that the debate reflects a statist bias. Michael Dodson, Assimilation versus Self-determination, op. cit., p. 2, noted that it is the white way to control the agenda and debate, to determine the who and what of self-determination.
this discussion as it is the basis of arguments against the recognition of a right of Indigenous peoples to self-determination.

The barriers to abandoning the colonial relationship between Indigenous peoples and the states, have moved from overt racism, to rest on a conception of the supremacy of the state. Russell described this as the ‘sovereign idea of sovereignty’, that is, a notion of absolute and incontrovertible power. However, Barry Hindess argued that in early theories of sovereignty, the fact of power was intimately tied to the conception of power as a function of consent. Hindess suggested that although this understanding of power has fallen out of fashion since the Second World War, modern conceptions of statehood and sovereignty remain rooted in these same values.

International law debates, then, reflect two conceptions of power. One, the statist view, concerned with the fact of power and the preservation of existing states’ territory; the other, concerned with the legitimacy of government, according to liberal democratic standards. This distinction is central to the claims of Indigenous peoples in the international sphere. Paul Coe argued that ‘while one group has dominant power and the means to implement it, that does not necessarily give that group the right to sovereignty and the exercise of power’. Michael Dodson also criticised international law for giving greatest weight to the ‘power to have power’. Dodson suggested that Indigenous peoples seek a recognised ‘right’ to have power, with support at a ‘moral, legal and political level’. Power construed in this way is a question of legitimacy.

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94 Russell, op. cit., p. 17. Watson, op. cit., p. 54, argued that ‘we have devolved from racism, to a fear of states dis-integrating and collapsing. As though the basis upon which colonial states exist is an honourable and justifiable one that should be preserved’.

95 See Hindess, op. cit., p 12. These two ideas of power and legitimacy of government are the central themes of Hindess’ book.


97 Dodson, Towards the exercise of Indigenous rights, op. cit., p. 70.

98 ibid., p. 71.

99 ibid., p. 73.
The international human rights regime consists of rights and freedoms directed to ensuring that governments are representative of the ‘whole people belonging to the territory without distinction as to race, creed or colour.’\textsuperscript{100} International instruments relating to non-discrimination and political participation are central to the concern for legitimate government, as well as recognition of a scheme of individual rights. The rights of minorities and religious rights have also received recognition. However, Indigenous peoples’ claims have not been accommodated by the existing regime. The assumptions of an homogenous people and uniform institutions of government have excluded their claims. Nowhere has this exclusion been better illustrated than in the treatment of Indigenous peoples’ assertion of the right of self-determination.

\textit{Self-determination and human rights}

United States President Woodrow Wilson first raised the notion of self-determination as a principle of international relations.\textsuperscript{101} Until then, self-determination had been confined to the context of sovereignty and self-rule in political theory. Wilson popularised the term ‘self-determination’ as descriptive of the right of peoples to have the government of their choice, free from external domination.\textsuperscript{102} This was

\textsuperscript{100} The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV) of 24 October 1970 GA Res. 2625 UNGAOR 25\textsuperscript{th} Sess. Supp No. 28, p. 121 (1971) para.1. (The Declaration on Friendly Relations).

\textsuperscript{101} President Wilson’s enthusiasm for a general and broadly applicable principle received criticism, most notably from his own Secretary of State, Robert Lansing who referred to self-determination as: one of those declarations of principle which sounds true, and in the abstract may be true, and which appeals strongly to man’s innate sense of moral right and to his conception of natural justice, but which, when an attempt is made to apply it in every case, becomes a source of political instability and domestic disorder and not infrequently a cause of rebellion.


\textsuperscript{102} Trotsky also professed the principle of self-determination of peoples, though the philosophical basis for this was in direct contrast to Wilson’s liberalism. The platform of the Petrograd socialists argued that: ‘Peace without annexations and indemnities on the basis of self-determination of peoples is the formula adopted without mental reservations by the proletarian mind and heart’. Proclamation of 15 May 1917, quoted in Umozurike, op. cit., pp. 14, 15.
firmly based in the notion of popular sovereignty. The people, not states, were central to this idea.

Examining the emergence of the ‘right’ of self-determination, Pomerance went so far as to say that self-determination:

has not only been transformed from a political or moral principle to a full legal ‘right’; it has become the pre-emptory norm of international law, capable of overriding all other possible peremptory norms and even such others as the prohibition of the threat or use of force in international relations.

The right of all peoples to self-determination was included at Article 1 of the United Nations Charter, among the purposes of the Charter, and Article 55 in which the United Nations pledged to promote important political and social goals:

With a view to the creation of conditions of stability and well-being which are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

Self-determination and human rights were seen as part of the same norm and as the basis for friendly relations and international peace. Human rights instruments, while the emphasis remained on the rights of individuals, included the right of peoples to self-determination. Self-determination has been recognised in a number

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103 President Wilson, in a message to the Provisional government of Russia, 22 May 1917, stated that ‘We are fighting for the liberty, the self-government, and the undictated development of all peoples’. See The Papers of Woodrow Wilson, vol. 42 (1917), edited by Arthur Link, Princeton University Press, Princeton, pp. 366-7.

104 Michla Pomerance, Self-determination in Law and Practice: The new doctrine in the United Nations, Nijhoff, The Hague, 1982, p. 1. It is generally agreed that there is a right of self-determination in positive international law in some form. See generally, Thornberry, op. cit. Contrast Buchheit, op. cit., p. 81, who noted the argument presented to the Human Rights Committee through the late 1950s, that self-determination is a political principle and not a legal right, thus should not be included in a legally binding document. Ingrid Detter De Lupis, International Law and the Independent State, 2nd edn, Gower, Hants, 1987, p. 14, noted, in particular, the right to self-government, which reflects an internal expression of self-determination, as an emerging new rule of international law.


of important international instruments and has been exercised in a number of instances to free ‘peoples under alien domination’. Yet it remains the most controversial right used to determine the legitimacy of the government of a state.

Formulation of the principle of self-determination into the language of rights has led to the pressure for precise definition and delineation of the nature, scope and content of the right. Defining the right of self-determination in international law has been characterised by attempts to deny the existence or application of the right in circumstances that threaten existing states.

President Wilson’s understanding of self-determination incorporated two aspects. The first aspect identified the people as the ultimate authority within a state (internal self-determination) and the second, of great importance in the ensuing international order, was the casting off of alien rule in respect for the autonomy of sovereign peoples (external self-determination). However, it was intended that the principle only be applied to the national minorities of the vanquished powers, and was not to be used to inquire into ancient wrongs.

The most notable exclusion in the decolonisation process was the ‘salt water thesis’ of The General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, which restricted the obligation to facilitate self-determination to geographically separate territories, that were distinct, ethnically or culturally, from the administrating country. Irene Watson referred to the mythology of ‘post-

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108 Thus, implementation has been limited to the decolonisation context and has not been readily accepted by states to extend any further. Thornberry, op. cit., p. 874.
109 It has been suggested that the external perspective reflects the status in relations with other internationally recognised sovereign powers and is distinguished from the internal perspective, or the nature and forms of governance, adopted by the people. More broadly, however, external self-determination can be defined as the act by which a people determine their future international status and liberate themselves from alien rule. Pomerance, op. cit., p. 37.
110 Wilson was influenced by the views of John Stuart Mill who agreed with the assimilation of Indigenous cultures. See note 74 above.
colonialism' that 'spread throughout the states' academic institutions' with the passing of these declarations. The assertion that colonialism ended with the passing of this resolution, ignores the '300 million Indigenous Peoples [who] still live a colonised existence'.\textsuperscript{112} The exclusion of Indigenous peoples from this process of decolonisation is not premised on a discernible difference between the peoples themselves (for example on a scientific development view) but is affected by determination of states to protect their territorial integrity. Watson and Dodson both spoke of the 'cost' involved in the recognition of Indigenous self-determination as a primary reason for their exclusion from international legal rights.\textsuperscript{113}

While later UN resolutions do not carry the same emphasis on colonialism, they have become more focussed on democratic government and the enjoyment of individual human rights as the measures of legitimate government.\textsuperscript{114} \textit{The Declaration on Friendly Relations} recognised the right of peoples to self-determination as the basis for friendly relations but qualifies this in terms that reflect the fiction that the state represents a single homogenous people. For the assessment of a valid exercise of internal self-determination, liberal democracy has emerged as a norm of international law. It implies that self-determination is satisfied where a 'legitimate' representative government is in place.\textsuperscript{115} Various commentators have noted the emphasis on liberal

\textsuperscript{112} Watson, Indigenous Peoples' law-ways, op. cit., p. 56.
\textsuperscript{113} ibid., p. 46, 55, and Dodson, Towards the exercise of Indigenous rights, op. cit., p. 69-70.
\textsuperscript{114} Thornberry, op. cit., p. 875.
\textsuperscript{115} \textit{The Declaration on Friendly Relations}, op. cit., at para. 1, asserts that:

\begin{quote}
Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
\end{quote}

Heraclides, op. cit., p. 30, argued that the current regime for allowing self-determination favours the incumbent authority regardless of the nature of that authority. Significantly, the United States proposal originally contained a reference to representation of 'all distinct peoples' as opposed to 'the whole people' which was included in the final draft. \textit{The Declaration on Friendly Relations} establishes a set of guidelines for the exercise of self-determination to ensure that the outcome is truly the wish of the people. Indeed the guidelines belie a suspicion of any outcome short of complete independence. Although this provides some safeguards, it is a reflection of the United Nations predisposition to see secession as the inevitable result of recognising a right to self-determination. Pomerance, op. cit., p. 25, noted that while independence is not an imperative or even necessary option, anything short should be open to subsequent review.
majoritarianism.\textsuperscript{116} This universal understanding of freedom focussing on participation has proved a difficult obstacle for Indigenous peoples.\textsuperscript{117}

Self-determination means more than merely political rights of participation. Michael Dodson argued that self-determination is to peoples what freedom is to individuals, that self-determination:

>[is] the most fundamental of our rights as peoples; the pillar on which all other rights rest; a right of such a profound nature that the integrity of all other rights depends on its observance.\textsuperscript{118}

On this view, self-determination of peoples comes before individual rights and is in itself essential for individual freedom.\textsuperscript{119}

In contrast, states argue that self-determination is an instrumental right the purpose of which is to facilitate the enjoyment of individual human rights.\textsuperscript{120} As an instrumental right, the function of self-determination would be to ensure that a people enjoy the human rights recognised by international law.\textsuperscript{121} By implication, where such rights are enjoyed, in a representative system of government, self-determination is being exercised. Similarly, where such rights are being denied, the content of self-determination would be that which is required to ensure the protection of human rights.

In the first instance, criticism can be leveled against this approach for requiring a measurable degree of suffering under human rights abuses before a right of self-


\textsuperscript{117} On the idea of the universal vision of truth, see generally Williams, \textit{...Discourses of Conquest}, op. cit.


\textsuperscript{120} Crawford, op. cit., p. 14.

\textsuperscript{121} See, for example, James Anaya, 'The capacity of international law to advance ethnic or nationality rights claims', Symposium: 1990 Moscow Academic Conference, \textit{Human Rights Quarterly}, vol. 13, 1991, p. 403.
determination is recognised. However, on a more fundamental level, this approach suggests that had United Nations efforts to protect individual human rights been more successful, there would be no demand for an exercisable right to self-determination by Indigenous peoples.

The protection afforded to Indigenous peoples under the individual rights regime can be summarised briefly. *The United Nations Charter* established non-discrimination in the enjoyment of human rights, among the central tenets of the United Nations. Therefore one of the principal purposes of the United Nations is in 'promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

The ideal of non-discrimination in the enjoyment of human rights was reiterated, and elaborated, in later human rights instruments including *The Universal Declaration on Human Rights, The International Covenant on Civil and Political Rights, and The International Covenant on Economic, Social and Cultural Rights*. The human rights covenants, to which Australia is a party, impose obligations on states to ensure the human rights contained in them, 'without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status'.

*The International Convention on the Elimination of all Forms of Discrimination* (CERD) also signed by Australia, reinforces the prohibition on discrimination and the obligation on states to eliminate racial discrimination. A recent recommendation has reaffirmed the application of the provisions of the Convention to Indigenous peoples and calls upon states to include reference to them in their periodic reports.

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122 *United Nations Charter* Article 1(3), see also Article 55.
124 *ibid.*
Further, *The International Covenant on Civil and Political Rights* recognises, in Article 27, the rights of minorities to enjoy their own culture, religion and language. It has been argued that Article 27 could protect issues of cultural importance such as the relationship of Indigenous peoples to their lands.\(^{127}\) Moreover, the Human Rights Committee of the United Nations stated that protection of minority rights may require ‘positive measures’ and acknowledged the importance of culture, including land use.\(^{128}\) Article 27 has been used to confirm special rights of Indigenous people, in order to protect activities central to cultural survival.\(^{129}\) However, the Committee specifically identified these rights as a manifestation of individual rights.\(^{130}\) Therefore, rights which appear to be collective rights, such as the right to the exercise of religion or to be educated in one’s own language, are primarily concerned with successful integration and the freedom of the individual, rather than with the survival of peoples.\(^{131}\)

The comparison between the ‘instrumental right’ position of states and arguments put forward by some commentators who, while supportive of Indigenous peoples’ claims, adopted a human rights approach to self-determination are worthy of note. It has been suggested that minority claims to autonomy and recognition encompass the more specific grievances of Indigenous peoples.\(^{132}\) For example, James Anaya advocated a ‘human rights approach to autonomy claims’ which focused on the imperative of ‘cultural survival and flourishing’, drawing on the fundamental values of freedom, equality and peace.\(^{133}\) Anaya avoided the historical basis for

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\(^{130}\) General Comment, op. cit., para. 6.2. Compare CERD, General Recommendation, op. cit., para.4.

\(^{131}\) For an exposition of this polyethnic or multicultural liberalism, see, generally, Kymlicka, op. cit.


claims of Indigenous peoples in an effort to circumvent the prejudices of the states against any challenge to their recognised sovereign powers or territory. In this way, Anaya suggested, self-determination is freed from the spectre of destabilisation and is therefore capable of embracing the continuum of outcomes short of secession that are often overlooked in international debate.\textsuperscript{134}

This approach would place reliance on the recognised rights of minorities in existing human rights instruments as the test of whether self-determination is being exercised. While it is important to de-emphasise secession as a threat, Indigenous peoples’ historical claims encompass much more than cultural integrity. In a similar way to the arguments of the states, these theories would require abuse of power, that is, a level of oppression, before a legitimate claim to alternative sovereignty would be entertained.\textsuperscript{135} Understandably, some Indigenous people have rejected this view because it fails to acknowledge important aspects of the experience of oppression and colonisation.\textsuperscript{136} Allotting a merely instrumental role to self-determination denies that even where individual rights are now protected Indigenous peoples may still suffer disadvantage stemming from alien domination. As a collective expression of political will, self-determination is both a means to an end, that is the enjoyment of human rights, and an end in itself.\textsuperscript{137} The restrictive approach of remedial self-determination can be distinguished from the more liberal approach, which Buchheit termed the ‘parochialist model’.\textsuperscript{138} Rather than requiring a measure of suffering before a claim of self-determination can

\textsuperscript{134} Anaya, op. cit., p. 409.
\textsuperscript{135} Buchheit, op. cit., pp. 53-5.
\textsuperscript{136} For example, Watson, Indigenous Peoples’ law-ways, op. cit., p. 56, described Anaya’s argument as: ‘a complete sellout from an Indigenous perspective’. On the importance of the historical and moral claim, see Werther, op. cit., pp. 34-6 and Macklem, Distributing sovereignty, op. cit.
\textsuperscript{137} Special Rapporteur Jose R. Martinez Cobo, op. cit., p. 20, concluded that self-government is an inherent part of the cultural and legal tradition of Indigenous peoples and, in its many forms, is a basic precondition to the enjoyment of other rights. See also Dodson, Towards the exercise of Indigenous rights, op. cit., p. 68; and Catherine Iorns, ‘Indigenous peoples and self-determination: Challenging state sovereignty’, Case Western Reserve Journal of International Law, vol. 24(2) 1992, pp. 209-10.
\textsuperscript{138} Buchheit, op. cit., p. 223. Compare Umozurike, op. cit., p. 58.
succeed, the parochialist model merely requires a genuine ‘self’ wanting to control its own political destiny, driven by the urge to be governed by those like them.\textsuperscript{139} This approach is rooted in the philosophical commitment to self-rule. For advocates of this approach, there is no need to assess the merit of the ‘alien rule’, for the mere fact of alien rule is the basis of the claim.\textsuperscript{140} Instead, there is an emphasis on the historic, cultural, religious and/or ethnic distinctiveness of the people and the genuine desire for autonomy. To this end, Espiell argued that alien subjugation is ‘any domination which the people freely determine as such ... whatever legal formula may be used in an attempt to conceal it’.\textsuperscript{141} Rather than focussing on a severe deprivation of human rights or on the disruption of international order, the inquiry is focussed on the rights of the group as a people.

For these reasons, it has been argued that there is a general imperative to address Indigenous peoples’ grievances apart from all other injustices, with regard to their unique histories.\textsuperscript{142} Falk distinguished Indigenous peoples through their deprivation of sovereign rights and a lack of participation or representation in prevailing political arrangements.\textsuperscript{143} Michael Dodson expressed a similar view:

Because the non-indigenous state was founded on the basis of non-recognition of pre-existing indigenous rights and laws, indigenous peoples and the non-indigenous state lack an agreement about the basic principles of nationhood, the structure of government, the source of law, and the shaping and sharing of power, wealth and national resources.\textsuperscript{144}

\textsuperscript{139} Buchheit, op. cit. Pomerance, op. cit., p. 73, advocated this as a democratic approach which is justified because the concept of self-determination is, itself, based on the notion of consent of the governed.
\textsuperscript{140} Buchheit, ibid., p. 223-4.
\textsuperscript{141} Espiell, op. cit., p. 6, and Pomerance, ibid., p. 15.
\textsuperscript{142} Werther, op. cit., pp. 34-6, argued that this historical and moral claim has been the source of their unique advances in the direction of self-determination thus far. See also Crawford, op. cit., p. 14. Also, Elizabeth Pearce, ‘Self-determination for Native Americans: Land rights and utility of domestic and international law’, Columbia Human Rights Law Review, vol. 22, 1991, p. 377, drew a distinction between minorities and peoples:

  Minorities are groups with distinct cultures, languages or religions that are legally and politically integrated into larger nations . . . ‘Peoples’ by contrast, generally have a history of autonomy, self-government and nationhood; their claim to self-determination rests on their historically separate political and legal existence.

While a minority may also constitute a people, to equate the two without distinction may deny Indigenous peoples a right to self-determination.
\textsuperscript{143} Falk, op. cit., p. 591.
\textsuperscript{144} Dodson, Towards the exercise of Indigenous rights, op. cit., p. 73.
These fundamental grievances result in a variety of encroachments, deficient social services, and constant pressure on lands and resources. Therefore, Indigenous peoples’ claims are centred on their collective identity based upon inherent sovereign rights to government by consent and a history of denial by internal domination. To this end, self-determination has been described as a collective right that attaches to a group whose goals ‘transcend the ending of discrimination’. On this view, members of the group are not joined simply by external discrimination but by internal cohesiveness. More than equal participation, Indigenous peoples seek distinct group survival and the freedom to determine their relationship with other groups, nations and states. The claims of Indigenous peoples cannot be adequately incorporated within the individual human rights or civil rights discourse (though they may appeal to those forums). Rather, they include unique rights as peoples, and, in particular, as first peoples whose sovereignty predates that of the state.

**Self-determination and statehood**

The concern over a competing sovereignty lies at the base of arguments against the right of Indigenous peoples to self-determination. Part of the difficulty for the claims of Indigenous peoples is that the incorporation of self-determination into international relations, through the process of nation building, assumed a connection between self-determination and statehood, even assuming it to be synonymous with the expression of statehood. This early conception of self-determination was described as ‘an imprecise amalgam of ideas about self-government and

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145 Sanders, Collective rights, op. cit., pp. 368-9, provided an analysis of individual, group and collective rights in this way. Individual rights, for example the right not to be discriminated against, are, in effect, the right not to be recognised by reference to a group. Group rights are the sum of the individual rights of its members. Collective rights do not end with the end of discrimination and characteristically relate to the assertion of identity. In contrast, international instruments clearly refer to the rights of minorities to preserve their culture and language, and practice their religion as the rights of individuals to the same, to be exercised in community with others. See also Falk, op. cit., pp. 585-6.

democracy'. The focus on territory and the threat of secession limits possibilities for the exercise of the right in the circumstances of Indigenous peoples.

The core concepts of self-determination apply to all independent states, in their right 'freely to choose and develop [their] political, social, economic and cultural systems', just as these elements should be enjoyed by all peoples in their pursuit of self-determination. Thus it was suggested that self-determination is a claim against the self-determination of another, not against anti-self-determination or non-self-determination. The principle that Indigenous peoples rely upon to support their claims to autonomy and independence is one of the central tenets underlying state sovereignty. As a result, the demands of Indigenous peoples are confronted with the ideas of territorial integrity and autonomy that dominate the international, statist sphere.

It is important to recognise that Indigenous peoples often operate outside the statist conceptions of international law. The desire for control over decision making in Indigenous communities does not necessarily lead to a desire for independent statehood. Therefore, arguments against secession do not preclude the recognition of the right of self-determination. Rather, they merely highlight the difficulties with radical change in current state structures and the need to address more creative solutions to resolve conflict.

use of the term 'peoples', referring to the people of the territory as a 'juridical' and injured 'entity', who have a right under international law to progress toward independence.

Falk, op. cit., pp. 585-6, argued that the growth of international human rights standards is a challenge to governmental supremacy. Yet the states define the nature and content of rights and limit international recourse. The developments in state practice have shown that in certain circumstances, and from time to time, the right of peoples to self-determination will take precedence over other norms of territorial integrity and exclusive jurisdiction. For example, in the context of the colonial subjugation model, self-determination was considered to have precedence over norms of territorial integrity, non-interference and non-violence. From this, Pomerance, op. cit., p. 1, concluded that self-determination has become 'the pre-emptory norm of international law' (original emphasis).

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

Buchheit, op. cit., pp. 21-31, provided a comprehensive list of the arguments against secession, and some of the contradictory principles that refute or at least balance the argument. However, 'The Spectre of Secession' which Buchheit argued underpin the fears of states should be identified as merely practical arguments against injudicious secession. Falk, op. cit., pp. 603-4, suggested that what is required is a formal expression of the urgency and seriousness of the claims and the grossness of the abuse of human rights, and a qualitative extension of human rights and self-determination.
At the same time, the failure to recognise the right of Indigenous peoples to self-determination cannot be justified merely by the threat to the territorial integrity of the state. Territorial integrity cannot simply be equated with stability and self-determination with disruptive change. As Irene Watson argued, for Indigenous peoples peace is not a known or lived reality.\(^{151}\) Indeed it could be argued that recognition of the right to complete self-rule may provide a sense of security, by creating a more equal relationship, and thus provide the foundations for a negotiated state structure.\(^{152}\)

The question of who is to be recognised as the ‘self’ entitled to self-determination continues to be a source of contention. Attempts to limit the applicability of the recognised right of peoples to self-determination have led the states to simply assert that Indigenous peoples are not peoples and therefore unable to claim self-determination.\(^{153}\) Thus, a convenient conclusion has been reached first and a definition has been constructed around it, to exclude those for whom it may connote a right of secession.\(^{154}\)

Generalised theories of sovereignty have confused debate over the status of multinational states, and particularly Indigenous peoples. While the states continue to argue that it is the population of a state as a whole which is to be considered a people for the purposes of self-determination, peoples within current state boundaries argue for their separate recognition. International law has been framed upon the assumption


\(^{152}\) For example, The Declaration on Friendly Relations, op. cit., general part, para 3, recognised self determination as the basis of friendly relations.


\(^{154}\) This was epitomised in the ‘salt water thesis’ in Resolution 1541, discussed above. A similar criticism of International law formulation was expressed by Dodson, Towards the exercise of Indigenous rights, op. cit., p. 70.
that the state is an indivisible people while considering Indigenous peoples as merely minority populations. Moreover, it assumed that states acting in the international arena express the legitimate authority of the people that they represent.

Yet, the international community has begun to recognise the distinction between states and the 'peoples' who are entitled to exercise self-determination. The Declaration on Friendly Relations reflects a strengthening of the principle among the fundamental tenets of international law. A pivotal change in the approach in this declaration was to address the implementation provisions to 'peoples' rather than to 'states'. The change in emphasis is important for the emergence of an effective right of self-determination.

**Draft Declaration on the Rights of Indigenous Peoples**

The continuing international attention on the treatment of Indigenous peoples by states has led to a reconsideration of the status of Indigenous peoples in matters of international concern. In 1971 Jose Martinez Cobo was appointed special rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a study of the specific problem of discrimination against Indigenous peoples. The fact of the study being undertaken gave a level of

157 The International Commission of Jurists' Report, *The Events in East Pakistan, 1971: A Legal Study*, Geneva, 1972, p. 67, observed that The Declaration on Friendly Relations was 'the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity'. In its three preambular paragraphs, the Declaration affirms the principle of self-determination. In contrast to earlier formulations of the main principles of international law, this document gives some guidance as to how they stand in relation to one another. The Resolution states, in general part para 2, that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles . . . Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of the Member States under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this Declaration.

While not making self-determination necessarily peremptory, this provision clearly disposes of notions of supremacy of particular principles over others.

legitimacy to the claims of Indigenous peoples and placed these issues on the agenda of a number of countries, non-governmental organisations and international bodies.\textsuperscript{159} Even before the completion of the report, with support from Norway and the Netherlands in particular, the United Nations Economic and Social Council established the United Nations Working Group on Indigenous Populations (WGIP) as a pre-sessional working group of the Sub-Commission.\textsuperscript{160} The Working Group was established for the dual purposes of providing a forum to review the experiences of Indigenous peoples and to draft standards for the treatment of Indigenous peoples by member states.\textsuperscript{161}

The establishment of the Working Group was a significant act of recognition of the struggle of Indigenous peoples and the need for an international response to their claims. The Working Group is structured as a body of ‘experts’ who hear submissions from states, non-governmental organisations and from Indigenous peoples themselves.\textsuperscript{162} The Working Group has met annually since 1982 and at each session the ‘review of developments’ has allowed Indigenous peoples to come


\textsuperscript{160} Sub-Commission Resolution 2 (XXXIV), 8 September 1981, endorsed by the Commission on Human Rights Resolution 1982/19, 10 March 1982, and authorised by ECOSOC Resolution 1982/34, 7 May 1982. The Cobo Report, op. cit., was completed in 1983. The use of ‘populations’ in the title of the Working Group was quickly recognised as a denigrative term that denied Indigenous peoples rights as peoples under international law. The Working Group is often referred to as the Working Group on Indigenous Peoples as a sign of respect and recognition. The title of the document emerging from the Working Group (\textit{The Draft Declaration on the Rights of Indigenous Peoples}) and the terms of the declaration refer to peoples and proposals have been suggested for changing the name of the Working Group in any restructuring of its role.

\textsuperscript{161} The two tasks were identified in the 1982 Resolution of the ECOSOC, op. cit.

(i) to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations; and

(ii) give special attention to the evolution of standards concerning the rights of such populations.

\textsuperscript{162} There are five members of the Working Group (representing the five regions recognised by the UN) which are drawn from the Sub-Commission. As experts they act in their individual capacity and do not represent the governments of their states. The number of Indigenous NGO’s with consultative status is limited (approximately twelve, predominantly North American, but including NAILSS and ATSIC from Australia). From the outset it was determined that any Indigenous person or representative could address the Working Group. To facilitate this involvement the United Nations Voluntary Fund for Indigenous Populations was established to fund a number of Indigenous people to attend Working Group Sessions.
together from all over the world to share their stories and challenge the governments of the states in which they find themselves.\textsuperscript{163}

The value of this forum for Indigenous peoples to find support in their common experience should not be underestimated. Michael Dodson, in the Fourth Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, stated that:

\begin{quote}
The United Nations Working Group on Indigenous Populations is a forum where Indigenous peoples from around the world come together. It provides a structure for the articulation of our rights. It gives us the shared power of common positions. I have described the Working Group as a ‘small revolution’, a revolution which has seen the Earth’s 300 million Indigenous people stand, not in isolation against often hostile Nation States, but together in dialogue with governments, many of which had their genesis in colonial power.\textsuperscript{164}
\end{quote}

Integral to the success of Working Group for Indigenous Populations was its process and operation. Marcia Langton highlighted the significance of being treated equally in the Working Group, with equal status in many respects, equal speaking rights and equal treatment of reports, and recognition of the right of any Indigenous person to speak.\textsuperscript{165}

From 1985 the Working Group has concentrated on drafting standards for the promotion and protection of the rights of Indigenous peoples. A \textit{Draft Declaration of the Rights of Indigenous Peoples} was developed based on the rights of minorities under current human rights instruments and the rights of peoples as they are currently understood. The Working Group recognised that in order to adequately address the concerns of Indigenous peoples, the declaration must protect Indigenous peoples’ individual rights, distinct collective identity, education, economic and social

\textsuperscript{163} In 1986, the meeting of the Working Group, along with the Sub-Commission and its other subsidiaries, were cancelled for financial reasons. Each year the Aboriginal and Torres Strait Islander Commission publishes the Australian Contribution to the Working Group. These collections provide an interesting contrast by bringing together the statements from the Australian government, ATSIC and Indigenous community organisations including legal rights groups, education groups, Land Councils, among many others.


rights, land rights, self-government rights and self-determination rights. An intersessional working group of the Commission on Human Rights is now considering the draft declaration.

The Indigenous participants at the WGIP, while generally supporting the Draft Declaration, had expressed some reservations about the level of compromise throughout the Working Group's history right up until the final text was agreed upon. During the eleven years of the Working Group states' representatives argued strongly against the inclusion of 'peoples' rights', namely the right of self-determination. For example in 1983, Australia's representative, while supporting the concept of self-management, sought to 'avoid any suggestion that separate development or secession is at issue'. Eventually, through many years of dialogue, the importance of the right was recognised by all the participants and the final draft included, at Article 3, that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Many Indigenous people argued that without this recognition the Draft Declaration would not have reflected the aspirations of Indigenous peoples.

At the same time, some Indigenous people expressed disappointment at the inclusion of Article 31, which purports to elucidate the meaning of self-determination for


167 Commission on Human Rights, Resolution 1995/32, 3 March 1995, resolved 'to establish an open-ended inter-sessional working group ... with the sole purpose of elaborating a draft declaration, considering the draft ... "United Nations declaration of the rights of indigenous peoples" for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People'.


170 Article 3 is supported by preambular para. 14, that acknowledges the right of self-determination in the United Nations Charter and the human rights covenants (ICCPR and ICESCR) thus providing the link between Indigenous peoples and 'all peoples' as understood in those instruments.

171 Watson, Indigenous Peoples' law-ways, op. cit., p. 56. See also Sharon Venne, op. cit.
Indigenous peoples but implicitly excludes recognition of a right of secession.\textsuperscript{172}

Article 31 states:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

While the inclusion of this provision may ensure the passage of the draft through the levels of the United Nations and relieve some of the states’ paranoia over the threat of secession, it is arguable that any limitation of the concept of self-determination may fundamentally undermine it.

As a result of these reservations, Indigenous participants at the first session of the working group of the Commission on Human Rights were insistent that the declaration be accepted for consideration in its entirety.\textsuperscript{173} The representative of the Grand Council of Crees stated:

The Draft Declaration is perhaps the most representative document that the United Nations has ever produced, representative in the sense that its normative statements reflect in a more than token way, the experience, perspectives, and contributions of indigenous peoples. In a word, it is a document of equal dialogue and mutual recognition . . . [therefore] the Working Group should approach the Draft Declaration before it on the basis of a high presumption of validity of its provisions.\textsuperscript{174}

\textsuperscript{172} Watson, ibid., p. 57, with others, referred to this provision as ‘the shopping list’.

\textsuperscript{173} A statement adopted by consensus from the Indigenous organisations attending the preparatory meeting called for the adoption of the draft declaration by the sub-commission as it ‘reflected minimum standards for the survival of Indigenous peoples’ (Report of the Working Group established in accordance with the Commission on Human Rights Resolution 1995/32 of 3 March 1995, at its first session, UN Doc E/CN.4/1996/84, para 25). This sentiment was reiterated at the Second Session (Report of the Working Group established in accordance with the Commission on Human Rights Resolution 1995/32 of 3 March 1995, at its second session, UN Doc E/CN.4/1996/WG.15/CRP.7, para 7). At the first meeting in November/December 1995, it was agreed that: ‘In general, both Governments and Indigenous organizations agree that the draft . . . as adopted by the Sub-Commission constituted a sound basis for discussions to come’. See Report of the first session, paragraph 21. However, a draft agenda for the second session again caused concern with the Indigenous caucus calling for the immediate adoption of the declaration ‘without change, amendment or deletion’. The proposal was disregarded and the Indigenous people withdrew from the meeting restating concerns over the level of involvement of Indigenous peoples in the process stating that ‘this blatant disregard [was] a serious violation of the agreed process of the principle of full participation and the general goodwill and spirit of co-operation’. Statement of the Indigenous peoples caucus to the Chairman of the Intersessional open ended working group established to elaborate a draft declaration on the rights of Indigenous peoples, 21 October 1996. For a full report, see Sarah Pritchard, ‘The United Nations and the making of a declaration on Indigenous rights’, Aboriginal Law Bulletin, vol. 3(89), 1997, p. 6. The Indigenous delegation returned to the plenary on 25 October.

\textsuperscript{174} Report of the First session, op. cit.
For the same reasons, and to protect the integrity of the Draft Declaration, concern has been raised over the level of involvement of Indigenous peoples under the more restrictive rules of the Commission's working group. Involvement and meaningful participation of Indigenous peoples was so important to the drafting process. The struggle to re-establish such a level of engagement has resulted in some frustration for Indigenous participants in this new forum, resulting in a withdrawal from the 1996 meeting.\textsuperscript{175}

Despite the uncertainties and concerns for the Draft Declaration, Michael Dodson commented on the value that Indigenous peoples continue to place in the process:

\begin{quote}
We have not yet lost faith in the capacity of the Working Group, in time, to arrive at an understanding of the aspirations and entitlements of Indigenous nations and peoples.\textsuperscript{176}
\end{quote}

Standards that emerge from the Draft Declaration, largely reflecting Indigenous aspirations, will have significant import. They will give recognition to the claims of Indigenous peoples as legitimate claims against the states. The moral persuasiveness of the WGIP has already been evident, as has the impact of 'intercultural dialogue' on the state actors. In the midst of the tension at the 1996 meeting of the working group of the Commission on Human Rights, the Canadian government, previously opposed to Article 3 and the use of the term 'peoples', stated that:

\begin{quote}
the government of Canada accepts a right of self-determination for Indigenous peoples which respects the political, constitutional and territorial integrity of democratic states.\textsuperscript{177}
\end{quote}

This turn around highlighted the impact of sustained dialogue and openness on the part of states can achieve.

\textsuperscript{175} Indigenous participants walked out in protest with only the Australian delegation remaining. For comment, see Watson, Indigenous Peoples' law-ways, op. cit., p. 58, note 35. See also, Pritchard, ...the making of a declaration, op. cit., pp. 7-8.

\textsuperscript{176} Michael Dodson, Statement on behalf of the Central Land Council, Indigenous Woman Aboriginal Corporation, NAILSS and the NSW Aboriginal Land Council, reported in Pritchard, ...the making of a declaration, op. cit., p. 8.

\textsuperscript{177} Report of the second meeting, op. cit., para. 309. Note comments by Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, also on behalf of ATSIC and NAILSS, Reported in Pritchard, ...the making of a declaration, op. cit., that the Canadian statement 'is testimony to what is possible in building understanding and respect for these concepts [and] confirms our faith in the value and importance of this process'. See also the Report of the Second meeting, para. 319. A similar transformation could be observed in the Australian government representatives at the WGIP, although the impact of the change in government has yet to be assessed.
Proposals for strengthening and renewing the role of the WGIP appear to have the support of governments.\textsuperscript{178} However, the Working Group would have no role in hearing complaints by Indigenous peoples against states for abuse of human rights and no mechanisms to investigate claims or question governments. In proposing a renewed structure for the Working Group, members have suggested that other 'competent' bodies within the United Nations system would be better to undertake complaints.\textsuperscript{179} However, other bodies within the United Nations have been inaccessible for Indigenous peoples’ self-determination claims.\textsuperscript{180}

The Human Rights Committee, established under the \textit{International Covenant on Civil and Political Rights}, the Committee on the Elimination of Racial Discrimination, established under the \textit{Convention on the Elimination of All Forms of Discrimination}, and the Committee Against Torture, established under the \textit{Convention Against Torture} all have individual complaints procedures against states that have signed the relevant instruments and agreed to the procedures.\textsuperscript{181} Attempts by Indigenous peoples to access these procedures have been relatively unsuccessful. While upholding individual rights against discrimination, in the \textit{Lovelace} and \textit{Kitok} cases, claims by Indigenous peoples under the right of self-determination would not be entertained.\textsuperscript{182} In \textit{Ominayak v Canada} the Human Rights Committee determined that the ‘individual’ complaints procedure under the Optional Protocol could not

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{178}] Prior to the change in government this certainly included Australia. See statements by Damir Ivkovic, on behalf of the Australian (Keating-Labor Party) government, in ATSIC, UN Working Group on Indigenous Populations, 13th Session, The Australian Contribution, 1995. On the future role of the Working Group, Agenda item 8, p. 107, ‘Australia sees the Working Group as having a continuing and important role. The WGIP performs a valuable function as the only forum in which indigenous peoples can freely raise their concerns’. Also, p. 113, on the consideration of a permanent forum (Agenda item 9), ‘Australia strongly supports the establishment of a permanent forum for Indigenous peoples within the United Nations system’.\textsuperscript{179}


\item[\textsuperscript{182}] \textit{Lovelace v Canada} UNDoc CCPR/C/OP/1(1988); and \textit{Kitok v Sweden} UNDoc CCPR/C/33/D/197/1985(1988).
\end{itemize}
\end{footnotesize}
accommodate communications concerning the collective right of self-
determination.¹⁸³ This direction was confirmed in the Mikmaq case where the
Committee rejected arguments based on self-determination as beyond the
competence of the Committee.¹⁸⁴ In the absence of effective complaint procedures,
the forum provided by the review of developments at the WGIP is valued by
Indigenous peoples, as evidenced by the high levels of participation.

The limitation of the international system remains the preference for maintaining the
status quo of state sovereignty. Reflecting on the difficulties of states’ resistance,
Michael Dodson argued that:

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

> And when people are not free they will fight for that freedom. And they
> will continue to fight for that freedom until it is theirs.¹⁸⁵

The principles of non-intervention and territorial integrity, traditionally the
cornerstones of states’ expression of self-determination, should not be presumed to
take precedence over other norms of international law, in particular the right of
peoples to self-determination.

The preponderance of academic opinion agrees that Indigenous peoples’ right to self-
determination, including the right to independent statehood, could be recognised
within the framework of current international law.¹⁸⁶ Taken together, the
international instruments show a systematic affirmation of the right of all peoples to
self-determination and, as Michael Dodson has observed, ‘[T]he fact that we are

Instead, the committee attempted to fit the claims within an individual right to participate in
government.
¹⁸⁵ Dodson, Towards the exercise of Indigenous rights, op. cit., p. 75.
¹⁸⁶ For an assessment of the approaches see, for example, Iorns, op. cit.
colonised within geographical borders of existing states has in no way attenuated the impact of colonisation, which for us has been equally heinous'.

Recognition of Indigenous peoples as colonised peoples will require a fundamental shift in thinking and in the assumptions upon which previous approaches have been based. This would appear to be a difficult task when, as we have seen, the exclusion of Indigenous peoples from recognition has its roots in the earliest principles of international law. If Tully is correct, then the change that is required can only come from dialogue, where equality and respect are truly practised and Indigenous voices heard. For many Indigenous peoples the Working Group has provided this opportunity.

Conclusion

Examining the international response to the claims of Indigenous peoples reveals the realities of power in the international sphere and also the limits of its founding theories. The jealously guarded authority and territory of existing states is supported by the international system. However, Indigenous peoples' claims do not, of necessity, demand concessions in this statist sphere. The conflation of sovereignty and statehood in international law feeds the resistance to Indigenous peoples' claims, as a threat to the ideal of an homogenous state. International law reinforces the ideal of uniform institutions and universal participation as the measures of legitimate sovereignty. Also, the primacy of individual rights discredits the collective claims of Indigenous peoples whose unique status has not been recognised.

Many Indigenous people have embraced the move toward rights discourse. Indeed Robert Williams Jr. described its adoption as 'an act of self defence' because, 'rights

187 Dodson, Towards the exercise of Indigenous rights, op. cit., p. 69.
discourse enables indigenous peoples to understand and express their oppression in
terms that are meaningful to them and to their oppressors'.

Further, Williams argued that rights discourse can be liberating for Indigenous
peoples ‘if applied and systematised correctly’, that is, to include collective rights.
Indeed, in relation to the assertion of self-determination, Michael Dodson argued
that, ‘[t]he level of fervour with which we assert the right is a reflection of its
profound and pervasive violation’.

This discussion illustrates that supreme sovereignty and the individual as sole
possessor of rights are part of legal and political language. All of these emerge from
a particular tradition of thought that has become universally accepted and permeates
the institutions and doctrines to which Indigenous peoples appeal. The final point to
highlight is that the international law does not necessarily hold the answer for
Indigenous peoples’ struggle for self-determination. Like the other tools available,
international law remains a part of a comprehensive strategy, in which use is also
made of the domestic courts.

III. The language of self-determination

The assertion of identity, autonomy and authority and the demand for recognition
and respect have led Indigenous peoples to embrace the language of self-
determination. The attraction of this language is in the force of its imagery, in its

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188 Robert A. Williams Jr, ‘Encounters on the frontiers of international human rights law: Redefining
the terms of Indigenous peoples’ survival in the world’, *Duke Law Journal*, 1990, p. 662. In contrast,
Flanagan, op. cit., p. 84, argued that although Aboriginal people are ‘taking the opportunity to restate
their ancient view of themselves’, the influence of legal tradition upon their vocabulary produces
anomalies. In particular, self-determination claims are asserted through doctrines originally founded
in hierarchical relationship of dependence.

189 Williams, ibid., p. 662, argued that this would require that rights regimes include collective rights
and secondly to appreciates the value of Indigenous peoples’ story-telling.

190 Dodson, *Towards the exercise of Indigenous rights*, op. cit., p. 68.
meaning, and also in the application of the concept in international law and politics. I use the term ‘self-determination claims’ throughout the thesis to describe the broad array of claims made by Indigenous peoples against the state as peoples. Therefore, claims that assert oppression, such as claims to equality and non-discrimination, claims to equal protection of the laws, as well as assertions of collective identity, through self-government, land titles and the recognition of Indigenous laws and institutions come under the broad penumbra of self-determination claims. These are not claims for special rights or privileges. Rather, they are claims for recognition of the prior and continuing authority of Indigenous peoples, respect for their autonomy and their status as the first peoples of the land. This issue of respect is fundamental to Indigenous peoples’ claims against the state.

Self-determination has been expressed as the freedom of a people to determine their own political status, and the freedom to pursue their economic, social and cultural development.\(^{191}\) In this sense, self-determination is not, in itself, secession or self-government or the right to vote. Rather, it is seen as a statement of principle, that whatever the nature of the institutions of government, they be chosen by the freely expressed will of the people.\(^{192}\)

It has been suggested that self-determination is ‘merely a statement of a problem and not a solution for it’.\(^{193}\) But self-determination is better understood as a statement of the appropriate way to respond to the aspirations of Indigenous peoples. Alternatively, it could be said to be a description of the nature of the process for attaining outcomes. Irene Watson explained that:

> Self-determination is a term adopted by Indigenous Peoples to express to the world who we are. And by what path or process we should proceed

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\(^{191}\) This is the language used in international instruments discussed above. More specifically, Umozurike, op. cit., p. 192, has characterised self-determination as including: 1) government according to the will of the people; 2) absence of internal or external domination; 3) the free pursuit of economic social and cultural development; 4) enjoyment of fundamental human rights and equal treatment; and 5) the absence of discrimination on grounds of race, colour, class, caste creed or political conviction. Compare Buchheit, op. cit., p. 14, who defined external self-determination as the expression, by a group of people, of their right to pursue their political, social, cultural and economic wishes without the interference or coercion of outside states.

\(^{192}\) Pomerance, op. cit., pp. 26-34. See also Thornberry, op. cit., pp. 868-9.

in gaining respect and recognition as Peoples and custodians of the earth our mother.\textsuperscript{194}

The attraction is in the emphasis on process as the essence of self-determination. In this context, self-determination respects a people's autonomy and authority in decision-making.

With this understanding of process, it has been argued that self-determination should be viewed as a continuum of outcomes up to and including secession.\textsuperscript{195} The possibility of territorial and non-territorial autonomy remains central to the self-determination process.\textsuperscript{196} Yet the ultimate mode of self-determination that emerges in the circumstances of a particular case must meet the demands of the Indigenous people concerned. The idea of 'self' and identity, and the power to 'determine' seems to provide recognition of the many aspirations implicit in Indigenous peoples' claims. It is the characteristic of self-rule that underscores the claims of Indigenous peoples.

In non-Indigenous legal and political theory self-determination has been associated with statehood and the conventions of modern theories of sovereignty. The impact of this association is imperative not least because states, governments and many theorists use the rhetoric of sovereignty to preclude recognition of Indigenous peoples' claims. Examining the reactions to self-determination claims in an international context, Hurst Hannum noted that:

Sovereignty is the cornerstone of international rhetoric about state independence and freedom of action, and the most common response to initiatives which seek to limit a state's action in any way is that such initiatives constitute an impermissible limitation on that state's sovereignty.\textsuperscript{197}

\textsuperscript{194} Watson, Indigenous Peoples' law-ways, op. cit., p. 55.
\textsuperscript{195} Pomerance, op. cit., p. 75.
\textsuperscript{196} Heraclides, op. cit., p. 11. Similarly, James Anaya, op. cit., p. 409, argued that the self-determination principle is capable of embracing 'more nuanced interpretations and applications, particularly in an increasingly interdependent world in which the formal attributes of statehood mean less and less'. As a result, self-determination should be seen as 'a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics'.
\textsuperscript{197} Hannum, op. cit., p. 14. Although I take issue with Hannum's suggestion early in his book, at p. 15, that 'sovereignty is an attribute of statehood and only states can be sovereign', this does set up the difficulty for Indigenous peoples asserting self-determination in the face of states' assertions of sole sovereignty.
Yet, many Indigenous peoples also voice their claims in the language of sovereignty, although their understanding of sovereignty may be different to that put forward by the state. Boldt and Long argued that the appeal of sovereignty, similar to that of self-determination, is in its vagueness, allowing people to ‘project onto it a promise of most of their political, socio-cultural, and economic aspirations’.198

Commentators have described the claims of Indigenous peoples as a third movement of decolonisation or anti-imperialism, by those who were excluded and suppressed by the previous waves of decolonisation and state building.199 The analogy with earlier struggles for independence and freedom from colonial domination further elucidates the attraction of the language of self-determination and sovereignty.200 However, the first movements of anti-imperialism and decolonisation sought independence and self-government within an accepted framework of nation-state building, with its presumptions of uniformity and legitimacy. The difficulty for Indigenous peoples is that their claims often question the dominant framework. Irene Watson suggested that:

Indigenous peoples question not only by what right the colonial power has come to exist but also to what extent colonial rules and regulations become incorporated into indigenous legal systems . . . The question remains to be answered, how far is the state prepared to go, in peeling away the layers of the imposed legal system? Are they prepared to undress themselves, and in their alien nakedness surrender to the law of the land?201

While Indigenous peoples do not necessarily seek secession or independent statehood, their claims challenge the legitimacy of their oppressor’s authority and

198 Boldt and Long, op. cit., p. 334. See also Hannum, op. cit., p. 14, ‘the content of the term . . . is at least murky, whatever its emotional appeal’. Peter Russell, op. cit., p. 17, suggested that Indigenous peoples assert sovereignty specifically because non-indigenous peoples deny that they have it.
199 See, for example, Tully, Strange Multiplicity, op. cit., p. 16, drew the analogy with earlier struggles against imperial systems, initially against the papacy and Holy Roman Empire and the absolutist regimes in societies within Europe and then the continuing progression of former colonies freeing themselves from European imperialism. On these movements, see generally, Mattern, op. cit. Compare Peter Russell, op. cit., p. 4, who saw the first wave of decolonisation in the emergence of independent states such as the United States, Canada, New Zealand and Australia from colonial rule and the second in the process of nation building throughout Europe, Africa and Asia, after World War II.
200 Tully, Strange Multiplicity, op. cit., p. 16.
most importantly they question the universality of the framework against which their
claims are judged.\textsuperscript{202}

The legitimacy of claims, in the first instance, is tested by the structures and
language of alien institutions. But even where these claims are acknowledged, they
are then assessed according to the same conventional criteria designed to exclude
them. Demands for recognition of sovereignty, nationhood, or self-determination are
all assessed in terms that presume the very universals under challenge, including the
uniform state with its centralised, hierarchical systems of legal and political
institutions.\textsuperscript{203}

Concern must also be raised over the impact of the process on the claimants
themselves. It is difficult to imagine that these alien concepts can be relied upon
without some of their substance being imported into Indigenous ways. Peter Russell
identified the irony in Indigenous peoples' success in the courts and international
forums:

\begin{quote}
The use of these terms reflects more than simply a change in the use of
symbols. It reflects a significant degree of societal assimilation. Fourth
world peoples like third world peoples will find themselves becoming
less distinct from the dominant society as they adopt that society's
techniques to resist its domination.\textsuperscript{204}
\end{quote}

The influence of European, patriarchal, hierarchical, ideas and institutions is a subtle
aspect of assimilation.\textsuperscript{205} In response, Indigenous peoples continue to assert the
value of their own ways, which survive in the face of centuries of attempts at
coercive assimilation.

\textsuperscript{202} Peter Russell, op. cit., p. 2, argued that the challenge in this third movement of decolonisation is
that 'it must make it possible for the decolonized and the former colonizers not only to share the same
territory but to share membership in a common [multi-national] political community'.
\textsuperscript{204} Russell, op. cit., pp. 6-7, also noted this process in the decolonisation process in Africa. The term
'Fourth world' peoples has been used to refer to Indigenous peoples who often live in 'third world'
conditions in first world, wealthy countries.
\textsuperscript{205} Boldt and Long, op. cit., pp. 335-7. This problem has been of particular concern to Indigenous
women. See for example, in the case of land claims hearings, Deborah Bird Rose, 'Land rights and
deep colonising: The erasure of women', \textit{Aboriginal Law Bulletin}, vol. 3(85), 1996, p. 9. See also
Annie Keely, 'Women and land: The problems Aboriginal women face in providing gender restricted
evidence', \textit{Aboriginal Law Bulletin}, vol. 3(87), 1996, p. 4-5 and Deborah Bird Rose, 'Women and
land claims', \textit{Land, Rights, Laws: Issues of Native Title}, Issues Paper No. 6, Native Title Research
Unit, AIATSIS, January 1995, p. 4.
As a result, however, Indigenous peoples currently face an ‘impasse’. Either they seek recognition, not on their terms but on the terms of ‘the master’ or they can refuse to engage in the process and resort to resistance.\textsuperscript{206} The fact that these continue to be the only options available merely underscores the continuing process of colonialism. However, an alternative exists. Irene Watson argued that movement away from colonialism can only occur where the state is prepared to question its own institutions and ways of thinking in order to listen to Indigenous peoples claims.\textsuperscript{207}

On the few occasions where such a willingness has been demonstrated, Indigenous peoples have shown their readiness to engage in a dialogue. The discussion in this chapter has shown that many Indigenous peoples are enthusiastic about international law and international forums where there is an encouragement for participants to listen to the voices of others and not to speak for others, and reciprocally, of not being compelled to speak in the dominant language and traditions of discourse.\textsuperscript{208}

Noel Pearson recognised the significance of the High Court’s recognition of customary land titles in a similar vein:

> For a long time, the only political currency which Aboriginal people could use was their refusal to be involved. Now that the non-Aboriginal legal system has offered something in the way of rights, however narrow, to refuse to engage in the game and to fail to appreciate the rules and its limitations – even if our purpose is to disrupt the game – no longer seems smart.\textsuperscript{209}

Pearson explained that Indigenous peoples may be willing to negotiate with the state, where the state shows a willingness to listen to the claims that Indigenous peoples make. Pearson also acknowledged, however, that any negotiation requires an understanding of the limitations of the process.\textsuperscript{210}

\textsuperscript{206} Tully, \textit{Strange Multiplicity}, op. cit., p. 56.
\textsuperscript{207} See Watson, Indigenous Peoples’ law-ways, op. cit., p. 58.
\textsuperscript{208} This observation has been made by others. See, for example, Tully, \textit{Strange Multiplicity}, op. cit., p. 34. Of course, the international arena has not been entirely receptive to Indigenous peoples claims and the willingness of states to listen to their voices has not always been forthcoming or wholehearted.
One of the primary problems, as Jeremy Webber suggested, remains the limitations of the language of the non-Indigenous participants in this debate:

the words we use to describe our world are always inadequate and provisional. They are in large measure artefacts, made in another time for another purpose . . . [A]fter all, here as elsewhere, the cross-cultural debate occurs predominantly through the use of non-Aboriginal concepts, in part because they are the only concepts non-Aboriginals know. These forms of expression need refinement and reconception as our situation changes, as we come to accept the value of other cultures, and as our understanding grows.211

From this acknowledgement, Tully argued that non-Indigenous people are capable of freeing themselves from ‘deeply ingrained, imperious habits of thought and behaviour’ through ‘dialogue’, rather than the imperial monologue of conventional modern theory.212

Recognising and respecting participants comes through allowing them to speak in their own language and ways. Tully explained that this ability to see and understand ‘aspectively’ is an inter-cultural dialogue already familiar to Indigenous peoples but one that our own culture has yet to embrace.213 Respecting Indigenous peoples in their own terms must overcome the powerful norm of uniformity in conventional theory that permeates the ways of thinking in European-derived cultures.

211 Webber, op. cit., p. 136 (Parentheses omitted). Here Webber echoes the thoughts of the philosopher Ludwig Wittgenstein whose own struggles, particularly with his class, led him to theorise on the link between culture and language. In its simplest form, Wittgenstein’s argument was that ‘the limits of my language are the limits of my world’. See Ludwig Wittgenstein, Philosophical Investigations, translated by G. E. M. Auscombe, 3rd edn, Blackwell, Oxford, 1974. For an explanation of Wittgenstein on culture and constitutionalism, see Tully, Strange Multiplicity, op. cit., pp. 103-13.


213 Tully, Strange Multiplicity, op. cit., pp. 24-5, 26, 58.
Conclusion

The political theory of sovereignty provides two useful clues to the modern conception of self-determination. First, it clearly delineates the nature of internal sovereignty as the source of authority within a community. Second, self-determination, as it is currently understood as a right of ‘peoples’, is a reflection of the notions of popular sovereignty, which posits the ultimate authority of government in the people. Sovereignty also has an external aspect, which respects the autonomy of other sovereign peoples. The view of sovereignty that emerged from modern theory, however, is based on a fiction of homogeneity that cannot be sustained in the context of multi-nation societies. The norms of liberal democracy and individual rights also create an ideological barrier to recognition of Indigenous peoples through assumptions of universality. The impact of these assumptions on Indigenous peoples is the lived experiences of coercion, assimilation and genocide.

On a more fundamental level, however, the idea that ‘the people’ are sovereign and entitled to self-rule accommodates Indigenous peoples’ assertions of authority and autonomy. Freedom from internal domination in the enjoyment of self-determination is an important measure of the legitimacy of the exercise of power within a state. An absence of domination demands a recognition of the interests of Indigenous peoples. Internally, the ability of a people to determine the political and other structures that will facilitate distinct survival is the measure of self-determination.

At the international level too, the ideal of consent is defined in deference to the conception of the nation-state. In defining the content and scope of international law states have attempted to limit international recourse for Indigenous peoples through deliberate exclusion. The ‘selves’ entitled to self-determination under international law were arbitrarily distinguished from Indigenous peoples. The fundamental political good of self-rule and the international norm of equality of respect for
peoples, could have extended to Indigenous peoples as a natural connection to other colonised peoples. However, the statist theory has defined the limits of self-determination, based on current state attitudes toward the inviolability of their own sovereignty. The stumbling block continues to be the unquestioning adherence to the assumption of homogeneity.\textsuperscript{214}

While the use of the term ‘peoples’ has created confusion, the principle of self-determination has been entrenched in international law and paved the way for evolution and development. \textit{The Draft Declaration on the Rights of Indigenous Peoples}, prepared by the Working Group on Indigenous Populations provides an opportunity for an international response to the disadvantage faced by Indigenous peoples. The \textit{Draft Declaration}, and the mechanisms of involvement that have emerged around it, heralds a change in attitude at the international level. The perspective brought by Indigenous presence in the international arena, allows claims to be assessed on the basis of world order logic that is mindful of the statist claims but also receptive to societal claims of a non-statist character, including those of ‘captive nations’.\textsuperscript{215}

When Indigenous peoples bring these same claims into the domestic sphere the assumptions persist. The assumption of a supreme sovereign and the assumption that the individual is the sole possessor of rights are the foundation of Australian legal and political institutions. The discussion in this chapter therefore provides a background to the approach of the courts toward self-determination claims.

\begin{flushleft}
\textsuperscript{214} Buchheit, op. cit., p. 17 lamented:

\begin{quote}
One searches in vain, however, for any principled justification of why . . . a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of the cartographers, annexed to an independent state must forever remain without the scope of the principle of self-determination.
\end{quote}

See also Pearce, op. cit., pp. 377-8, who noted that the International Court of Justice definition clearly encompasses Indigenous peoples of the Americas, in contrast to other international documents. See also Pomerance, op. cit., pp. 16-17, 41-2.

\textsuperscript{215} Falk, op. cit., p. 593.
\end{flushleft}
Chapter 3

The utility of the Courts for the Assertion of Indigenous Self-determination Claims

The Australian courts, like their counterparts throughout the common law world, have resisted claims that question the central ideas of sole sovereignty and individual rights underpinning the liberal state. In response to the High Court's attempt to recognise Indigenous systems of land titles in *Mabo v Queensland [No. 2]*, Michael Mansell commented that:

The court did not overturn anything of substance, but merely propounded white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land . . . If *Mabo* represents the best that the legal system has to offer, then Aborigines will be put off by the effort and costs involved in litigating for such a puny reward. *Mabo* offers something for those who are grateful for small blessings, but nothing in the way of justice.

Despite this type of criticism, Indigenous peoples continue to assert self-determination claims through the courts. Indigenous peoples using the courts need

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to consider the structural and cultural barriers to develop a strategy for maximising the utility of the common law. At the same time they must avoid legitimising the role the courts have played in the history of Indigenous peoples relations with the Australian state.

This chapter examines the difficulties of asserting cultural claims in an alien forum. Part one provides an overview of the strategic advantages and limitations of asserting Indigenous peoples’ self-determination claims through the courts, first as a forum for advancing claims against the state, and second for achieving substantive outcomes. Two central issues emerge that require further examination. Part two considers the relationship between the courts and other institutions of the state, and the impact of institutional limitations on the courts’ capacity to achieve social change. Part three examines the specific discourse and culture of the courts and the impact these characteristics have on the substantive results of court cases.

I. Advantages and limitations of using the courts: Overview

Cultural and institutional limitations have an impact not only upon the utility of the courts, but upon their legitimacy as decision-makers with respect to Indigenous self-determination. It is not merely a concern that the courts may fail to fully appreciate an alternative cultural perspective. Self-determination claims bear upon the relationship between Indigenous peoples and non-Indigenous society. Demands for respect for Indigenous belief systems, acceptance of responsibility for past wrongs and, above all, justice for Indigenous peoples in the present, are the cornerstones of self-determination claims.
It is arguable that Indigenous peoples continue to come before the courts more out of necessity than from any acceptance of the legitimacy of the institution. The necessity arises from the process of colonisation itself that has led to the domination of one society and its laws over another. As a result of the power relations with the colonising state, Indigenous peoples cannot invoke their own law in negotiating for self-determination. Indigenous laws and institutions, while they persist, are not recognised by the dominant legal system as a site for determining these issues. Therefore, if Indigenous peoples are to assert legal rights against the state they have little choice but to engage with the legal structures of the state.

Through Indigenous peoples' continuing struggles against colonialism direct concessions from the state are observable. While the gains have been moderate, it could be suggested that any recognition is significant given the fundamental challenge the claims of Indigenous peoples pose to the state. Understandably, however, the role of the courts in gaining recognition of Indigenous peoples' claims is subject to considerable debate. Some have suggested that the courts are a useful indicator of trends and patterns in Indigenous - non-Indigenous political relations. Some acknowledge the strategic advantages of the courts as a forum, and some see a potential role for the courts in substantially shaping relations between Indigenous and non-Indigenous people. In contrast, others question the ability of courts to effect social change at all, and criticise the expenditure of resources for litigation.

There are a number of key issues that are contested in this debate, over and above the consideration of the outcomes of particular cases. The ability of courts to implement their decisions has come under particular criticism, while the nature of the forum and

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4 ibid., p. 66.
the strategic utility of the courts are considered their greatest advantage. The relative powerlessness of Indigenous peoples, in political terms, centres the debate on the need to use the tools that are available. The question is at what cost.

**The enforceability of common law decisions**

The value of the courts in Indigenous peoples’ strategies must be assessed in the context of the structural relationship between institutions of the state. The enforceability of court decisions depends, to a large degree, on other arms of government for their implementation. For this reason, some have suggested that the courts cannot protect the rights of minorities or achieve social change and that political alternatives should be the focus of social movements. The difficulty of implementing a particular decision can be contrasted with the value of the recognition of rights and the development of beneficial doctrines over time.

When Chief Justice Marshall of the United States Supreme Court held that state government laws could not interfere with the sovereign-to-sovereign relationship between the Cherokee Nation and the Federal government, United States President, Andrew Jackson, is reputed to have remarked, ‘John Marshall has made his decision, now let him enforce it’. The decision in *Worcester v Georgia* was not implemented and the Cherokee were forcibly removed from their lands. A. V. Dicey, the influential English constitutional lawyer, used the example of the *Cherokee Nation case* to illustrate the weakness of the courts when they are in conflict with the

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8 The trek of the Cherokee, Choctaw, Creek, Chicksaw and Seminole Indians from their ancestral lands in Georgia to reservations eight hundred miles west (between 1831 and 1842) was characterised by acts of genocide including poisoning and violence. The most devastating march of the Cherokee, in 1838-9, became known as the ‘trail of tears’ and only one quarter of the Cherokee population survived the exodus. See briefly, Carl Waldman and Molly Braun, *Atlas of the North American Indian*, Facts on File, New York, 1985, pp. 183-5. For more discussion see Anthony Wallace, *The Long Bitter Trail: Andrew Jackson and the Indians*, Hill & Wang, New York, 1993.
interests of the state and without the support of the executive. Marshall CJ himself commented on the limits of the ‘Courts of the conqueror’ to question the exercise of brute force underpinning the claims to sovereignty, jurisdiction and title to lands by the colonising state.  

It has been argued that the courts’ inability to implement decisions is the critical factor in their failure as tools for social reform. This is a serious criticism of the utility of the courts for Indigenous peoples asserting self-determination claims. This criticism centres not only on the limits of the courts’ willingness to challenge the legitimacy of acts of state but also on their capacity to effect a change in the relations of power within the state.

However, these criticisms often fail to pay sufficient regard to the long term development of the law from a particular decision. For example, *Worcester v Georgia* came to form the basis of the ‘domestic dependent nation’ doctrine that recognised a limited form of sovereignty inherent in Indian nations. Repeatedly, Indian nations have returned to the United States Supreme Court to enforce the decision in particular instances. The result of this evolution is a legal doctrine that limits the exercise of power by governments through recognition of a sovereign sphere of autonomy in the Indian nations. In this respect the doctrine could be

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11 Making this argument, Rosenberg, op. cit., p. 21, relied on cases such as the United States Supreme Court decision in *Brown v Board of Education* 347 US 483 (1954), in which the Supreme Court held that the segregation of schools on the basis of race was unconstitutional. Rosenberg, pp. 42-72, argued that due to insufficient popular support for the decision, the lower courts failed to implement the decision and there was no political will to enforce de-segregation. It was more than ten years before any significant change in segregated schooling occurred. Rosenberg suggested that the decision may have even heightened opposition to the civil rights movement.

12 See also *Cherokee Nation v Georgia* 31 US (5 Pet) 1 (1831). The Cherokee nation cases form the basis of the judicial recognition and therefore legislative recognition of the sovereignty (though limited domestically) of Indian nations, their jurisdiction over territory and their exclusive relationship with the federal government to the exclusion of the States. See generally Frickey, op. cit. For a view of the development of the law in the United States, based on these early decisions see, for example, *United States v Santa Fe Pacific Rail Co.* 314 US 339, at p. 345 (1941); *Tee-Hit-Ton v*
described as quasi-constitutional, although its genesis is from within the common law.

An example of the limits of the courts' implementation powers was seen in Australia with the claim by John Koowarta, and the Winychanam group of Aurukun, against the Queensland government. John Koowarta was denied the right to purchase the Archer River Holding pastoral lease in Queensland, through the Aboriginal Land Fund Commission. This denial was solely on the basis of Aboriginality. In the High Court, counsel for Mr Koowarta argued that such a decision was inconsistent with the Commonwealth *Racial Discrimination Act 1975*. The High Court agreed that the Queensland government had discriminated against Mr Koowarta in not allowing the purchase of the lease. Instead of Mr Koowarta getting his land, the Queensland government blocked the purchase by creating a national park over the lease property. To this end, Frank Brennan argued that acting for groups whose rights are highly politicised would continue to require a balancing of the prospect of success in litigation against the risk of legislative or executive derogation from the claims. After all, the defendant is the State 'whose representatives have no compunction in pillorying the courts and moving the goal posts so that the interests of the majority remain secure'.

In contrast, during the Mabo litigation the Queensland government sought to circumvent proceedings by passing the *Queensland Coast Islands Declaratory Act 1985* which deemed complete beneficial ownership of all of Queensland to be in the Crown regardless of whether native title now or had ever existed. This time, the courts were able to protect the interests of the claimants. The High Court declared

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16 *Queensland Coast Islands Declaratory Act 1985* (Qld), Section 3.
that the legislation violated the *Racial Discrimination Act*, relying on the precedent of *Koowarta's case*.

A majority of four judges determined that the Queensland Act denied the Meriam people rights in their lands while other Australians were unaffected by the legislation. Therefore the legislation was contrary to the principle of equality before the law enshrined in section 10 of the *Racial Discrimination Act*. The primary difference in the reasoning of the majority and the minority was not whether the courts could strike down discriminatory legislation, or whether this legislation was indeed discriminatory, but whether the claim could be entertained prior to a determination of rights to land being made.

After ten years of litigation the High Court recognised Indigenous peoples' laws and rights over lands. The Meriam peoples were declared to hold title to their lands 'as against the whole world'. Although very little land has been transferred to Indigenous peoples since the *Mabo* decision, the decision fundamentally changed the relationship between Indigenous peoples and the Australian state and society.

However, the delay and expense in achieving reform through such a process appears to support arguments that courts are not structured for social reform. Rosenberg stated that:

> In general . . . not only does litigation steer activists to an institution that is constrained from helping them, but it siphons off crucial resources and talent and runs the risk of weakening political efforts.

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19 ibid., at p. 196, per Mason CJ, and at p. 243, per Dawson J; but contrast Wilson J at p. 206.

20 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 217, per Order of the Court.

21 Apart from the original High Court declaration over the Murray Islands, there have been only two determinations of native title under the processes set up by the *Native Title Act 1993* (Cth). The first was a determination that the Dunggutti people were native title holders of land at Crescent Head in New South Wales, and that compensation should be paid for extinguishment by compulsory acquisition. (NNTT ref # NC94/5). The second was a determination of native title over Aboriginal reserve land belonging to the Warra peoples of the Hope Vale community of Cape York (NNTT ref # QC96/15).

Arguing that the courts cannot be removed from the political system in which they operate, Rosenberg concluded that to expect change through the courts is a romantic but unrealistic vision of rights winning over politics.\(^{23}\)

Indigenous peoples may question whether an alternative approach that concentrated efforts on direct political action would have significant effect in relation to Indigenous self-determination. The limits of the political, social and economic power of Indigenous peoples in relation to the state constrain their ability to disrupt the political centre. Thus, to a large degree, Indigenous self-determination depends upon the will of the state to permit it, regardless of the theoretical, legal or moral authority of the claim.\(^{24}\) Instead, it has been argued that the greatest self-determination gains have been achieved through Indigenous peoples appropriating the state bureaucracies and using the legal processes to their own advantage.\(^{25}\)

It is in this context that Werther argued the incremental nature of self-determination gains has been the essence of their success.\(^{26}\) For Werther, this reflects the ability of Indigenous peoples to ‘work quietly’ within existing state systems and structures.\(^{27}\)

If an incremental approach is appropriate, then the courts may be better suited to the

\(^{23}\) The basis of this criticism is that the courts’ ability to effect change has been overstated by social reformers who have ‘reified and removed the courts from the political and economic system in which they operate’. Rosenberg, ibid., p. 343, did not turn his mind to the specific circumstance of Indigenous self-determination claims, concentrating on the Black American civil rights movement, women’s pro-choice movement and less substantially on the environmental movement. Indeed Cass Sunstein suggested that Rosenberg’s own conditions for successfully using the courts may well have been met in the case of Indigenous peoples in Australia. Sunstein, Personal Communication, 13 September 1996.

\(^{24}\) Werther, op. cit., pp. 59-61, 82, 98 argued that Indigenous peoples are unable to have significant influence over non-Indigenous parties due to their small, dispersed population and their economic and social marginalisation.


\(^{26}\) Werther, op. cit., p. 98.

\(^{27}\) ibid. However, Werther, p. 59, acknowledged that, ‘[f]or aboriginal people there may be instances when the symbolic and mobilisation benefits of having their own national political party outweigh the costs, but this must be decided with a firm understanding that effecting change directly through the electoral mechanism is almost impossible’. See also Peter Leslie, ‘The role of political parties in
claims of Indigenous peoples than is suggested by Rosenberg’s analysis. The development of doctrines over time, characteristic of the common law, fits within this incremental strategy. The implementation of specific decisions is therefore better understood as part of a broader, longer-term view of what is required to achieve social and political change from within the structures of the colonial state.

The advantages of the courts’ processes

Apart from the development of common law doctrine, the characteristics of the court as a forum arguably hold particular advantages for Indigenous peoples’ self-determination claims. The freedom of the courts from the vagaries of political and electoral pressures enables them to determine issues outside the public debate or popular opinion. This independence is imperative for the assertion of self-determination claims that may threaten the privileges of the majority. Claims for the protection and promotion of the rights of minorities are bound to be politically unpopular. Therefore, courts are able to act where other arms of the state are unable or unwilling.

The courts are also thought to provide equal access and influence in that the adversarial process allows Indigenous claimants to meet the state on a more equal footing, at least in terms of the presentation of argument. It is argued that the legal processes provide greater assurance that all interested parties will be heard and that all relevant information will be brought to bear. The rigorous assessment of the information ensures that the actions and views of the state are questioned outside the bureaucracy that supports them.


29 Cavanagh and Sarat, ibid., pp. 381-2, argued that ‘it is difficult to see how any other institutional actor [than a judge] is better equipped to become informed of the ramifications of comparable decisions’. In addition, and in contrast to legislative and executive processes, claimants can gain access to information held by the state through the process of ‘discovery’, the sharing of relevant information between the parties prior to the trial.
Importantly, the arguments before a court can be based on principle, enabling self-
determination claims to be asserted without compromise. The determinations of the
courts, in turn, reflect the nature of the arguments. Thus, the courts are able to make
aspirant and principled statements. Abram Chayes argued that:

the ability of a judicial pronouncement to sustain itself . . . and the power
of judicial action to generate assent over the long haul become the
ultimate touchstones of legitimacy.

Chayes went further to suggest that ‘judicial action only achieves such legitimacy by
responding to and indeed stirring the deep and durable demands for a just society’. 32

The principle advantage of the courts is the requirement to be objective. Also,
impartiality requires more than the absence of actual bias but respect for due process,
that is, ‘treating equally all those who seek its remedies or against whom its remedies
are sought’. 33 While acknowledging criticisms that dispute that there is such a thing
as judicial objectivity, an issue I will consider below, those coming before the courts
can demand impartiality and challenge the legitimacy of a court that is not seen to be
objective. Political or personal preferences are expected to be excluded from the
determination of the court and, through written reasons, determinations are often
more transparent than political decisions.

The method of assessing information in the courts is, however, a double-edged
sword and has marked implications for Indigenous peoples’ self-determination
claims. Concern has been raised that the consideration of what is relevant to the

30 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd
edn, Yale University Press, New Haven, 1986, p. 26, argued that courts have the capacity to ‘appeal
to [our] better natures, to call forth [our] aspirations, which may have been forgotten in a moments
hue and cry’. See also, Mason, Defining the framework of government: Judicial deference versus
human rights and due process, paper presented to the Centre for Public Policy, Workshop on the
Changing Role of the Judiciary, University of Melbourne, 7 June 1996, p. 25, and Sir Gerard
Brennan, Justice resides in the courts, Opening Address to the Symposium of the Australian Judicial
Conference, Canberra, November 2, 1996, reproduced in edited form in the *Australian*, 8 November
1996, p. 15.

31 Abram Chayes, ‘The role of the judge in public law litigation’, *Harvard Law Review*, vol. 89(7),
1976, p. 1316.

32 ibid.

33 Brennan, Justice resides, op. cit., p. 15.
claims, as well as the methods of assessing claims, is biased in favour of information and evidence from within a particular sphere of thought. This 'badness of fit' between the claims being made and the courts' treatment of them will be discussed in detail in part three of this chapter.

**The courts as part of a broader strategy**

Where Indigenous peoples ground their claims in their sovereignty as peoples, it has been suggested that they challenge the state's need for formal legitimacy as a 'law abiding polity'. That is, self-determination claims highlight the contradictions in the treatment of Indigenous peoples under the law. To this end, there may be a strategic advantage gained by structuring the debate around the concept of Indigenous status. Claiming Indigenous status provides a legal and moral basis for achieving self-determination which courts find as difficult to ignore as it is to reconcile with the existing law. Specific doctrinal arguments are often overshadowed by the challenge that claims of Indigenous status pose to the core of state claims to exclusive sovereignty and the primacy of individual rights. To the extent that the courts recognise self-determination claims, they are giving reality to Indigenous peoples' sovereignty and existence of collective rights. As a corollary, the assertion of Indigenous self-determination claims in the courts challenge state assumptions regarding the applicability of individual or group rights within the liberal state.

Arguing self-determination claims through the courts may heighten the power of claims that can be suppressed or disregarded in the political sphere. While opponents may argue that framing questions for the courts strips the claims of

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34 See for example, Archie Zariski, 'The truth in judging - Testimony (fifty bare arsed highlanders): The dilemmas of inter-cultural testimony', *Alternative Law Journal*, vol. 21(1), 1996, p. 24. These issues will be further explored in part three below.

35 Werther, op. cit., p. 33.

36 ibid., pp. xi, xvi-xvii, 4, 14, 36, 87-90.
popular appeal, there remain significant indirect benefits in terms of political leverage and ‘pricking powerful consciences’.\(^{37}\) Success, or indeed failure, in the courts can be seen as a tool to agitate for policy and legislative change. Patrick Macklem observed that even small victories in the legal sphere can be quickly translated into political power.\(^{38}\) Macklem argued that Indigenous peoples have made far more gains in the legal sphere that in the political sphere because legal decisions often act as the impetus for political change.\(^{39}\)

Where Indigenous peoples lack the key resources that can be translated into political influence, the courts are useful not only for direct outcomes but also to strengthen the voice of the claimants within the other branches. Judicial delineation of rights, however limited, can be used as bargaining power in negotiations over specific policy outcomes. For example, in 1971 Justice Blackburn of the Supreme Court of the Northern Territory refused to recognise Aboriginal title to lands.\(^{40}\) The decision prompted the Whitlam Labor government to initiate discussion on national land rights. As a result land rights legislation was introduced in the Northern Territory and later in almost all other states.\(^{41}\) Werther observed that ‘the political effect of this decision was to energise a national debate over aboriginal rights and eventually lead to major concessions by the state’.\(^{42}\)


\(^{40}\) *Milirrpum v Nabalco* (1971) 17 FLR 141. For further discussion of the decision, see pp. 165-7 below.


\(^{42}\) Werther, op. cit., p. 74, was able to point to similar dynamics in the wake of failed land cases in Canada and Norway.
Success in the courts can also provide Indigenous peoples with tools that can be wielded in negotiations with the government for even greater measures of self-determination. In some instances, the threat or spectre of litigation can provide the necessary political pressure to facilitate negotiations. This process could be observed in Australia in the wake of *Mabo v Queensland [No. 2]*. The recognition of rights to traditional lands under the common law led to the introduction of the *Native Title Act 1993* (Cth) confirming the title in Australian law. The High Court decision also gave Indigenous peoples greater power in negotiating the final form of the legislation than had been the case with previous land rights legislation. Similarly, the inadequacy of the native title recognised in *Mabo* was highlighted and as a result the government made an undertaking to introduce social justice measures and a land fund to make restitution for the dispossession.

Irrespective of the strategic advantages of claims being asserted in the courts, in weighing the advantages against the disadvantages Rosenberg, for example, placed great importance upon the question of resources, suggesting that:

> strategic choices have costs, and a strategy that produces little or no change drains resources that could be more effectively employed in other strategies.

In total, Rosenberg’s analysis suggested that in order for change to come through the courts, popular or political support for the changes must already exist. Moreover, there must be external avenues for the implementation of the changes. In the result, court decisions would be neither sufficient nor necessary. They are not sufficient because they require support from other agencies for successful implementation of

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45 Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, AGPS, Canberra, 1993, pp. 34-7. While the social justice package has not been rejected, it has not been acted upon.
46 Rosenberg, op. cit., p. 339, concluded that ‘not only does litigation steer activists to an institution that is constrained from helping them but it also siphons off crucial resources and talent and runs the risk of weakening political efforts’.
47 ibid., pp. 32-6.
change and they are not necessary because if all these conditions existed, change would occur outside the courts. On this view, courts can only assist a reform movement by removing lingering obstacles, and providing a ‘mopping-up’ role.48

However, it is arguable that the courts could manipulate these conditions to force a reluctant government to act, in particular, by binding the government to the decision through the threat of compensatory relief. Also, rights recognised by the courts can be exercised, returning to the courts for protection when those rights are threatened. The spectre of compensating Indigenous peoples for each encroachment on common law titles forced the state’s compliance. For Indigenous peoples’ self-determination claims the issues are of such magnitude that the threat of compensation is a significant incentive for government action.

While the extent to which the courts’ can act independently has been questioned, they do provide a public platform within the state structures from which Indigenous peoples can present their demands to the state. The courts can be a forum for the amplification of the voice of the oppressed. In addition, court action publicises and politicises the claims against the state, bringing the issues into public debate. All of these characteristics of the courts respond to the marginalised position of Indigenous peoples in colonial states.

This view directly contrasts with the criticisms of the courts’ implementation power and presents the courts as a public, and therefore political, forum from which to agitate for reform. While it may be true that in most respects the courts are an imperfect, or conservative, measure of ‘true relations’ between Indigenous people and the state, they may also impel changes in ‘direction, trend and pattern’ of those relations.49

There is a need, however, to further examine the two most significant difficulties

48 ibid., p. 342.
49 Werther, op. cit., p. 64.
encountered in bringing claims to the courts. First, because of the absence of constitutional recognition of Indigenous peoples in Australia, the common law is the source of rights claimed against the state. Therefore the claims that the courts are vulnerable to the legislature must be considered in detail. It is necessary to consider whether this has an impact on the courts’ capacity to recognise self-determination claims. Second, the courts must be acknowledged as a cultural institution. As such, there are obstacles of understanding; in translating and presenting claims and in the courts’ ability to accommodate claims from an alternative worldview.

II. Political and institutional constraints of the judicial system

There has been debate about the legitimacy of Australian courts’ initiation of legal reform. Many have accused the High Court of Australia of ‘judicial activism’ in the sense that it has usurped the role of Parliament as lawmaker. The recognition of Indigenous land titles under the common law in *Mabo v Queensland [No. 2]* has been a focus of the debate. This section concentrates on a somewhat different, though often entwined, discussion that centres on the courts’ capacity to achieve any

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50 See for example, P. H. Lane, ‘The changing role of the High Court’, *Australian Law Journal*, vol. 70, March 1996, pp. 246-51; S. E. K. Hulme, ‘Aspects of the High Courts’ handling of Mabo’, *Victorian Bar News*, No. 87, 1993; and P. Connolly, ‘Should the courts determine social policy’, *The High Court of Australia in Mabo*, Association of Mining and Exploration Companies Inc, 1993, p. 5. Contrast Hal Wooten, ‘Mabo – Issues and challenges’, *Judicial Review*, vol. 1, 1994, p. 303; and Noel Pearson, ‘Wik: Whither the separation of powers’, *Australian*, 2 January 1997, p. 11. Self-determination claims, of their nature, are more than likely to make their way to the High Court of Australia. Also, it is the High Court that determines the common law of Australia, within which Indigenous peoples’ rights are likely to be recognised (see *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, per Brennan J at p. 29). Therefore, references to the courts and the judiciary in this section refer to the High Court in particular.

substantive reform. This question is of great importance to Indigenous peoples assessing the utility of courts for asserting self-determination claims. In this sense, discussion does not revolve solely around the courts’ willingness to entertain self-determination claims. Rather, critics suggest that courts are constrained by their own structure and their relations with other institutions of the state and warn of the dangers in overstating the role of the courts in achieving social reform. The structural independence of the courts can be examined through key doctrines of the separation of powers and the rule of law.

The separation of powers

Australia bases its political structure on a separation of powers between the three arms of government – the legislature, the executive and the judiciary. The system is directed to providing checks and balances against the exercise of arbitrary power. Yet, there is some debate over the role of the judiciary within a democratic government. Some suggest that the courts are undemocratic and unrepresentative and should be merely interpreters of law. Others argue that the courts’ role is sometimes to make representative democracy more representative.

Alexander Hamilton, in the Federalist Papers, stated that:

\[\text{\footnotesize 52} \text{ Cavanagh and Sarat, op. cit., p. 373, clearly identified the need to separate ‘considerations of legitimacy of courts from those of competence or capacity’}.\]

\[\text{\footnotesize 53} \text{ However, the judiciary’s own perception of its role is of central importance and will be dealt with in the context of this discussion}.\]

\[\text{\footnotesize 54} \text{ Rosenberg, in a seminar to the ANU Law Faculty, 17 May 1996, challenged what was described as an emerging view that not only are courts able to effect social change but are uniquely suited to the task. To this end, Rosenberg, Hollow Hope, op. cit., pp. 15, 21, identified constraints on the capacity of the courts to achieve substantive reform, creating a dependence on the other arms of government}.\]

\[\text{\footnotesize 55} \text{ The independence of judiciary and the separation of powers was affirmed in R v Kirby: Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 and Attorney-General for the Commonwealth v The Queen (1957) 95 CLR 529. See generally Sir Anthony Mason, A new perspective on the separation of powers, Paper delivered to the Reshaping Australian Institutions ANU Public Lecture Series, No. 1, 25 July 1996}.\]

\[\text{\footnotesize 56} \text{ See for example Lane, op. cit.}\]

[the judiciary] has no influence over either the sword or the purse; no direction of the strength or of the wealth of the society; and can take no active resolution whatever. It may be truly said to have neither FORCE nor WILL but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.  

These comments are often invoked to support criticism of the utility of the courts in the promotion of a reform agenda, emphasising the lack of budgetary or coercive power to enforce decisions. For, if it is true that the courts depend upon the executive for the efficacy of their decisions then Indigenous peoples must seriously question whether courts can be sufficiently independent to entertain a challenge to the state or a claim against state interests. Here, we return to the first limitation identified in the overview in part one. The extent to which courts are able to operate independently of the other arms of state affects their capacity to promote significant reform.

Hamilton, himself, was championing the cause of the separation of powers and of the pivotal role of the judiciary in preserving the freedom of the individual against the power of the parliament. When Hamilton described the judiciary as the ‘least dangerous’ arm of the state it was not a reference to its status as a threat, or courts play a representation reinforcing role. See also John Williams, ‘The court of many colours’, Australian, 4 March 1997, p. 13.


otherwise, to the political centre, but to the constitutional rights of the people. Hamilton concluded that the general liberty of the people can never be under threat from the judiciary, as long as it remains independent.

Therefore, rather than implying a hierarchy within the structures of the state, the independence of the judiciary depends upon it being equal in relations with the legislature and executive. Hamilton argued that:

"it is not with a view to infractions of the Constitution only that the independence of judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws."

Admittedly, the role, and more importantly, the power, of the court to control the actions of the legislature are less clear in the absence of a comprehensive constitution. However, the role of the judiciary in protecting citizens against the excesses of the representative body is not limited to those jurisdictions in which rights are enumerated in a limited constitution.

The simultaneous adoption of the Westminster system of responsible government has meant the incomplete separation of the executive and legislative arms of government. The responsibility implied by the greater independence of the

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60 Hamilton, op. cit., p. 437, argued that 'the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be the least in a capacity to annoy or injure them'. This is directly contrasted to the coercive power of the executive and the budgetary power of the legislature: 'the sword and the purse'. See also Sir Gerard Brennan, 'Courts, democracy and the law', Australian Law Journal, vol. 65, January 1991, p. 33.

61 Hamilton, op. cit., pp. 437-8. The complete independence of the courts was seen as 'peculiarly essential'. The comments were made in the context of an argument for tenure of good behaviour for the judiciary being entrenched in the United States Constitution, to reinforce the independence of the judicial arm. Hamilton, op. cit., p. 440, saw the courts as the 'bulwarks of limited constitution against legislative encroachments'. See also p. 437; Madison, Federalist Papers, op. cit., No. XLVII, p. 303; and M. J. C Vile, Constitutionalism and the Separation of Powers, Clarendon, Oxford, 1967, p. 13.

62 Hamilton, op. cit., p. 441. Hamilton, p. 439, argued that this conclusion does not 'suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.' Compare Dicey, op. cit., pp. 170-1, in his critique of the written Constitution, as interpreters and enforcers of the Constitution, 'the Bench of judges is not only guardian but also at a given moment the master of the Constitution'.

63 ibid., p. 437. The rule of law and the separation of powers has a place in both liberal and republican tradition at once a design for protection against the despotism of the Crown and in the latter case against the 'tyranny of the majority'.

64 For discussion, see for example, Brennan, Courts, democracy and the law, op. cit., p. 35. See also Mason, Defining the framework, op. cit., p. 7. Recognised by the High Court in Brown v West (1990)
judiciary led Sir Gerard Brennan, currently Chief Justice of the High Court, to reflect that:

As the wind of political expediency now chills Parliament’s willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed. 65

The courts allow those excluded from the political process not only to give voice to their interests but also to be heard. 66 Sir Gerard Brennan argued that control over Parliament by the Executive has exposed the interests of minorities and individuals to risk. 67 Moreover, only when these marginalised groups are included in some way can the state claim legitimacy. To this end, Neier argued that the courts play a critical role in making pluralist democracies actually work. 68

The notion of the courts as protector of rights and of marginalised groups exists in Australian society despite the absence of a constitutional Bill of Rights. Sir Gerard Brennan commented that, as a society, ‘[w]e are the inheritors of a Constitution (partly written) which we accept, without too much reflection, as appropriate to secure and preserve our freedom’. 69 This ‘faith’ is an inheritance from British ancestry. 70 While the separation of powers and the notion of representative government were entrenched in the Constitution, 71 the protection of rights was left to

169 CLR 195 at p. 201. Mason, A new perspective, op. cit., p. 10, noted that the independence of the judiciary is therefore the strongest element of the separation of powers structure.

65 Brennan, Courts, democracy and the law, op. cit. See also Mason, Defining the framework, op. cit.


67 Brennan, Justice resides, op. cit., p. 15.


69 Brennan, Courts, democracy and the law, op. cit., p. 32.

70 Alexis de Tocqueville, ‘Social control: Individualism, alienation and deviance’, in On Democracy, Revolution and Society, edited by John Stone and Stephen Mermell, University of Chicago Press, Chicago, 1980, p. 282, observed of English constitutionalism, ‘The love of justice, the peaceful and legal introduction of the judge into the domain of politics, are perhaps the most standing characteristics of a free people.’

71 The separation of powers is explicit in the construction of the Constitution (Chapters I, II and III refer to the Parliament, the Executive government and the Judicature respectively) and, particularly the independence of the judiciary through security of tenure and guaranteed remuneration (s72), and the constitutional protection of Chapter III Courts. The High Court has determined that representative government is implied by sections 7 and 24, referring to election ‘directly by the people’. See Nationwide News Pty Ltd v Wells (1992) 177 CLR 1; and Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
the 'rule of law'. Where individual and minority rights are not guaranteed by a
supreme law in the form of a constitution, the function of the courts to stand between
the government and the governed becomes more important.

The rule of law and common law rights
The notion of the rule of law encapsulates the idea that there are fundamental
principles that are 'superior, and possibly anterior, to positive law'. The rule of law
is a constitutional principle, guiding both the exercise of power by the state and the
bounds of positive law. Geoffrey Walker described the rule of law as 'a philosophy
of judicial restraint and fairness in the use of government power', thus reconciling
the two antagonistic forces of law and power. In this way, the rule of law reflects a
conception of the separation of powers between judiciary and legislature, defining
their respective spheres of operation.

While the rule of law can be explained as an institutional doctrine, it is generally
accepted that it also carries certain values of the common law and is intrinsically
linked to understandings of rights and freedoms. For example, the International
Commission of Jurists (ICJ) was established in 1955 to promote the rule of law
throughout the world. In its first declaration, The Act of Athens, the ICJ spoke of
'the Rule of Law which springs from the rights of the individual developed through

72 Dicey, op. cit., p. 179, traced the rule of law as an institution since the Norman Conquest. Interestingly, the need for a Bill of Rights in the American Constitution was at first rejected at the Philadelphia Convention, on the understanding that they would be sufficiently protected by the separation of powers in the Constitution, the Bill, of rights was seen as a natural outgrowth of the protections afforded by the separation of powers. See Mason, A new perspective, op. cit., p. 9.


74 ibid., pp. 1-3, 42.
Therefore, the role of the courts in the protection of rights is central to the rule of law tradition.

There has been criticism that such an approach ties the rule of law to a liberal–free market–democratic model. However, the ICJ asserted a continuing and more inclusive relevance of the rule of law:

the Rule of Law is a dynamic concept . . . which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which legitimate aspirations and dignity may be realized.

The difficulty in defining the rule of law, and its association with a limited set of individual freedoms, has seen it invoked less often in legal commentary and case law. It has been argued that the temporary disfavour of the rule of law was in large degree due to the focus upon Dicey’s formulation of the principle, and criticisms of it. The implication of this emphasis has been a failure to explicate and develop the doctrine of the rule of law. Allen has suggested that this, in turn, has led to serious imbalance between the powers of Parliament and other institutions of the Constitution.

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76 Justice John Toohey, 'A Government of laws, and not of men?', *Public Law Review*, vol. 4, 1993, footnote 10, p. 160, admitted that the common law has not necessarily consistently protected the interests of minorities, but suggested that perhaps insufficient use was made of the common law prior to the introduction of discrimination legislation. See also Tatz, op. cit., pp. 103-36.

77 See Walker, op. cit., pp. 11-12.


79 Walker, op. cit., p. 8, 128. Dicey, op. cit., pp. 198-9, characterised the rule of law as having three aspects. First, the rule of law provides a restraint on arbitrary power; second, the rule of law also means equality before the law, which Dicey equated with the universal application of the 'ordinary laws of the land'; and finally, the rule of law sees the fundamental rights of the citizens depending not upon the special guarantee of a written document, but instead arising from the ordinary law.

80 T. R. S. Allen, 'Legislative supremacy and the rule of law: Democracy and constitutionalism', *Cambridge Law Journal*, vol. 44, 1985, p. 114, commented that the failure of the courts to develop a clear and coherent doctrine of the rule of law can be traced to Dicey's failure to present his formulation 'in clear juristic terms'. 
Early reference can be found to the powers vested in the courts in upholding the rule of law. The authority of the courts to reject an Act of Parliament was affirmed in *Dr Bonham’s case*, in 1610 where Sir Edward Coke pronounced:

> it appears in our books, that in many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.\(^\text{81}\)

It appeared for a time that the notion had little application, particularly during a period in which a principle of parliamentary sovereignty was recognised by the High Court.\(^\text{82}\)

Despite this, many commentators have identified the rule of law as a constitutional principle or convention upon which our written Constitution was premised.\(^\text{83}\) Recent members of the High Court have criticised the approach of the Court in earlier times for ignoring the separation of powers and the rule of law for the protection of rights and judicial independence.\(^\text{84}\) However, it has been suggested that the rule of law has taken on a renewed importance in the context of a re-emergence of natural law tradition and the recognition of fundamental rights.\(^\text{85}\) Sir Gerard Brennan argued that the judiciary:

> [as] the least dangerous branch of government, has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of sword to make the rule of law

\(^\text{81}\) *Dr Bonham’s Case* (1610) 8 Co. Rep 113b, 118a; 77 ER 638, at p. 652, per Coke LJ, with Warburton and Daniel JJ. This was not an isolated case however, see *Walker*, ibid., pp. 118, 154. With respect to the power to void an act of the executive, see *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342. On Sir Edward Coke and the development of the rule of law doctrine, see *Walker*, pp. 104-19.

\(^\text{82}\) This was during the time of Chief Justice Dixon who reputedly had a ‘low opinion’ of the separation of powers doctrine. *Mason*, A new perspective, op. cit., p. 13. See generally, *Sir Owen Dixon*, ‘The law and the constitution’, *Law Quarterly Review*, vol. 51, 1935, p. 590, especially p. 606. *Walker*, ibid., pp. 118-19, suggested that the doctrine merely fell into disuse and as such has never been strictly overturned. See for example, *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 101, at pp. 117-18 per Evatt J.


\(^\text{85}\) See *Mason*, Defining the framework, ibid., p. 1; *Mason*, Future directions, op. cit., p. 162; and *Toohey* ibid., p. 167.
effective, provided the people whom we serve have confidence in the exercise of the power of judgement. 86

Brennan argued that the community looks to the courts for the protection of minorities and individuals against any overreaching of their legal interests by the legislative or executive arms of government

In New Zealand, where there is no written constitution, the resurgence of a notion of the rule of law has been stronger than elsewhere. 87 Sir Robin Cooke helped to re-establish the power of the judiciary in a series of cases. In New Zealand Drivers Association v New Zealand Road Carriers, Cooke P with McMullin, and Ongley JJ questioned:

the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights. 88

Similarly, in Fraser v State Services Commission, Cooke P felt that 'some common law rights may go so deep that even parliament cannot be accepted by the Courts to have destroyed them'. 89

While these decisions, and the principle that they support, have been acknowledged in Australian cases, they have not been affirmed. 90 The power of the courts to restrict

87 See generally, Jane Kelsey, Rolling Back the State: privatisation of power in Aotearoa/New Zealand, Bridget Williams Books, Wellington, 1993, pp. 191-211. Mason, Defining the framework, op. cit., p. 29, described the Australian jurisdiction as 'more conservative' in this respect than other jurisdictions, most notably New Zealand.
90 See Employees and Builders Labourers Federation of NSW (BLF) v Minister for Industrial Relations (1986) 7 NSWLR 372 per Kirby P, pp. 403-4 and Street CJ, pp. 386-7. See also Greiner v Independent Commission against Corruption (1992) 28 NSWLR 125 per Mahoney JA, p. 152. Compare House of Lords decisions concerning Nazi war crimes where legislation constituted 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all': Oppenheimer v Cattermole [1976] AC 249, p. 278. See also John M. Kelly, A Short History of Western Legal Theory, Clarendon, Oxford, 1992, pp. 418-9. See also the House of Lords decision in R v Home Secretary; Ex Parte Brind [1991] 1 AC 696, where Lord Bridge of Harwich, p. 748, did not deny the power of the courts to prevent the exercise of power by the executive, granted by parliament, where it would infringe fundamental human rights.
the Parliament has generally been limited to the interpretation of statutes.\textsuperscript{91} The courts will presume an intention on the part of Parliament not to infringe upon the rights of citizens, so that ‘where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred’.\textsuperscript{92} The text of a statute is interpreted, as far as possible, with respect for the values of the common law ‘so that they do not trench upon interests by which the common law set great store.’\textsuperscript{93} The limits to this protection are to force the legislature to be explicit if it intends to abrogate rights.\textsuperscript{94} Therefore, where Parliament enacts legislation that is harmful to human rights, the courts are ‘helpless to remedy injustice in the face of unjust legislation, enacted within power’.\textsuperscript{95}

The theory of the rule of law asserts that there are fundamental principles and rights against which the laws of the land can be judged, particularly as they relate to the exercise of power by the Parliament against the vulnerable. The extent to which the courts can restrain Parliament is as much a matter of judicial doctrine as political philosophy, and precedent exists for a strengthening of the power of the judiciary in this regard.\textsuperscript{96} Moreover, the interpretation or understanding of those fundamental principles, can, and has, developed as the legal system seeks to be more inclusive.

\textsuperscript{91} However, note the recent decision in \textit{Kartinyeri v The Commonwealth} (unreported decision of the High Court of Australia, A29/1997, 1 April 1998; [1998] HCA 22), in which legislation allowing the building of the Hindmarsh Island bridge was found to be a valid exercise of Commonwealth legislative power. Two of the six justices, Gaudron J, at paras 44-5 and Kirby J, paras 152 ff., found that the Commonwealth’s power to make laws with respect to Aboriginal people was limited to beneficial laws, while two other judges, Gummow and Hayne JJ, at para. 82, found that the constitutional power was limited by the power of the courts to overturn legislation that showed a ‘manifest abuse’. See also Gaudron J, paras 36-42 and Kirby J, para 117, point 3, and paras 159 ff. The remaining two judges, Brennan CJ and McHugh J, found it unnecessary to decide.

\textsuperscript{92} \textit{Balog v Independent Commission against Corruption} (1990) 169 CLR 625, at pp. 635-6.


\textsuperscript{94} See Mason, Defining the framework, op. cit., p. 28; \textit{Davis v The Commonwealth} (1988) 166 CLR 79 at 100; and \textit{Coco v The Queen} (1994) 179 CLR 427 at pp. 36-7.

\textsuperscript{95} Brennan, Courts, democracy and the law, op. cit., p. 37.

\textsuperscript{96} ‘After all’, Sir Gerard Brennan, ibid., p. 38, observed, ‘the doctrine of the sovereignty of Parliament must itself be found in the common law which first distributed among the three branches of government their respective functions.’
However, Dicey’s observations on the United Kingdom Constitution remain pertinent to Australia in relation to common law rights, when it is admitted that, ‘[o]ur constitution, in short, is a judge made constitution, and it bears on its face all the features, good and bad, of judge made law’. Therefore, the strength of the rule of law as a constitutional doctrine is largely to be determined by the courts themselves in determining the balance of power between the judicial and legislative arms of the state. Unless the courts assert their power to protect rights, Parliament can prove its ‘sovereign power’ by interfering with those rights. In turn, the strength of the rule of law determines the security of common law rights including the common law recognition of the rights of Indigenous peoples. It is clear that the rule of law and the idea of fundamental, inalienable rights are accepted by the courts. However, the balance that is drawn by the courts, between fundamental rights and the intentions of parliament, requires further examination in the following section.

Parliamentary supremacy or judicial deference?

For Dicey, there was no ‘balancing’ between common law rights and the intentions of parliament. On the contrary, Dicey’s treatise on the *Law of the Constitution* juxtaposes the rule of law against the supremacy of Parliament. Dicey argued that Parliament:

> [has] the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

This position seems contrary to the notion of constitutionalism and to the rule of law itself. In the context of a republican critique of Dicey’s position, John Williams

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97 Dicey, op. cit., p. 192.
98 ibid., p. 38.
pointed out that 'this perspective places one group (in this case the parliament) above the law, the very thing that the rule of law was meant to prevent'.

Moreover, the notion of constitutionalism asserts that government should be limited according to clearly articulated principles, whether written or unwritten. In answer to this Dicey suggests the limitations imposed by the conventions of English constitutionalism are illusory:

No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts.

The clear role for the judiciary and the strong separation of judicial power that flows from Australia’s written constitution, in turn, reinforces the rule of law. Dicey acknowledged that the separation of powers and also the distribution of powers in a federal scheme are antithetical to parliamentary sovereignty. ‘When we bear that in mind,’ Sir Anthony Mason observed, ‘it is surprising that Dicey’s theory of parliamentary sovereignty took such a strong hold in Australia’. The High Court has distanced itself from Dicey’s theory of parliamentary sovereignty but, as Sir Anthony noted, ‘not entirely so’.

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99 John Williams, The protection of rights, op. cit., p. 35 (original emphasis). Sir Gerard Brennan, Justice resides, op. cit., p. 15, argued that 'a free society only exists so long as it is governed by the rule of law – the rule which binds the governors and the governed'.

100 Dicey, op. cit., p. 68. The limitations referred to include judicial legislation (common law); natural law or international law; Crown prerogative and preceding legislation and parliaments. See pp. 58-68. Instead Dicey, pp. 68-82, relied on civil disobedience and electoral repercussions to constrain parliament.

101 Dicey, ibid., p. 133, admitted that the separation of powers that ‘makes the judges the guardians of the constitution provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation’. Arguably the reservation of Judicial Independence in Chapter III of the Constitution protects the rights of individuals in the judicial process. See for example Dietrich v The Queen (1992) 177 CLR 292, per Brennan J.

102 In relation to federalism, see Dicey, ibid., p. 135, where an entire chapter (III) (especially pp. 153-9) is devoted to federalism while little attention is given to the separation of powers doctrine. See also Mason, Defining the framework, op. cit., p. 10, and Mason, A new perspective, op. cit., p. 12.

103 Mason, Defining the framework, op. cit., p.10.

104 ibid., p. 5. See also, p. 22. Some renowned constitutional commentators still affirm the doctrine, see for example Lane, op. cit., p. 250. Perhaps the clearest rejection of parliamentary sovereignty can be found in Australian Capital Television v Commonwealth (1992) 177 CLR 106.
Parliamentary supremacy has been rejected as a constituting principle of institutional relations in Australia. Yet, a residual adherence to the influence of Dicey emerges from the English common law tradition that has formed part of Australian law. This remains a concern for the protection of rights in Australian law. The interpretation of the separation of powers doctrine has deferred to the ‘supremacy’ of parliament in the absence of constitutional limitations.

The ‘balance’, as Mason has described it, suggests that while the courts will give greater weight to rights than would the political process, they will adhere to the power of parliament to abrogate those rights through unambiguous legislation. For example, the power of parliaments, both state and Commonwealth, to abrogate the rights of Indigenous people to their lands was included in the native title doctrine established in the Mabo case. The common law protection of Indigenous rights fell short of protection against the parliament as sovereign. Arguably, this does not accord with tenets of the separation of powers or the rule of law, placing the Parliament in a position of supremacy above the law. This hierarchy leaves the judiciary vulnerable to the interests of the legislature or executive, creating the type of alliance between the arms of government originally feared by Hamilton.

The detachment of the courts from the state undermines the balance in the separation of powers. At the same time, however, the High Court has acknowledged its role in recognising and protecting fundamental rights and freedoms through the common law. This approach has been described as a ‘deference to legislative judgement’ rather than a ‘concession to Parliamentary supremacy’.

To this end, Sir Anthony Mason has argued that:

Judicial deference to legislative judgement – the refusal of the High Court to substitute its opinion for that of parliament on the question

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106 Mabo v Queensland [No. 2] (1992) 175 CLR 1, at pp. 33-6, per Brennan J.
107 Hamilton, op. cit., p. 437. See also Werther, op. cit., p. 36.
108 Mason, Defining the framework, op. cit., p. 23.
whether a law will achieve the legitimate end in view, ultimately rests on the separation of powers rather than on parliamentary supremacy.\textsuperscript{109}

Moreover, in determining the extent of the powers of the judiciary to circumscribe legislation that impinges on rights, Mason suggested:

Such a judgement calls for an evaluation of the community consensus or underlying philosophy as to the proper balance between the legislature and the judiciary as lawmakers.\textsuperscript{109}

The significance of the distinction between deference and supremacy is that while the courts respect the role of the legislature, pursuant to the Constitution, legislation must be reasonable and appropriate to the end in question.\textsuperscript{111} There has been a renewed willingness on the part of the High Court to check the exercise of political power on this basis. This has been illustrated most particularly in the freedom of political communication cases.\textsuperscript{112} The High Court’s preference for tracing protection to a textual basis within the Constitution goes some way to explain the Court’s willingness to venture out in these decisions. For example, in the emergence of the ‘democratic principles’ argument to sustain judicial intervention, the textual foundation within the Constitution, in this case, is representative government.\textsuperscript{113} Mason identified this as a ‘purposive trend in judicial reasoning’ that showed:

a willingness to identify an object or purpose from the provision of the Constitution, and develop by way of implication a principle or rule of law which will give effect to that object or purpose.\textsuperscript{114}

On this basis, the Court, in cases such as \textit{ACTV} and \textit{Langer}, found itself able to invalidate legislation which was not appropriate and adapted to the end in

\textsuperscript{109} A ‘legitimate end’ being the legitimate exercise of a constitutional head of power. See Mason, A new perspective, op. cit., p. 33.


\textsuperscript{111} Mason, Defining the framework, op. cit., p. 23. The test originally adopted in reference to the external affairs power has been applied more generally. See Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106. Compare Langer v Commonwealth (1996) 134 ALR 400 at p. 413.

\textsuperscript{112} Nationwide News Pty Ltd v Wells (1992) 177 CLR 1; Australian Capital Television v Commonwealth (1992) 177 CLR 106; and Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104.

\textsuperscript{113} See Mason, Defining the framework, op. cit., p. 8.

\textsuperscript{114} ibid., p. 21.
question. While the principle identified in these cases was founded on representative government, the power of the Court to invalidate the legislation was founded on the separation of powers.

The willingness of the High Court to restrain the Commonwealth from interfering with rights is important. It illustrates a strengthening of the presumption that without unequivocal expression of intent, no statute will be read as authorising an abrogation or curtailment of a common law right. Moreover, it has extended that presumption to the protection of fundamental rights and freedoms. Sir Gerard Brennan concluded that:

If we again ask the question “are the courts fitted to provide an effective check against any oppressive exercise of power by the other branches of government?” the answer is not an unqualified yes or no . . . The Judicial Branch of government is still the least dangerous branch to the political rights of the community and the most constant protector of those rights, but its strengthening is critical to the democratic freedom of which we boast and to the peace, order and good government that are the birthright of future generations.

In sum, the notion that the courts are the ‘least dangerous’ branch of government may explain Indigenous peoples’ willingness to utilise the courts. Mason has suggested that judges tend to give more weight to ‘rights’, and to respect for human dignity than politicians or administrators. And they do have the power to recognise rights that were not previously acknowledged. Further, the Parliament is reluctant to override a determination of the High Court because the courts have

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115 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 and Langer v Commonwealth (1996) 134 ALR 400 at p. 413. In this context, the Court found that provisions of the proposed law so far intruded into the freedom of expression as not to reasonably and appropriately be adapted to the ends that lay within the limits of power.

116 Mason, Defining the framework, op. cit., p. 22, noted that parliamentary supremacy did not feature in the reasoning of the court.


120 ibid., p. 11.
legitimacy and moral authority in the community that governments are reticent to challenge. 121

Together, these observations suggest that self-determination claims may not only be successful in the courts but may have continuing recognition through the legislature and executive. While the courts have recognised particular rights of Indigenous peoples and given them the protection of the common law, as with Indigenous land titles, the power of parliaments to abrogate these rights limits that recognition. Without constitutional protection, those rights remain vulnerable. However, there is scope for the courts to adopt an approach that embraces the principle of judicial independence. The strengthening of the presumptive rule of interpretation to protect rights from the arbitrary exercise of power offers a greater security to recognised rights. The courts continually look to a principled decision rather than an expedient or popular solution. Therefore, the importance of their role in legitimating democratic government underscores an approach that puts greater store on the recognition and protection of rights.

III. The limits of the courts as a cultural institution

Indigenous self-determination claims are an assertion of a persisting sovereignty and the survival of Indigenous identity. When these claims are asserted in Australian courts, they are subjected to a different culture that struggles to comprehend an alternative worldview. This raises the concern whether Indigenous peoples can truly obtain any measure of recognition from the dominant and alien legal system. This

121 Sir Anthony Mason, in a speech to the NSW Law Society, reported by Bernard Lane, Australian, 24 October 1997, p. 3, argued that 'a court decision has its own authority, moral as well as legal, and unless that moral and legal authority is undermined, the case for displacing the decision is unlikely to carry the day'.

part examines some of the difficulties that arise from the clash of cultures that occurs when Indigenous peoples claim rights through the courts. A consideration of some impressions of Indigenous peoples engaging with an alien institution leads to an analysis of particular issues arising from the way in which courts understand self-determination claims. These issues include the fragmentation of claims, the exclusive process of legal reasoning and the restricted acceptance of evidence. The proceedings in the Queensland Supreme Court of the Meriam peoples land claim over the Murray Islands, and the Kumarangk/Hindmarsh Island heritage protection claim by the Ngarrindjeri people help to illustrate the difficulties facing Indigenous peoples.

Assumptions of a uniform and universal colonial law

In the wake of the High Court decision in the Wik peoples' case, Galarrwuy Yunupingu made an observation about the ‘ownership’ of the law and the courts that, while obvious to Indigenous peoples in Australia, those who constitute the Australian legal system find difficult to comprehend. Galarrwuy commented that:

> You have a legal and court system which is your High Court – this is your system – you have this system and you say to us: we must obey that system. We must fit into that system. We must become part of that system because we’re all Australians.  

The demand for Indigenous peoples to conform to the non-Indigenous legal structures implies the supremacy and universality of non-Indigenous law. It is also assimilationist in that it suppresses the expression of Indigenous ‘law-ways’. Irene Watson argued that Indigenous law-ways have survived, although they remain subverted by the Australian state. Watson explained the importance of Indigenous law:

122 Galarrwuy Yunupingu quoted by David Byrne, *Sharing Country: Land Rights, Human Rights and Reconciliation after Wik*, Proceedings of a Public Forum at University of Sydney, 28 February 1997, Research Institute for Humanities and Social Sciences, University of Sydney, 1997, p. 84.

Our voices were once heard in light of the law. The law transcends all things, guiding us in the tradition of living a good life, that is, a life that is sustainable and one which enables our grandchildren yet to be born to also experience a good life on earth. The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it. And it is, as explained by George Tinamin: Ngangatja apu wiya, ngayuka tjamu. This is not a rock, it is my grandfather. This is a place where the dreaming comes up, right from inside the ground.

Marcia Langton, similarly, described Indigenous law as a holistic expression of Indigenous identity and society:

What our people mean when they talk about their Law, is a cosmology, a worldview which is a religious, philosophic, poetic and normative explanation of how the natural, human and supernatural domains work. Aboriginal Law ties each individual to kin and to ‘country’ – particular estates of land – and to Dreamings. One is born with the responsibilities and obligations which these inheritances carry. There are many onerous duties, and they are not considered to be optional . . . As many of our people observe, Aboriginal Law is hard work.

In this way, Indigenous peoples are perhaps more explicit about the connection between law and culture in a society.

Indigenous peoples argue that there are different law-ways operating in Australia, and that they are alienated from the laws and institutions of the state that do not recognise the reality of pluralism and Indigenous Law in particular. The greatest obstacle to courts recognising the limitations posed by this alienation are that legal institutions and legal reasoning are not generally viewed as culturally relative. The myth of universality that permeates modern political theory is as pervasive in discussing the Australian legal system as it was for earlier discussions of sovereignty. For Indigenous peoples, utilising the courts requires engagement with a foreign institution. The courts’ procedures and structure reflect the European culture from which they were derived. The discourse too is culturally driven, requiring Indigenous peoples to translate their claims for self-determination, which are essentially cultural claims, into alien forms.

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124 ibid., p. 39.
Notwithstanding the fundamental importance of Indigenous peoples’ claims to country, or other cultural, social and political claims, Robert Williams Jr. argued that:

[Indigenous peoples] have been judged and their legal rights and status have been determined in European legal thought and discourse by alien and alienating norms derived from the European’s experience of the world.\(^{126}\)

The hidden norms of the Australian and other European-derived legal system have been theorised by many traditions of critical scholarship. Mari Matsuda summarised the broad ‘critical perspective’ of the law, in the context of relations of power in society:

As feminist theorists have pointed out, everyone has a gender, but the hidden norm in law is male. As critical race theorists have pointed out, everyone has a race, but the hidden norm in law is white . . . When parties are in a relationship of domination and subordination we tend to say the dominant is normal and the subordinate is different from normal.\(^{127}\)

There are a number of implications of this hidden culture of the legal system. Where the cultural bias of the system is not acknowledged, those who participate in the system act on a number of assumptions that perpetuate the habits of thought, making it difficult to challenge the prevailing relations of power and recognition.\(^{128}\)

It was argued in the previous chapter that the language of modern political theory is inextricably tied up with the institutions of the modern, liberal-democratic state. Moreover, the cultural and temporal influences on those theories are equally part of the make-up of those institutions, including the courts. The previous chapter also

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\(^{127}\) Mari Matsuda, ‘Voices of America: Accent, antidiscrimination law, and a jurisprudence for the last reconstruction’, *Yale Law Journal*, vol. 100, 1991, p. 1361. Matsuda, p. 1395, drew this hidden norm from the concept of ‘positioned perspective’ of feminist and critical race theory and the critique of neutrality, associated with Foucault, which rejected the idea of the universal. Critical theory, Matsuda, p. 1393, argued, aims to ‘unmask false claims of objectivity and neutrality’ and to ‘examine the context of power’.

concluded that modern theories, and the institutions that emerged from it, were designed to eliminate or suppress cultural diversity and justify uniformity.

The legal system operates on the assertion that it is objective and neutral, that it encapsulates universal values. Moreover, there is an assumption that institutional uniformity and the type of political and legal monism upon which the legal system is based, reflects a superior ‘constitution’ of society. This preference for legal and political monism in the institutional structures of the state emerges from the theories of sovereignty that identified a single supreme authority as the locus of sovereignty. The idea that this is somehow a superior structure for society is also a reflection of the progressive view of human history, that is, as societies developed they would converge on a uniform set of legal and political institutions. The dominant, Eurocentric worldview ensured that this model would reflect the dominant European model. These models of hierarchy persisted in legal doctrines such as parliamentary sovereignty.

The assertion of a universal, neutral and supreme legal system is a device of colonisation. The assumptions upon which the courts assess Indigenous claims does violence to Indigenous peoples when it excludes them, suppresses their law and forces assimilation to the dominant law-way. The implications of such a bias for the utility of the courts in the assertion of self-determination claims are important. The difficulties of presenting claims to an alien forum, and translating ideas into an alien language, to be judged according to alien norms, impose substantial barriers for Indigenous claimants.

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129 Tully, ibid., p. 66. For example, Matsuda, op. cit., p. 1395, argued that it is a typical justification to assert that uniformity is both efficient and unifying.
The claims of the Meriam peoples and Ngarrindjeri people

Two examples illustrate the cultural difficulties that Australian courts pose for the assertion of self-determination claims. First, the Meriam peoples’ claim over the Murray Islands culminated in the most significant recognition of Indigenous self-determination claims by a court in Australia. The case spanned ten years from the time of application; through attempts by the Queensland government to pre-empt the case; and the findings of fact by Justice Moynihan of the Queensland Supreme Court, until the final determination of the High Court of Australia. Edward Koiki Mabo, the principal plaintiff, died less than six months before the High Court handed down its decision. In June 1992 the High Court recognised the prior and continuing system of land titles in the Murray Islands in *Mabo v Queensland* [No. 2]. However, the passage of the claim was difficult for the plaintiffs and the Meriam people as a whole, many of whom gave evidence. The determination of issues of fact before Justice Moynihan of the Supreme Court of Queensland highlighted some of the difficulties of institutional structure and understanding that arise in the assertion of self-determination claims through the courts.

Nonie Sharp, who spent a great deal of time with the Meriam people during and after the trial, summed up the experience:

> [the] long hearing of Meriam claims to traditional title to certain lands, reefs and sea areas and the existence of a system of Meriam land law was beset by distortion and trivialisation. The overall effect of this was often to diminish Meriam meanings and certain matters of profound meaning to the Meriam were bypassed.

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131 *Mabo v Queensland* (Determination of issues of fact, Supreme Court of Queensland, Moynihan J, 16 November 1990).
133 For the story of Eddie Koiki Mabo, and the genesis of Mabo’s case see *MABO: Life of an Island Man*, (motion picture) Film Australia, 1997.
Sharp concluded that the ‘oral tradition and the absence of corporate political authority’ in Meriam culture tested the capacity of the courts: ‘the former tested the boundaries of the court’s rules of evidence; the latter stretched the court’s comprehension to its limits.\(^{136}\)

The Kumarangk/Hindmarsh Island dispute highlighted the continuing problem of legitimacy of the Australian legal system for Indigenous peoples seeking protection of cultural interests.\(^{137}\) The dispute involved a struggle over Aboriginal heritage protection for the island known as Hindmarsh, or Kumarangk, in South Australia and a bid to halt development of a bridge to the mainland. The Ngarrindjeri people argued that the island and the surrounding waters were of special significance because of their importance to the spiritual and cultural beliefs of the Ngarrindjeri, including particular secret-sacred beliefs exclusive to Ngarrindjeri women. The integrity of the women claiming sacred knowledge and significance was directly challenged and a South Australian government Royal Commission determined that the sacred knowledge was a fabrication. The Commissioner, Justice Iris Stevens concluded that, ‘the beliefs said to constitute the “women’s business” . . . are not supported by any form of logic, or by what was already known of Ngarrindjeri culture’.\(^{138}\) The issue is by ‘whose knowledge, and whose logic’ were these claims

\(^{136}\) ibid., p. 166.

\(^{137}\) The Kumarangk/Hindmarsh Island dispute has been described as an epic saga. Hilary Charlesworth, ‘Little boxes: A review of the Commonwealth Hindmarsh Island Report by Justice Jane Mathews’, Aboriginal Law Bulletin, vol. 3(90), 1997, p. 19, suggested that it ‘will surely enter Australian folklore as one of the most complex and litigated of disputes’. A number of cases were argued in the Federal Court of Australia, the South Australian Supreme Court and the High Court of Australia, together with various official reports including a South Australian government Royal Commission. In the final stage, legislation concerning the dispute was passed by the Commonwealth Parliament on the third attempt. The constitutionality of the legislation was affirmed by the High Court in Kartinyeri v The Commonwealth (unreported decision of the High Court of Australia, A29/1997, 1 April 1988; [1988] HCA 22). For a time line of events, see Jennifer Clarke, ‘Chronology of the Kumarangk/Hindmarsh Island affair’, Aboriginal Law Bulletin, vol. 3(84), 1996, pp. 22-3. See also Deane Fergie, ‘Federal heritage protection, where to now? Cautionary tales from South Australia’, in Julie Finalyson and Ann Jackson-Nakano (eds), Heritage and Native title: Anthropological and Legal perspectives, proceedings from a workshop conducted by the Australian Anthropological Association and the Australian Institute of Aboriginal and Torres Strait Islander Studies, 14-15 February 1996, Canberra, NTRU/AIATSIS, Canberra, 1996, pp. 129-46.

\(^{138}\) Royal Commission of South Australia, Report of the Hindmarsh Island Bridge Royal Commission, Adelaide, (Iris Stevens, Royal Commissioner), 1995, p. 241. Irene Watson, Indigenous Peoples’ Law-Ways, op. cit., pp. 50-1, expressed concern that the finding of fabrication may be used to discredit Indigenous peoples’ claims generally.
assessed? Maureen Tehan has argued that two divergent and irreconcilable worldviews were operating in the Kumarangk dispute, and her comments are applicable more generally. The interaction of the state and the Indigenous people revealed a story of 'dominance and colonisation'. The Indigenous people claimed protection under the dominant system, seeking to translate their system of beliefs into a form that would be heard and understood within that system. The dominant system sought to define Indigenous cultural heritage in familiar terms, to be tested against established rules to test the 'truth' of the claim, and ultimately to discredit and reject the claims.

The Kumarangk dispute is an important illustration of the limitations of the courts. Maureen Tehan argued that:

Both politically and legally, the Hindmarsh Island Bridge case stands as an example of the inability of the Anglo-Australian system to comprehend Aboriginal cultural interests. It also provides clear evidence that the dominant political and legal system has yet to find a language and means of according any significant recognition to Indigenous systems of law, regulation and belief which does not operate to appropriate those systems ...

The following sections expand on the Meriam and Ngarrindjeri peoples' experience of the legal system to illustrate the difficulties that must be overcome if Indigenous peoples are to pursue claims through the courts.

**Presenting Indigenous claims in legal language**

The language of Indigenous people, demanding respect for their distinct identity and sovereignty, stands in stark contrast to the language of the law which has forced these broad claims to be fragmented into discrete units. While hopeful that the Mabo decision heralds a changing approach to self-determination claims, Dodson observed

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139 Watson, ibid., p. 50.
141 ibid.
what appears to be, ‘an addiction in the Australian legal system of isolating components of Aboriginal law in order to place them into the artificial compartments which western legal systems are familiar with’.142

Demands for self-determination are dissected into separate piecemeal claims for traditional rights to land, sacred sites, hunting and fishing; claims for jurisdiction and the recognition of customary laws; and claims to inherent sovereignty.143 Of course, claims to land are intimately tied to and in fact are a part of a broader Aboriginal law. It is difficult to make an artificial distinction between land and claims for recognition of law and jurisdiction.144 It was argued in chapter one that the self-determination claims that Indigenous peoples make against the state have an expression of sovereignty at their core. The interrelationship between claims to land, jurisdiction and sovereignty underscores the difficulty for Indigenous peoples of separating and fragmenting claims. The difficulty was highlighted by Rhonda Agius, a Ngarrindjeri woman, who commented that ‘Western Society has a way of putting things in little boxes. You don’t see things holistically as we do’.145

In contrast, the courts seem to approach each of these categories differently. While claims to land have been accepted, claims to criminal jurisdiction have been explicitly rejected.146 It could be argued that the distinction appears to depend upon the extent to which the claim is perceived as a threat to the state as the sole source of sovereignty. However, such a distinction is arbitrary because, as we have seen, self-determination claims at whatever level of abstraction are based on a claim to a

144 Sharp, op. cit., p. 17.
145 Justice Jane Mathews, Commonwealth Hindmarsh Island Report (under s.10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984), June 1996, p. 192.
persisting sovereignty, and therefore implicitly challenge the state as sole sovereign.  

Commenting on the distinction drawn by the courts, Michael Dodson explained that:

[the] process of artificially selecting what is legitimate provides compromised justice for Indigenous people . . . The Australian legal system must take the further step of accepting that native title is inseparable from the culture that gives it meaning.

The barrier to this change is not primarily one of content but understanding. For courts to recognise the integrative and holistic nature of Indigenous cultural claims, they must first understand how their own culture impinges upon their ability to accommodate self-determination claims.

In reference to the process of determining the issues of fact in the Meriam peoples’ claim, Sharp argued that the legal process had not provided a ‘suitable medium through which to express Meriam people’s relationships to land’. Moreover, that at the heart of this ‘badness of fit’ was the gulf between Meriam interrelationship with land and sea and the European idea of land as an economic commodity. For Justice Moynihan, the Meriam relationship with the land was characterised as purely economic. In contrast Justice Blackburn, twenty years earlier, had found the Yolgnu relationship with the land was purely spiritual. Neither is entirely correct

147 Werther, op. cit., p. xvii, argued that challenging the sovereignty of the state is inherent in self-determination claims. Therefore, Werther criticised legal analysis that focuses on defining self-determination based on western legal experience, which cannot even explain the scope of self-determination claims.

148 Dodson, From Lore to Law, op. cit., p. 2, referring specifically to the contrast between the Mabo and Walker decisions. See also, Matsuda, Voices from America, op. cit., p. 1401, argued that this kind of ‘selective filter that appropriates certain aspects of subordinate culture and discards others is not pluralism; it is domination’.

149 Sharp, op. cit., p. xix.

150 ibid. Sharp, p. 11, argued that these misperceptions filtered through from Moynihan J to the Determination of Issues of Fact, and ultimately to the High Court decision in some degree.

151 See discussion of Justice Moynihan’s findings in Mabo v Queensland [No. 2] (1992) 175 CLR 1, per Brennan J, at p. 18.

152 This distinction from Milirrpum was drawn by Moynihan J., reported in Butterworths, Native Title Service, p. 1052. Milirrpum v Nabalco (1971) 17 FLR 141. For a discussion of the Milirrpum case and the Yolgnu community, see Nancy Williams, The Yolgnu and their Land: A system of land tenure and the fight for its recognition, Australian Institute of Aboriginal Studies, Canberra, 1986. See also the comparison between the Milirrpum and Mabo proceedings by Nonie Sharp, op. cit., p. 162, who commented on the either/or framework of legal claims. For further discussion of the Milirrpum case, see pp. 165-7 below.
because the relationship is being judged according to European measures, where these two elements of life are distinct.\(^{153}\)

The recognition of native title to land in *Mabo* has been described as insufficient, or inadequate. Others go further to suggest that the recognition is misconstrued and inappropriate.\(^{154}\) In the First Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson argued that the treatment of Indigenous interests in land under native title fails to take into account the spiritual and cultural dimensions of the relationship. Instead the courts have focused on economic elements of land use with little understanding of the additional roles played by activities such as hunting, fishing and gathering in the maintenance of Indigenous cultural life.\(^{155}\)

Dodson was critical of the courts' unwillingness to recognise other rights and derivations from a full acceptance of Indigenous society as a source of law.\(^{156}\) This would include much broader jurisdiction and self-government claims.\(^{157}\) In the presentation of claims Indigenous peoples must, instead, confront the essentially Western cultural practice of fragmenting claims, which in Indigenous culture and law-ways may be interrelated. Moreover, even when claims are reduced to land claims for example, expressing Indigenous understandings of land and translating those ideas for the courts is difficult because the holistic understandings Indigenous peoples are not accommodated.

At the heart of the difficulty of translating Indigenous claims for the courts is the fundamentally different understanding of what is relevant to the claim. The translation of claims is more clearly explained by a discussion of the issue of

\(^{153}\) Sharp, ibid.


\(^{156}\) Dodson, From Lore to Law, op. cit., p. 2.

\(^{157}\) Matsuda, op. cit., p. 1401.
testimony and examining how oral traditions are received within the procedures of the courts for the reception of evidence. The hearing of testimonial evidence forms the foundation of decision-making in Australian courts. The issue of evidence is therefore a central consideration in contrasting the claims by Indigenous peoples and the courts' accommodation of those claims.

The Meriam people viewed the court case as an opportunity to explain their law, and 'to make things fair and square'. They had an expectation that they would be given the opportunity to recall the facts of their land tenure and how they came to know these laws, that they would be judged fairly, and 'that the truth of their ownership would then become evident to the judge'. This view of the courts as an opportunity to 'explain' is a common expression that helps to explain the attraction to the courts for Indigenous peoples. In this way the evidence given by the Meriam witnesses was directed toward gaining the courts' understanding of their law. Indeed, one of the primary reasons for remittance to the Queensland Supreme Court had been to allow the Meriam people to have 'the right to give evidence'. Despite this enthusiasm it became apparent very early that the hearing might not allow the Meriam people the opportunity they had sought.

There was an understandable expectation that testimony, as a form of evidence, would be capable of embracing the oral traditions of Indigenous peoples. However, as Archie Zariski pointed out, it constitutes 'a trap' for those concerned with cultural

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158 Although documentary evidence has grown and physical evidence continues to play a minor role, the general rule is that a witness can only give evidence of facts that have been perceived with one of their five senses. The statement is accepted as prima facie evidence of the possession of such knowledge. See generally, D. Byrne and J. D. Heydon, *Cross on Evidence*, 4th Australian edn, Butterworths, Sydney, 1991, p. 46.

159 Sharp, op. cit., p. 39, suggested that this expression is used by the Meriam to describe the court not as an adversarial experience but a system to restore balance. See, for example, evidence by Reverend Dave Passi: Transcript of proceedings in the Queensland Supreme Court (TQ) 1682, in Sharp, p. 37.

160 ibid., p. 38.

161 ibid., p. 71.

162 Greg McIntyre, interviewed by Sharp, ibid., p. 42.
claims. Precisely because the courts are cultural institutions, their reasoning reflects the culture from which they were derived. Therefore, Zariski argued:

If testimony is ultimately justified by virtue of necessary contribution to the coherence and cohesiveness of a Western World view then the giving of testimony will be perilous for those who do not share such a world.  

Nonie Sharp suggested that counsel for the Meriam people feared that the witnesses were being subjected to behaviour that they may have construed as ridicule. Greg McIntyre, the Meriam’s counsel, recalled that Justice Moynihan had struggled to understand or respect the evidence given. Sharp argued that these were not primarily problems of language but of understanding in a more complex sense, where the use of ‘mythical-religious idiom’, of metaphor and analogy, were apparently not readily accessible to the literal mind.

The emphasis placed upon testimonial evidence has been identified with a reliance on familiar ways of knowing, with parallels to methods of inductive logic and notions of objectivity in Western science:

It is the familiar face of the ‘common(sense) man’ of the law who both gives and receives testimony. But it is the face of the same not of the other, the outsider, or the alien. This testimony comes not from them but from us. It is a narrative from within a culture trying to look beyond its familiar stories.

It is arguable that Western legal ways of assessing truth are unable to do justice to the testimony of those who do not share the same traditions of thought.

Irene Watson described this as a problem of distance:

non-Indigenous peoples are much further removed from the knowledge and philosophy of their own Indigenous identities and relationships to the land than what Indigenous peoples are. It is a two thousand year

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164 ibid.
165 Sharp, op. cit., p. 42. Still, the witnesses showed few signs of frustration. See for example, the evidence of Gobedar Noah, TQ 2159, in Sharp, p. 72.
166 Greg McIntyre, Interview, Perth, 3 December 1996.
167 Sharp, op. cit., p. 74, also pp. 96, 142.
168 Asch and Bell, op. cit., p. 505.
169 Zariski, op. cit., pp. 24-5.
track back for many non-Indigenous peoples to the source of their own indignity. 170

Looking back at non-Indigenous relationships with the land we are faced with a very different understanding to that asserted by Indigenous peoples. But these relationships must be understood as emerging from the culture of the European society rather than as a universal measure of all societies. This same understanding must extend not only to the way in which claims are received, but how they are judged.

Judging claims through legal reasoning

There are characteristics of legal reasoning that make it difficult for Indigenous cultural claims to be successfully argued. Unfortunately, there are a number of aspects of legal decision-making that assume the universality of the Australian legal system, including the concept of law itself.

In the Meriam peoples’ claim, Greg McIntyre attributed much of Justice Moynihan’s difficulty to his narrow conception of law and his attraction to a notion of the ‘noble savage’. 171 Moynihan J concluded that the Meriam people were ruled more by custom or ‘good manners’ than by law. 172 Dismissing the evidence of several Meriam witnesses as to the existence and exercise of Malo’s law, Moynihan J suggested that ‘it does not become a rule of law just because any number of witnesses call it a rule of law’. 173 Elsewhere Moynihan J remarked ‘I would say it sounds more like a

171 Greg McIntyre, Interview, Perth, 3 December 1996.
172 See discussion of Justice Moynihan’s judgement in Mabo v Queensland [No. 2] (1992) 175 CLR 1, at p. 18, per Brennan J.
system of anarchy than a system of law that disputes are resolved by having a brawl or avoiding a brawl'.

In a similar vein to McIntyre, Sharp suggested that Justice Moynihan’s rejection of Malo’s law as merely a story was based on an understanding of law as the ‘command of the sovereign’. As well there was a perception of a progressive view of human history, in which Indigenous peoples occupy some sort of Hobbesian state of nature. To this end, Moynihan J remarked:

I suppose in those general senses any group of human beings – perhaps animals . . . has a series of precepts which have to be abided [by in order to] live together as a group.

Justice Moynihan reflected views expressed in many decisions regarding Indigenous systems of law throughout the common law world. One notable comparison is the decision of Justice McEachern of the Supreme Court of British Colombia in *Delgamuukw v The Queen* (1991). In relation to the Gitksan and Wet’suwet’en peoples’ claim for the recognition of self-government and other rights, Chief Justice McEachern of the Supreme Court of British Colombia remarked:

I have heard much at this trial about beliefs, feelings and justice. I must again say, as I endeavoured to say during the trial, that courts of law are frequently unable to respond to these subjective considerations.

It is understandable that the capacity of courts throughout the western world to comprehend self-determination claims is compromised if belief, feelings and even justice have no place in the determination of fact in the courts.

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174 TQ 1807, in Sharp, op. cit., p. 94.
175 ibid., p. 144. For a discussion of Hobbes and the pre-civic state of nature as well as the influence of the progressive view of human history, see pp. 37-8 above.
178 *Delgamuukw v British Colombia* (1991) 79 DLR (4th) 185 (BCSC), at p. 201, per McEachern CJ.
179 McEachern CJ drew a distinction between the ‘subjective considerations’ of beliefs feelings and justice, and admissible evidence - ‘the facts which permit the application of legal principle’. *Delgamuukw v British Colombia* (1991) 79 DLR (4th) 185 (BCSC) at p. 201.
Similarly, throughout the Kumarangk dispute the beliefs of the Ngarrindjeri women were viewed with suspicion. As a result, the Ngarrindjeri women refused to recognise the authority of the Royal Commission and did not give evidence.\footnote{Repeated attempts were made to challenge the Royal Commission, see \textit{ALRM v Stevens [No. 1]} (1994) 63 SASR 551; \textit{ALRM v Stevens [No. 2]} (1994) 63 SASR 558; and \textit{ALRM v Stevens [No. 3]} (1994) 63 SASR 566.} For those who did give evidence, it was an experience of frustration, again illustrating the difficulty of translating the claims and making them understood. The following exchange between George Trevorrow, questioned by the Counsel assisting the Commission, David Smith, is illuminating:

Q. How did you know that by connecting the island to the mainland by a bridge . . . was somehow offensive to its significance as a place of women’s business.

A. I think it is just common sense.

Q. But you didn’t know anything about the content of the women’s business.

A. No I still don’t know any of the content.

Q. It may be that a bridge from the island to the mainland would have no affect on –

A. It is still going through our waters . . .

Q. The importance of the waters is something to do with women’s business is it.

A. It very well could be, but it is important to the Ngarrindjeri culture because of the meeting of the waters. I didn’t want to say this, but the place of the waters relates to what we call – the Ngarrindjeri people call Ngaitji, which is each clan group’s symbolic totem so to speak. Those places like that is where these things bread, where they live, where they feed, all those things. To upset the totem area you are upsetting everybody. But I don’t expect you to understand that, the Ngarrindjeri Ngaitji.

Q. Let me put a suggestion to you: what you are talking about is a disturbance to the environment. Is that right.

A. No, more than that. To what those Ngaitji are to the people. They are not just animals and fish and snakes and things to us. They are real. They are more like people. Spiritual . . .

Q. I want to put a label on it so that we can understand it. Is it the case that what you are talking about – that is, that a bridge cannot go to the island – is to do with some other spirituality of the island not women’s business.
A. I'm talking about my business

Q. Can you tell us as much as you can about that.


Q. Which is what you are talking about, is a question of protecting the island from a lot of people coming to the island and ruining it. That's what it is isn't it.

A. You interpret it as environment, I don't. We have a different interpretation it seems. We cannot as Aboriginal people, separate environment and culture. They go hand in hand.

Q. The Ngaitjis, that is the bird symbols and totems for the clans and people, are in fact the wildlife, aren't they.

A. As you view them yes.

Q. Why are they different from--

A. Because - no, I can't talk to you about that. It is plain to see you would never understand about that anyway.

Q. I am suggesting that your objections to the bridge, in the end, boils down to really protecting the island from too many people coming onto it and degradation that would lead to in terms of wildlife, plants and that sort of thing. That's what it is about, isn't it.

A. Well, that's what you are calling it.

Q. You say it is more than that do you.

A. Yes. ¹⁸¹

Irene Watson pointed to the disrespect and ignorance of Indigenous peoples law and culture illustrated by this exchange. ¹⁸² However, it is also illustrative of the difficulty of translating holistic conceptions of land and culture of Indigenous Law within the traditions of the colonial legal system.

The Commonwealth Hindmarsh Island Report, prepared by Justice Jane Mathews, was highly critical of the findings of the Royal Commission but there too, Justice Mathews found it difficult 'fitting Aboriginal beliefs about land into the language of the Heritage Protection Act'. ¹⁸³ These comments hark back to observations by Nonie

¹⁸² ibid., p. 51.
¹⁸³ Mathews, op. cit., p. 191. Although eventually tabled in Parliament, the Mathews report has no legal effect due to a successful challenge against Justice Mathews as Reporter under the separation of powers doctrine: Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (unreported
Sharp of the 'badness of fit' between Indigenous and non-Indigenous conceptions in the Meriam Islands land claim.\footnote{184}

In greater detail, Justice Mathews went on to observe that:

the law requires that those who oppose a declaration [under the Act] must be given an opportunity to respond to the "case" against them. And if that case depends upon "embargoes" or "rules" which are associated with a particular tradition, then the law says that the opponents of a declaration must be told of the details of that tradition. This no doubt places a heavy burden on applicants, particularly those who are relying on confidential traditions.\footnote{185}

Hilary Charlesworth noted that Justice Mathews' comments here highlight the 'irony of the inability of legislation designed to protect Aboriginal heritage to understand that heritage in its own context'.\footnote{186} Instead, Indigenous peoples are forced to reformulate their claims into legal language. Some may question whether such a process can be successful if the legal system requires that Indigenous peoples also express their claims according to an alien way of understanding.

The unacknowledged biases of legal procedures and reasoning, and of legal practitioners, has a propensity to put Indigenous culture on trial in self-determination claims. The pervasive view of a universal law and legal institutions has so deeply affected the habits of thought of the non-Indigenous society that it has become difficult to conceive an alternative source of law within the borders of the Australian state and even more difficult to comprehend Indigenous peoples' claims in their own terms. But there are signs that leaps of thought are beginning to occur in the legal sphere.


\footnote{184}{Sharp, op. cit., p. xix.}
\footnote{185}{Mathews, op. cit., p. 205.}
\footnote{186}{Charlesworth, op. cit., p. 21.}
An alternative approach based on equality and respect

Commenting on the missed meanings and misunderstandings of the Meriam peoples’ testimony, Nonie Sharp stated that for the Meriam people ‘[s]ome matters were so deeply cultural that they were not open to question’. This is true of both sides of this encounter. The cultural engagement that occurs when self-determination claims are argued in the court requires each side to expose the fabric of their way of life to understand the similarities and differences with the other.

Michael Asch and Catherine Bell argued that the greatest difficulty facing self-determination claims is the reluctance of judges to view the evidence from a perspective outside their own. In the Meriam land claim, Justice Moynihan failed to appreciate his own perceptual biases and as a result, the ‘simplicity of his assumption coloured the summaries and interpretations he interpolated in the course of the hearings; they almost certainly coloured his evaluation of Meriam culture’.

The failure to acknowledge the cultural bias of legal processes and reliance upon the myth of an objective, neutral, universal law is coupled with a conscious or unconscious stereotyping of Indigenous society as primitive. Asch and Bell observed that:

The unfamiliar is characterised as subjective cultural belief rather than as factual and objective, leaving Aboriginal assertions of truth to be seen as untrustworthy and beyond proper consideration in a court of law.

Specific instances of this continued discrimination, and its prevalence in the content of law, are evident in both of the examples used in the discussion so far.

As we have seen, the colonial law provides the terms in which claims must be stated. Therefore, Indigenous peoples are forced to translate their worldview into legal language to make the courts understand their values and their culture. Moreover,

187 Sharp, op. cit., p. 74.
188 Asch and Bell, op. cit., p. 505.
189 Sharp, op. cit., p. 167.
190 Asch and Bell, op. cit., p. 505.
Indigenous peoples must also frame what are essentially historical, moral challenges to the legitimacy of assertions by the state in terms that will be accepted by an arm of the state. However, Sharp observed signs of ‘an awakening sensibility’ within the legal system, partly in response to the High Court’s *Mabo* decision, at the heart of which is an evolving understanding and respect for Indigenous peoples. Sharp argued that:

[there is] a break in ‘the natural inheritance’ of those born of the conquerors [and] an acceptance of the integrity of cultural difference and with it the tenet that the peoples who were dispossessed ‘are their moral equals’.  

Sir Gerard Brennan ties this sensibility to the rule of law, by suggesting that:

[p]erhaps the independence that is most difficult for judges to achieve is independence from those influences which unconsciously affect our attitude to particular classes of people. Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination.

The danger is that judicial independence of this kind depends ultimately on the ‘calibre and character of the judges themselves’. There are, however, elements of judicial reasoning that do allow the courts to successfully engage with Indigenous peoples’ law-ways.

As a first step, acknowledging that the law is cultural institution would substantially alter the approach taken to the proof of claims. Asch and Bell called for an ‘new legal epistemology’, a ‘new jurisprudence’ that is premised upon the equality of peoples. Moreover, an approach based on equality of peoples would accommodate alternative worldviews rather than requiring the remoulding, or worse the rejection, of claims based on cultural assumptions. The result would be that the courts would no longer interpret historical fact in a way that gives primacy to the perceptions of

191 Sharp, op. cit., p. 16.
192 Brennan, Justice resides, op. cit., p. 15.
193 ibid.
194 Asch and Bell, op. cit., p. 549.
one people over another. Such a reconstruction would require not only an acknowledgement of cultural bias, but also recognition of the need to admit new forms of evidence. This would include recognition of, for example, story-telling of dreaming tracks, of responsibility for land and culture, of ways of governing and of laws and relationships, as well as the history of dispossession and genocide which has affected every facet of Indigenous society. All of these issues would be received as evidence rather than be denigrated as subjective belief and hurt feelings.\(^{195}\)

In this manner, it is arguable that testimony can be conceived and received within a cultural context allowing Indigenous peoples to present their claims in their own way. A more accommodating approach stems from respect for the equality of Indigenous peoples and for their right to assert their claims against the state. Such an approach would require true communication, through an exchange of meaning and insight that cannot be achieved through interrogation and suspicion. Archie Zariski argued that in the process of gaining knowledge, the courts ‘ought to consider letting others speak more for themselves. In principle, we must be prepared to listen more and ask less’.\(^{196}\) If the coloniser’s law is to be accommodating of the claims of Indigenous peoples, it must be able to hear their voice and listen to the story they want to tell.

The acceptance of Indigenous evidence would face the greatest difficulty if, as in the case of the Gitksan and Wet’suwet’en, they were trying to explain their system of laws and government, in a cultural context. However, the recent decision of the full court of the Supreme Court of Canada in the *Delgamuukw case* reaffirmed the

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\(^{195}\) This was also identified as a significant difficulty in Monet’s account of the Gitksan and Wet’suwet’en trial before Chief Justice McEachern. Monet, op. cit., passim, related parts of testimony given by Gitksan chiefs and the interjections of the court which continually questioned the evidentiary value of what the witnesses wanted the court to hear. See for example, pp. 28-9, 38, 42 among others. Compare similar stories about the reception of evidence of titles to land in the *Mabo* proceedings in Sharp, op. cit., passim. Although, in the *Mabo case*, the bulk of evidence was left unchallenged by Moynihan J who was in the unusual position of determining facts for another court. Therefore, Moynihan J was not able to exclude evidence because issues such as whether the Meriam law was law, and therefore allowable or hearsay, was a matter for the High Court.

\(^{196}\) Zariski, op. cit., p. 27, put forward a specific proposal for reconstructing the trial process to achieve this shared vision, in which special juries for cultural claims, made up of members of the culture from which the issues arise, acted as ‘part jurors, part witnesses and in part as experts’ and who are respected as equals.
importance of adapting common law rules of evidence to accommodate the claims of Indigenous peoples. Chief Justice Lamer held that 'aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples'. Specifically, Lamer CJ stated that this would require the courts to 'come to terms with oral histories' recognising that for many Indigenous peoples oral histories are the only record.

Lamer CJ expressed concern that although admitting the oral history evidence, the trial judge had not given any independent weight to them, assumedly because they did not accurately convey historical truth as a court would normally understand it. Chief Justice Lamer suggested that McEachern CJ expected too much of the oral histories and placed an impossible burden on the claimants given the evidence that was available to them. Moreover, Lamer CJ was fearful 'that if this reasoning were followed, the oral histories of aboriginal people would be consistently and systematically undervalued by the Canadian legal system'.

In the Mabo decision, the High Court of Australia expressed concern that the difficulty of proving Indigenous peoples' claims should not preclude their recognition. While the statements are not as strong as in the Canadian context, there is a continuing movement toward respecting and giving due weight to the Indigenous perspective of what is appropriate and cogent evidence.

The need to overcome an implicit assumption of universality is not exclusively a problem of the courts. Assumptions of superiority and an evangelical imposition of

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198 Delgamuukw v British Columbia (1997), op. cit., Lamer CJ, para. 82. See also Van der Peet, op. cit., paras 49-50, 68.
199 Delgamuukw v British Columbia (1997), op. cit., para. 84. See also Van der Peet, op. cit., paras 49-50, 68.
200 ibid., para. 101.
201 ibid., para. 98.
202 Mabo v Queensland [No. 2] (1992) 175 CLR 1, at p. 51, per Brennan J.
one vision of the truth is a feature of European colonial cultures. Moreover, it is arguable that the courts may be the best place for bridging inter-cultural dialogue. Although Indigenous peoples have always resisted colonisation, only recently has recognition begun to come from the non-Indigenous state, through acknowledgement of claims in the courts, as well as recognition in international law. James Tully argued that this is a revival of the Aboriginal and common law system that has been 'hidden beneath the empire of modern constitutionalism'.

Tully identified an ‘Aboriginal and common law system’ of inter-cultural dialogue already in existence, in which three principles, of mutual recognition, continuity and consent, constitute a system that is familiar to both Indigenous Law and common law systems. The principles of mutual recognition and consent equate with the ideas of equality and respect already highlighted, whereas the principle of continuity embodies the idea of a dialogue, recognising that relationships between equals must be continually renegotiated.

In contrast, Nonie Sharp argued that the use of metaphor and analogy by the Meriam peoples was not readily accessible to the literal mind and therefore limited the ability of the court to understand and respect the claims being made. Also, the exchange between George Trevorrow and Counsel assisting the South Australian Royal Commission illustrate that legal practitioners in the court are often unable to comprehend the evidence given. These examples show that comprehension is as much a function of attitude as of familiarity. But where does this leave Indigenous peoples before the courts?

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204 Tully, op. cit., p. 136.
205 ibid., pp. 116-39. See also, pp. 140-82. Here Tully was speaking about the Aboriginal peoples of Canada specifically but has application more broadly. Personal Communication, 12 and 25 September, 1997.
206 Sharp, op. cit., p. 74.
207 For example, Mari Matsuda, op. cit., pp. 1362, 1397, has observed that the prejudices people harbour will surface in their response to accents, moreover, that this may be part of an embedded culture of domination.
As Tully argued, the common law method should be more accessible for this type of reasoning, because:

[in law] understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases so that one can pass easily from familiar cases to the unfamiliar and see the relation between them.\(^{208}\)

The value of analogical reasoning was also argued by Cass Sunstein who suggested that the use of analogy allows for ‘incompletely theorised agreements’, in which there is no need to agree on universal principles but to recognise differences and similarities in order to reach a resolution.\(^{209}\) Tully pointed to the claimants in the *Delgamuukw* case, arguing that Indigenous peoples are adept at explaining concepts of Indigenous culture and Law, contrasting these with European understandings and finding intermediate examples to help the court understand.\(^{210}\)

I have argued earlier that the incremental approach of the courts, and the common law method are viewed as one of the advantages of the courts and, indeed, one of the reasons for the self-determination gains that have been made in the courts. Similarly, Tully’s principle of continuity sees each agreement as ‘one link in an endless chain’, the link is open to review and to re-negotiation, if the agreement is not as appropriate as it might have appeared.\(^{211}\) There is a possibility that the development of doctrine will reflect a developing understanding of Indigenous law-ways so that they may be more successfully accommodated by the courts of the state.

\(^{208}\) Tully, op. cit., p. 108.


\(^{210}\) Tully, op. cit., p. 132. Indeed Tully, p. 134, suggested that the Gitksan and Wet’suwet’en understood the concepts that the judge used to dispossess them.

\(^{211}\) ibid., p. 135.
Conclusion

Given the limitations of the courts in their cultural context and the institutional or structural constraints on them, Rosenberg concluded his analysis of the courts urging that they be rejected as a vehicle of social change:

To ask [courts] to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with naive and romantic belief in the triumph of rights over politics. And while romance and even naiveté have their charms, they are not best exhibited in courtrooms.\textsuperscript{212}

Asking the courts to recognise and support self-determination claims by Indigenous peoples is fraught with dilemmas. Such claims require reliance on an institution which is in part responsible for legitimising centuries of dispossession and denial of Indigenous self-determination. The state maintains relative power and often, as Nettheim noted, law ‘simply follows and legitimates power.’\textsuperscript{213} In both form and content, there is a pervasive legal bias in favour of the oppressor.\textsuperscript{214} The courts are resistant to challenges to the legitimacy of the state. The common law is not wholly accommodating of the claims themselves and has deferred to the sovereign to which it owes its authority. Nor are the courts accommodating of alternative worldviews, forms of expression and unfamiliar conceptions of order and authority. Moreover, the institutions of the common law require Indigenous peoples to formulate their demands in a culturally specific discourse that does not adequately accommodate an Indigenous perspective.

Critics have argued that the result is an abdication of judicial responsibility for the actions of the state.\textsuperscript{215} For example, Chief Justice Marshall of the United States

\textsuperscript{212} Rosenberg, op. cit., p. 343.


\textsuperscript{214} Werther, op. cit., p. xviii.

\textsuperscript{215} Rosenberg, op. cit., pp. 13-14.
Supreme Court coined the phrase ‘courts of the conqueror’, arguing that the courts were powerless to interfere in the subjugation of Indian nations to the United States. But the courts are not subjects of the state, rather they are an arm of the state; they are not the courts of the conqueror, they are the conqueror. They have used their authority to affect the rights of Indigenous peoples and, in particular the relations between Indigenous peoples and the state. Yet, the courts perceive themselves in a hierarchy in which they assert that they are unable to entertain a challenge to state sovereignty.

However, there are strategic advantages as well as direct benefits in using the courts. As an institution and an arm of government, the judiciary provides an important public forum for the assertion of self-determination claims. The size of the Indigenous population and the relative power of the state make it necessary for Indigenous people to locate the forum where their voice will be best and most widely heard. The courts provide an opportunity to assert rights, challenge the state, publicise claims and educate the community.

Self-determination movements often work within the state structures and clearly recognise the political and, indeed, cultural, nature of the courts. Still, the strategic advantages of the courts make them one of the more useful tools in maintaining momentum toward self-determination. Werther referred to this strategic use of the courts as the ‘weapons of the weak’, because they are ‘available for conversion and provide a useful political link to the “centre”, which represents a strategic choice made because of its utility’.216

Noel Pearson, former Chair of the Cape York Land Council, has commented on devising strategies, that:

[Indigenous peoples] need to be realistic about the following: first, about the content and the nature of the tools which are available to us; second,

216 Werther, op. cit., pp. 50-51. From James Scott, Weapons of the Weak: Everyday Forms of Peasant Resistance, Yale University Press, Connecticut, 1985. This is not a true reflection of Scott’s use of the term. Scott was concerned with uprisings of a more revolutionary nature, which did not necessarily operate through existing state structures.
about what these tools can positively achieve. They are limited tools and to optimise results we must use them wisely and skilfully.

While accepting that the courts are not the answer to every claim of rights and having regard to their limitations, the advantages for Indigenous peoples in accessing a central arm of government and public forum are important.

The non-constitutional character of the rights being asserted places the claims of Indigenous peoples within the common law. Despite the difficulty in presenting Indigenous peoples' claims to the court other commentators have maintained the usefulness of the courts and the common law. Colin Tatz went so far as to say that:

the Australian political system has nothing to offer Aborigines but that they may win legally what they cannot win politically; that the law and legal process are perhaps more effective means of asserting rights than conventional politics.

In this alternative argument the strategic advantages of the court as a forum are recognised but so too are the real advantages of attaining specific self-determination goals and the development of long term self-determination strategies through the flexibility of the common law.

Observations made here suggest an opportunity to utilise the courts for self-determination claims that rejects past perceptions and, instead, appeals to the courts’ independence as well as their responsibility for law making in Australia, appealing to the responsibility of the courts and their legitimacy as protectors of the rights of citizens especially classes of citizens. Indigenous peoples in Australia and elsewhere have found the courts, and the common law in particular, a useful instrument to achieve public recognition of their claims and political leverage in negotiations with the state. The common law can also provide the direct benefits of litigation through

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218 Tatz, op. cit., p. 104.
acknowledgement of the rights claimed. The extent to which the common law can be utilised to recognise self-determination claims will be explored in the following chapters where the flexibility suggested here will be tested.
Chapter 4

The Impact of Common Law Doctrines on Indigenous Self-determination

The role of Australian courts in accommodating the claims of Indigenous peoples will depend, largely, on the receptiveness of the common law. The potential for recognition of rights within the common law attracts Indigenous peoples to the courts despite the institutional and cultural limitations. However the common law has not generally embraced these claims and the utility of the courts must be assessed in light of their approach to self-determination claims. The vision of a universal law with its attendant mythology of the superiority of the European legal and political institutions has been central to the courts’ relationship with Indigenous peoples in the past. These assumptions continue to influence current decisions and doctrines.

This chapter examines the doctrines that concern Indigenous self-determination and the more recent attempts to accommodate some recognition of Indigenous peoples within the common law of Australia. A comparison between the unique development of the doctrines concerning Indigenous peoples’ land, law and
sovereignty in Australia helps to explain the context of more recent developments in the Australian common law. The reclaiming of rights to lands and territories in recent court action is then considered. The overthrow of the myth of terra nullius is contrasted with the reinforcement of the act of state doctrine to illustrate the continuing tensions in the recognition achieved within the common law. Recent decisions are used to examine how these tensions are currently being played out.

The approach taken in this chapter is not intended to be wholly negative or critical. Rather, the discussion of the limitations of existing doctrines provides a foundation for determining the ways in which the common law might facilitate the realisation of self-determination in the future. This latter question forms the point of departure for the following chapter. The common law recognition of rights is central the strategic usefulness of the courts as a tool for asserting self-determination.

I. The domestication of the doctrine of discovery

Self-determination claims question the assertion of sovereignty, jurisdiction and title by the British Crown over the territories that became known as Australia. These assertions were legitimated first by political theory and then by natural law theory and international law and finally by the courts. The accepted justification for the acquisition of sovereignty was the superiority of the colonisers over the inhabitants particularly in relation to political organisation, but also with respect to religion, land use, social institutions and skin colour.¹ As we have seen, the law of nations, while positing equality of nations as a central tenet, was also formulated to justify

colonisation and limit recognition of Indigenous peoples. Vitoria acknowledged that the Indigenous peoples of the new world should be allowed to govern themselves 'in both public and private matters'. However, recognition was dependent upon a Eurocentric evaluation of the social and political development of Indigenous peoples and was dismissive of the governmental structures that were in place.

Similarly, the justification for the taking of lands from the Indigenous people was the assumption of superiority in land use and the 'right' of civilised peoples to cultivate the land. Vitoria and Vattel propounded this view from the sixteenth century as an attempt to reconcile the natural law rights of peoples with the colonisation of the Americas. The motivation of European powers in securing trading partners and allies was superseded by a new more intrusive agenda. The primary focus of colonial expansion had turned to the control of lands and resources. The 'discovering' states laid claim to all the lands of the discovered territory as sole sovereign.

2 See, for example, Samuel von Pufendorf, De Jure Naturae et Gentium Libri Octo [1688], translated by C. H. Oldfather, Oceania, New York, 1964, vol. II; Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum, [1764], translated by J. H. Drake, Oceania, New York, 1964, vol. II, pp. xxxii, xxxix; and Emmerich Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct of the Affairs of Nations and Sovereigns [1758], translated by C. H. Fenwick, Oceania, New York, 1964, vol. III, pp. xii, xiii. See generally, James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge University Press, New York, 1995, pp. 70-82. Contrast, for example, Asch and Macklem, op. cit., p. 510, who pointed to the notion of equality in the law of nations and therefore argued that colonisation was a breach of international law as it was understood at the time. See also Thomas Flanagan, 'From Indian title to Aboriginal rights', in Louis Knafla (ed.), Law and Justice in a New Land: Essays in Western Canadian Legal History, Carswell, Toronto, 1986, p. 85. This contrast is illustrative of Slattery's argument that the law of nations is unreliable as a basis for claims because it was not settled and was determined largely by, or in the interests of, the powers of the time. See Brian Slattery, Ancestral lands, alien laws: Judicial perspectives on Aboriginal title, University of Saskatchewan Native Law Centre, Studies on Aboriginal Rights, No. 2, 1983, p. 26.


5 It was asserted that the superiority of European land use justified the taking of uncultivated lands, leaving sufficient lands for the Indigenous people to survive. See John Locke, The Second Treatise of Government, ss. 31-8. Contrast Wolff, op. cit. This imposition of the West's vision of the 'truth' on the non-Western world is the basis of Robert Williams critique of the law as supporter of these assumptions. See Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest, Oxford University Press, New York, 1990. More generally, see James Crawford, The Creation of States in International Law, Clarendon, New York, 1979, pp. 176-81.

The interpretation of the doctrine of discovery by colonial courts

On the earliest understandings of the international law of nations 'discovery' carried with it rights as against other European nations in relation to trade. The rights flowing from discovery expanded with the changing interests in new territories, to include exclusive rights to purchase lands and the right of conquest. It could be argued, then, that the rights of colonised peoples have always been an issue of international law. However, British courts domesticated the rules of international relations and the acquisition of territory into the common law from the earliest times.

British courts had always purported to recognise the rights of inhabitants of newly 'acquired' territories where their traditions and values were similar to those of the British. However, the legitimacy of the Crown's assertion of sovereignty was justified if the territories could be characterised as a political and legal vacuum. The reasoning of the courts led to the development of a 'test' of civilisation that would determine the rights of peoples. Therefore, the laws applicable to conquered nations were firmly established in the antiquity of the common law, the ancient roman *ius gentium* and the universal law of nations.

Conquest was one of three methods of acquiring land under British common law and

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7 Phillip Frickey, 'Marshalling past and present: Colonialism, constitutionalism and interpretation in federal Indian law', *Harvard Law Review*, vol. 107(2), 1993, p. 397. The *basis of discovery was not to control Indians and Indian lands but the right to trade and purchase lands and protection from other European powers.*

8 To this end, Slattery, Ancestral Laws..., op. cit., p.37, argued that the doctrine of discovery was not as certain as some have suggested because the powerful states did not have a settled practice. See also Brian Slattery, 'Aboriginal sovereignty and imperial claims', *Osgoode Hall Law Journal*, vol. 29, 1991, p. 685.

9 See for example *Calvin's case* [1608] 7 Co Rep 1a; 77 ER 377 at p. 398. In *Calvin's case* in 1608 the test had distinctly religious aspect:

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    for if a King come to a Christian kingdom by conquest, seeing that he hath *vitoe et nicis potestatem*, he may at his pleasure alter and change the laws of the kingdom: but until he doth make alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel and bring them under his subjection, there *ipso facto* the laws of the infidels are abrogated, for that they be not only against Christianity, but against the law of God and of nature.

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10 See *Campbell v Hall* 1 Cowp. 204 (1774) per Lord Mansfield, pp. 209-11. See also Williams, op. cit., p. 301.
each of the methods had different implications. The classic pronouncement of the
methods of acquisition is found in Blackstone’s *Commentaries on the Laws of
England*:

Plantations, or colonies in distant countries, are either such where the
lands are claimed by right of occupancy only, by finding them desart and
uncultivated, and peopling them from the mother country; or where,
when already cultivated they have been either gained by conquest, or
ceded to us by treaties. And both these rights are founded upon the law
of nature, or at least upon that of nations.11

Where a colony was established by force, in a territory whose inhabitants had a legal
and political system in place, the local law continued unless contrary to British
concepts of morality and justice or until altered by the Crown.12 This was
distinguished from the rules for settlement, as stated by Blackstone:

For it is held, that if an uninhabited country be discovered and planted by
English subjects, all of the English laws are immediately there in force
. . . But in conquered or ceded countries, that have already laws of their
own, the king may indeed alter and change those laws; but, till he does
actually change them, the ancient laws of the country remain. . .13

Where lands were already inhabited, the doctrine of discovery did not envisage
immediate acquisition of sovereignty unless ceded or conquered. However, a fourth
method of acquisition of territories emerged in British colonial practice which turned
on the idea of cultivation in *Blackstone’s Commentaries* and harks back to a
distinction drawn in *Calvin’s cases*, between Christians and infidels.14 This latter
category of acquisition by ‘settlement’ saw occupation of territory by the original
inhabitants simply not recognised.15

The particular interpretation of what constituted ‘desert and uncultivated’ did not
necessarily coincide with Blackstone’s own conception of the justification for

12 The basis of the conquest rule can be traced to the decision in *Cambell v Hall* (1774) Lofft 655, at
pp. 741; 98 ER 848, at p. 895-6. See also *Blankard v Galdy* (1693) Holt KB 341; 90 ER 1089, and
*Calvin’s case* [1608] 7 Co Rep 1a; 77 ER 377.
the American plantations as within the latter class, having been obtained by conquest, by driving out
the Indigenous inhabitants, or by treaty. As such ‘the common law of England has no allowance or
authority there; they being no part of the mother country, but distinct (though dependent) dominions’.
14 Asch, op. cit., p. 424.
15 See generally Brian Slattery, The land rights of Indigenous Canadian peoples as affected by the
acquiring title to lands.\textsuperscript{16} Indeed, Blackstone went so far as to question the role of the law in legitimising the acts of state that wrested sovereignty and title from the Indigenous peoples:

Pleased as we are with possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at least we rest satisfied with the decision of the laws in our favour.\textsuperscript{17}

Michael Asch argued that had the test of occupancy been truly objective and non-discriminatory, the division between conquest and settlement may have been highly rational.\textsuperscript{18} Instead, the definition was based on ethnocentric biases so that unoccupied land, on the legal view, was not determined by the presence or absence of people but on whether the people met the test of civilisation.\textsuperscript{19}

The importance of this doctrine to the laws of the colonial states was highlighted by Robert Williams Jr. who argued that:

For the native peoples of the United States, Latin America, Canada, Australia and New Zealand . . . the end of the history of their colonisation begins by denying the legitimacy of and respect for the rule of law maintained by the racist discourse of conquest of the Doctrine of Discovery.\textsuperscript{20}

The common law approach to conquest and settlement relied on assumptions of superiority, whether religious or political, that characterised the political and natural law theories. The courts incorporated these justifications in their ‘reasoning’ to reassert a test of civilisation by which the superiority of the British could be used to justify the denial of the rights and interests of the Indigenous peoples as well as their sovereignty and independence.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item Blackstone, \textit{Commentaries}, op. cit., Book 2, p. 2. Blackstone’s distinctions were primarily concerned with the implications for the introduction of the law of England to new territories, rather than with the recognition of rights of the Indigenous inhabitants. Blackstone’s concern for the treatment of Indigenous peoples is reflected in the following passage, at Book 2, p. 7:

But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

\item ibid., p. 2.
\item Asch, op. cit., p. 44.
\item ibid.
\item Williams, op. cit., p. 325.
\item Robert Williams Jr., ‘Learning not to live with Eurocentric myopia: A reply to Professor
\end{enumerate}
\end{footnotesize}
Conquest and acts of state: the United States' approach

Between 1823 and 1832 the United States Supreme Court, under Chief Justice Marshall, handed down a series of decisions which form the basis for the recognition of Aboriginal rights in the United States, Canada and, more recently, Australia. In *Johnson v M'Intosh* the Court had its first opportunity to face squarely the issue of rights over Indian lands. Confronted with a dispute between colonists over deeds, Chief Justice Marshall treated the loss of independence and control over lands as a fait accompli.

While conceding that the 'pretension of converting discovery of inhabited country' into a form of title was an 'extravagant' one, Marshall CJ abdicated judicial responsibility for the rights of peoples against the exercise of power by the state. In this way, Phillip Frickey argued that 'colonial pretensions' were privileged to the exclusion of all other considerations.

The doctrine of discovery was adopted into the domestic law of the United States but formulated on the narrowest construction, giving the discovering nation the


American Indian nations have been judged and their legal rights and status determined in European legal thought and discourse by alien and alienating norms derived from the European's experience of the world. the central texts of contemporary Federal Indian law, beginning with its grounding legal text, the Doctrine of Discovery, deny respect to American tribal peoples' fundamental human rights of autonomy and self determination.

22 In the United States, see Williams v Lee 358 US 217 (1958); in Canada, R v Sioui (1990) 70 DLR (4th) 427 at p. 449 (SCC); and in Australia, see Mabo v Queensland [No. 2] (1992) 175 CLR 1, at p. 60, per Brennan J.

23 21 US (Wheat.) 543 (1823). One significant earlier case in which Marshall CJ commented on the status of the lands past the Western frontier, referring to Indian lands as 'the vacant lands within the United States': Fletcher v Peck 10 US (6 Cranch) 87 at p. 142 (1810). Williams, ... Discourses of Conquest, op. cit., p. 309, described this case as the 'preliminary ceremonies in the legal internment of the doctrine that American Indians possessed natural rights to the lands they had occupied since time immemorial'.

24 Johnson v M'Intosh 21 US (Wheat.) 543 (1823) at p. 591.

exclusive right to extinguish Indigenous peoples right of occupancy, and recognising no natural law based rights to sovereignty in the Indigenous peoples:26

the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired . . . [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.27

What began as a law regulating trade as between European powers became a doctrine of dependence, subjecting the Indigenous peoples to the authority of the state, cementing the vulnerability of Indigenous land and other rights in law. In Johnson v M’Intosh Marshall CJ both recognised European arrogance and reinforced it, relying on a perception of the courts' institutional impotence.28

Frickey argued that in embracing colonialism Marshall CJ relied on two ‘starkly colonial visions’ of cultural superiority and judicial inferiority.29 For example, Marshall CJ stated that:

Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals maybe, respecting the original justice of the claim which has been successfully asserted.30

26 Johnson v M’Intosh 21 US (Wheat.) 543 (1823), at pp. 573-4. See also Williams, ... Discourses of Conquest, op. cit., p. 313.


28 Chief Justice Marshall stressed the need to accept ‘the actual state of things’, and engaged in a process of rationalising in law, the acts of the state. Williams, ... Discourses of Conquest, op. cit., p. 308, argued that in Johnson v M’Intosh Marshall CJ merely legitimated the outcome of United States military campaigns and commercial agreements and ‘silently ignored’ the rights of the Indigenous peoples. For example, see Marshall CJ at pp. 572-3. This sentiment was reiterated at p. 589: ‘some excuse if not justification in the character and habits of the people whose rights had been wrested from them’. See also Werther, op. cit., p. 39, and Macklem, ...Borders of the Canadian legal imagination, op. cit., pp. 400-1. However, Marshall CJ displayed his own prejudices and falsities in comments such as the following, from Johnson, p. 590:

the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

29 Frickey, op. cit., p. 388. Both of these assumptions have been discussed extensively throughout chapters two and three leading up to this discussion.

While Marshall CJ expressly avoided judgements about the justness of colonisation or even of assertions of superiority, the decision ‘immunised’ those questions from judicial review. For Williams, ‘[t]he dominant themes of Marshall’s denial of Indian natural-law rights in Johnson are clearly established in those early evasions of judicial accountability’. Therefore, Johnson v M’Intosh established the dichotomy between power and law that was to form the foundation of the judicial inaction that has become known as the ‘act of state’ doctrine.

During the period in which Marshall CJ was developing the discovery doctrine as domestic law, there was some dissent among his peers who saw the Indian nations as foreign and independent and, although they may have entered into a protection arrangement with the more powerful State, considered this a frequent occurrence among independent nations. However the argument was defeated and the principle of equal sovereignty was replaced by one of ‘relative sovereignty’ which established the hierarchy between Indigenous peoples and the colonising state in the common law, under the ‘dependent nation’ idea.

Later cases involving the Cherokee Nation elaborated on the ‘diminished’ sovereignty alluded to in Johnson v M’Intosh. Unlike Johnson, the Cherokee cases involved a claim by Indigenous people in which sovereignty was a central issue. While dismissing the claim on a technical, jurisdictional question, Chief Justice Marshall constructed a model of Indian status that posited the Indigenous peoples not as foreign states but certainly as sovereign entities within the Constitution of the United States. Remarkably, Marshall CJ accepted the arguments and underlying

31 Johnson v M’Intosh 21 US (Wheat.) 543 (1823), at pp. 588, 589.
33 Williams, ... Discourses of Conquest, op. cit., p. 312.
34 This dichotomy was identified by Frickey, op. cit., p. 389.
36 Meyers, op. cit., pp. 89-90, noted that the Marshall doctrine enshrines a tension between nationhood and dependence in the maintenance of a ‘measured separatism’.
37 Johnson v M’Intosh (1823) 21 US 260, at p. 574.
38 Cherokee Nation v Georgia 30 US (5 Pet.) 1 (1831), at p. 18.
assumptions of the Cherokee, accepting their status as ‘nation’ as well as the integrity of their relationship with the United States under treaty.\footnote{Ibid., p. 15.} Marshall CJ stated that the Cherokee, with other Indian nations were ‘a distinct political society’.\footnote{Ibid., p. 16.}

This construction of Indian status was confirmed in \textit{Worcester v Georgia} in 1832.\footnote{31 US (6 Pet.) 515 (1832).} Marshall CJ concluded that Indian nations were:

\begin{quote}
distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.\footnote{Ibid., p. 557.}
\end{quote}

\textit{Worcester v Georgia} confirmed an exclusive sovereign to sovereign relationship between Indian nations and the federal government that would be upheld by the courts. This however, was no protection against the federal government itself.\footnote{See \textit{Cherokee Nation v Georgia} 30 US (5 Pet.) 1 (1831), at p. 18; \textit{Worcester v Georgia} 31 US (6 Pet.) 515 (1832), at pp. 557-62. Confirmed in \textit{US v Sandoval} 231 US 28 (1913), at pp. 46-7.}

Marshall CJ appeared more willing to criticise the origins of the titles asserted by the state and now legitimated by the law:

\begin{quote}
It is difficult to comprehend . . . that discovery . . . should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.\footnote{\textit{Worcester v Georgia} 31 US (6 Pet.) 515 (1832), p. 542.}
\end{quote}

While less strident in its commitment to judicial impotence, \textit{Worcester v Georgia} reaffirmed the act of state doctrine:

\begin{quote}
power, war, conquest, give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.\footnote{Ibid., p. 543.}
\end{quote}

Despite accepting that the doctrine of discovery and conquest was difficult to defend on the grounds of justice or natural law, Marshall CJ kept the Court shrouded in a
veil of judicial incompetence. Aggression against Indian peoples was now subject to judicial scrutiny under the domestic dependent nation doctrine, but colonisation itself and historical acts of aggression by the state were seen as merely part of the fabric of legal history.\textsuperscript{46} Williams concluded that:

White society’s exercise of power over Indian tribes received the sanction of the Rule of Law in \textit{Johnson v McIntosh} . . . [and] while the tasks of conquest and colonization had not been fully actualized on the entire American continent, the originary rules and principles of federal Indian law set down by Marshall in \textit{Johnson v McIntosh} and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized basis.\textsuperscript{47}

Assuming the supremacy of the federal government legitimised the exercise of power to extinguish the rights of Indigenous peoples without consent and unrestricted by any natural or common law rights. Chief Justice Marshall’s rejection of the natural law literature and embrace of the power of the state were explicit. For example, in \textit{Worcester v Georgia}, Marshall CJ stated that ‘natural law and abstract principles of justice must take a back seat to power and accomplished fact’.\textsuperscript{48} Guntram Werther has highlighted the implications of such assumptions of superiority, and the role of the law in supporting them:

The tactic of denying legal recognition of international law status of aboriginal nations has been an important political function of legal fictions in aboriginal law throughout history . . . In the world of practical politics, this question comes down to one of relative power.\textsuperscript{49}

In short, respect for the equality of peoples was disregarded in the face of absolute power. While Indigenous peoples continued to exercise sovereignty over their remaining lands and peoples the law no longer recognised their independence. The creation of a hierarchy of sovereignty subordinated Indian nations and left Indigenous peoples without recourse against the exercise of power by the state to dispossess them of their lands.

\textsuperscript{46} Frickey, op. cit., p. 395. See also Williams, \textit{...Discourses of Conquest}, op. cit., p. 317.
\textsuperscript{47} ibid.
\textsuperscript{48} \textit{Worcester v Georgia} 31 US (Pet.) 515 (1832), at p. 543.
\textsuperscript{49} Werther, op. cit., p. 40.
II. The Australian courts’ approach

The assertion of sovereignty by the British Crown over the lands and peoples of Australia was unilateral, without the knowledge or consent of the peoples of the continent. The actions of the Crown in relation to Australia were, arguably, against the European, international and domestic law and in contrast to European practice of the time. In fact, the Admiralty’s instructions to Lieutenant James Cook in 1768 reflected the more accepted approach:

You are likewise to observe the genius, temper, disposition and number of the natives if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them presents of such trifles as they may value, inviting them to traffick, and shewing them every kind of civility and regard; taking care however not to suffer yourself to be surprised by them, but to be always on your guard against any accident.

You are also with consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for his majesty by setting up proper marks and inscriptions as first discoverers.\(^50\)

Nettheim commented that Cook may have found the east coast of Australia, but he did not discover it.\(^51\) The land was already occupied by peoples organised into cohesive societies with their own laws and beliefs.\(^52\) Many commentators have gone so far as to conclude that no assertion of sovereignty can be legitimate if made by brute force without the consent of the Indigenous peoples.\(^53\) Cook did not seek and certainly did not receive the consent of the people when sovereignty was declared.


\(^{51}\) Nettheim, Consent of the natives, op. cit.


Characterising Australia as a settled colony

Colonisation proceeded on the false assumption that the continent was sparsely populated. It appears that this may have been in part due to information provided by Joseph Banks that the environment was too hostile to sustain substantial populations.\(^5^4\)

However, with the arrival of the First Fleet, information to the contrary quickly came to light.\(^5^5\) Yet, as Reynolds observed, the advantages of assuming the absence of people were so great that legal doctrine simply continued to depict the colony as one acquired by occupation of terra nullius.\(^5^6\)

As a result, Blackstone’s formulations, regarding the reception of laws into the colonies, were applied as if the territories were ‘desert and uninhabited’. In a triumph of fiction over fact, a distinction was drawn between what constituted discovery of uninhabited lands in law and the reality of Indigenous occupation.

The settlement thesis, which allowed the ‘discovery’ of inhabited territories, was extended to deny rights under the law of the land as well as under international law. The fiction of terra nullius asserted that discovery of uninhabited lands gave rise to rights of occupation in the sovereign, leading to a greater fiction of the state as first occupier of all the territories claimed.\(^5^7\)

The fiction of terra nullius fulfilled the imperial imperative for control over resources, allowing the state to govern the use of land and resources to serve its own purposes.\(^5^8\)

Therefore, the ‘discovery’ obviated a fiction of absolute Crown ownership for the very reason, given by Reynolds, that is, ‘[t]he fundamental problem with discovery as a basis for possession is that one can only discover that which is ownerless’.\(^5^9\)

It is not surprising then that the reality of


\(^{5^5}\) Reynolds, Sovereignty, op. cit., pp. x, 19-21. See, for example, the observations of Watkin Tench, Sydney’s First Four Years, Angus & Robertson, Sydney, 1961, pp. 51-2, that the area around Sydney Harbour was ‘more populous than it was generally believed to be in Europe’.

\(^{5^6}\) Reynolds, Sovereignty, op. cit., p. x.


\(^{5^8}\) Smith, op. cit., p. 541.

violent dispossession in Australia occurred despite the Imperial instructions to James Cook.60 The interests of the emerging colonial state were served best by the complete denial of the rights of the Indigenous inhabitants of the ‘acquired territory’.

Such wholesale dispossession was not unique to Australian colonies. The recognition of rights as conquered peoples under law, as had occurred in North America in the Marshall decisions, however, were not adopted in Australia. Nineteenth century Australian courts were aware of the Marshall decisions.61 Justice Willis of the Supreme Court of New South Wales followed similar reasoning to that of Johnson v M’Intosh in describing the Aboriginal peoples of Australia as domestic dependent nations. In R v Bon Jon, in 1841, Justice Willis conceived Indigenous peoples as ‘dependent allies’ who were entitled to be left undisturbed in their possession save for the right of the Crown to preemption.62 Willis J refused to continue the trial of an Aboriginal person for a breach of British criminal law. Instead, evidence was accepted that the Indigenous people had a complete system of punishment among themselves which is appropriate for every sort of offence and that the British law was not applicable to the Indigenous peoples particularly in disputes among themselves.63 Therefore, Willis J considered that Indigenous peoples were not ‘unqualified subjects’ of the Crown and the introduction of the common law to the colony was thought insufficient to extinguish Indigenous laws and jurisdiction.

However, an earlier case had drawn a distinction between the Indigenous peoples of Australia and those of North America. In R v Jack Congo Murrell Justice Burton, of

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61 See for example, R v Jemmy (Full Court of the Supreme Court of Victoria, Stawell CJ, Barry and Pohleman JJ, The Argus, 7 September 1860), referring to the ‘laws of the Conqueror’ but determined that ‘[t]he jurisdiction of the Court is supreme, in fact, throughout the colony, and with regard to all persons in it.’

62 That is, the right as against other European nations (and against individuals) to purchase lands from the Indigenous peoples. R v Bon Jon (SCNSW, Willis J, Port Phillip Gazette, 18 September 1841). This decision was a likely contributing factor to the dismissal of Willis in 1843. See John Hookey, ‘Settlement and sovereignty’, in Peter Hanks and Brian Keon-Cohen (eds), Aborigines and the Law, Allen & Unwin, Sydney, 1984, p. 2.

63 (unreported decision of the SCNSW, Willis J, Port Phillip Gazette, 18 September 1841) reviewed by Hookey, op. cit., pp. 2-5. See also a South Australian Grand Jury decision in 1847 discussed in Reynolds, Sovereignty, op. cit., pp. 63-4; and pp. 69-71.
the New South Wales Supreme Court, argued:

although it be granted that the Aboriginal Natives of New Holland are entitled to be regarded by Civilised nations as a free and independent people, and are entitled to the possession of those rights which are as such valuable to them, yet the various tribes had not attained at the first settlement of the English people among them to such a position in point of numbers and civilisation and to such a form of government and laws, as to be entitled to be recognised as sovereign states governed by laws of their own.64

Even a hierarchy of sovereignty between the colonial state and Indigenous peoples, such as had characterised the Marshall cases was rejected.

Burton J denied any sovereignty in the Indigenous peoples of the continent, rejecting their authority to determine their relations with the colonisers or to determine their internal relations, laws and political systems. While the case concerned a crime that occurred within the settlement community, it was implicit in the decision that the courts would not recognise the Indigenous peoples as distinct self-governing communities with their own traditional sanctions.65 The assumption that British law was superior and universal justified its imposition over Indigenous peoples and, indeed, continues to obstruct the recognition of Aboriginal law today.66

The courts’ approach failed to acknowledge that law is derivative of the culture from which it emerged and cannot be assumed to be universally applicable. For practical purposes it is arguable that the introduction of the common law was necessary for the control of the British colonists. However, this does not justify the imposition of the law onto Indigenous peoples and the denial of any sphere of operation for Aboriginal law.

Understandably, it was not thought that the Aboriginal law could appropriately apply to the colonists. The colonial administration accepted the difficulties of applying the

64 R v Jack Congo Murrell (1836) 1 Legge Rep 72, affirmed in R v Wedge [1976] 1 NSWLR 581. Hookey, op. cit., p. 4, refers to a longer unreported decision. Reynolds, Sovereignty, op. cit., pp. 71-3, noted reliance on key passages from Vattel’s Law of Nations. See also, R v Peter (The Argus, 29 June 1860), and R v Jemmy (The Argus, 7 September 1860) in which the United States precedents were rejected. See Reynolds, pp. 73-4.

65 Hookey, ibid., p. 5. Compare R v Bon Jon (SCNSW, Willis J, Port Phillip Gazette, 18 September 1841) where Willis J accepted evidence of exactly that.

66 The Australian Law Reform Commission, Recognition of Aboriginal Customary Laws, ALRC
laws of one culture to the members of another who could not comprehend the law or its cultural context. However, this pluralism was not extended for the benefit of the Indigenous peoples. The inherent problems and inconsistencies of such an approach were obvious from the outset. In 1885, Justice Holroyd, of the Supreme Court of Victoria, observed that:

> From the first the English have occupied Australia as if it were an uninhabited desert country. The native population were not conquered, but the English Government and afterward the colonial authorities, assumed jurisdiction over them as if they were strangers who had immigrated into British territory, and punished them for disobeying laws which they could hardly understand, and which were palpably inapplicable to their condition.\textsuperscript{67}

In contrast Justice Willis had recognised that the imposition of an alien legal system on peoples who had no comprehension of it, was simply discriminatory:

> As a British subject he is entitled to be tried by his peers. Who are the peers of a black man? Are those of whose laws, customs, language, and religion he is totally ignorant his peers? He is tried in his native land by a new race to him, and by laws of which he knows nothing.\textsuperscript{68}

Daunton-Fear and Frieberg argued that this approach effectively translated the British law into a system of strict liability for Indigenous peoples.\textsuperscript{69} In applying British law to Indigenous people the notion of \textit{mens rea} or moral guilt was dispensed with. They concluded that:

> [it] would not be unreasonable to expect the law and its agencies to be meaningful to the people who are subjected to it and it would seem that unless this is done and if the law becomes increasingly removed from what is viewed as justice, it will rely more on force for its validity than on consent.\textsuperscript{70}

\textsuperscript{67} M'Hugh \textit{v} Robertson (1885) 11 VLR 410, at p. 431.

\textsuperscript{68} Quoted in Daunton-Fear and Frieberg, op. cit., p. 49. Also note observations by R. L. Misner, 'Administration of criminal justice on Aboriginal settlements', \textit{Sydney Law Review}, vol. 7(2), 1974, p. 260, of the position of Indigenous peoples in the Australian criminal justice system, that 'there are no aboriginal judges, no aboriginal lawyers, no aboriginal jailers. The aborigine has only one role, that of prisoner'. The difficulties were admitted by the High Court of Australia in 1934 in \textit{Tuckier v The King} (1934) 52 CLR 335, at 349, per Starke J:

> He lived under the protection of the law in force in Australia, but had no conception of its standards. Yet by the law he must be tried. He understood little or nothing of the proceedings or of their consequences to him.

The indirect effect of the failure to recognise Indigenous laws justified this comment from one judge:

> We may recognise a marriage in a civilised country, but we can hardly do the same in the case of these aborigines who have no laws of which we can take cognisance. \textit{R v Cobby} (1883) 4 LR NSW 355 at p. 356, following \textit{R v Neddy Monkey} (1861) 1 W&W(L) 40.

\textsuperscript{69} Daunton-Fear and Frieberg, op. cit., p. 50.

\textsuperscript{70} ibid., pp. 47-8, also noted that the greatest injustice arises where the offence being prosecuted is not a crime under Aboriginal law.
In *R v Murrell*, counsel for the defendant had argued that Aboriginal people were not bound by laws that gave them no protection.\(^{71}\) In the same year similar reasoning prompted Cooper CJ of the South Australian Supreme Court to suggest that the killing of one Aboriginal person by another was not a concern of the colonial government because as they claimed no protection from the law, they owed it no allegiance.\(^{72}\) In *Murrell's case*, however, Justice Burton rejected this argument:

> the greatest possible inconvenience and scandal to this community would be consequent if it were to be holden by this court that it had no jurisdiction in such a case as the present.\(^{73}\)

*R v Murrell* confirmed the imposition of the common law upon Indigenous peoples, in particular, the criminal law.\(^{74}\) However, John Hookey has noted that the reasoning of Burton J was not based on an acceptance of the settlement thesis. Rather, Burton J was concerned by the particular facts of the case, in which a murder had taken place within the limits of the township of Parramatta.

Even in *Murrell*, the court showed some understanding of the natural law traditions, in which the private rights of Indigenous peoples were recognised and considered to have the protection of the common law, in theory, if not in practice.\(^{75}\) Justice Burton rejected the argument that the Indigenous people were independent peoples. However they were thought to be entitled, by law, to those rights ‘which as such are valuable to them’.\(^{76}\) This recognition distinguishes between the assertion of sole sovereignty and the denial of rights. That is, an assertion of sovereignty does not of necessity result in loss of title to lands and resources.

\(^{71}\) The reciprocity argument was premised upon a conception of the social contract, that a person cannot legitimately be bound by a legal system that offers no protection.

\(^{72}\) In Daunton-Fear and Friberg, op. cit., p. 47.

\(^{73}\) Quoted in Hookey, op. cit., p. 3, referring to an unreported version of the judge's reasons for decision.

\(^{74}\) *R v Jack Congo Murrell* (1836) 1 Legge Rep 72.

\(^{75}\) Compare the decision of the US Supreme Court in *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831), after which the Cherokee were removed from their traditional lands and forced to trek what became known as the trail of tears. See generally, Anthony Wallace, *The Long, Bitter Trail: Andrew Jackson and the Indians*, Hill & Wang, New York, 1993.

\(^{76}\) (1836) 1 Legge Rep 72. Compare Burton J in *MacDonald v Levy* (1833) 1 Legge 39, at p. 45, where it was argued that, with regard to laws, the colony was not conquered.
The paramount concern in *Murrell* was for order within the colony, and, in fact, the courts did not generally concern themselves with matters amongst Indigenous people outside the limits of the colony, or with matters concerning the commission of a crime against an Indigenous person by a colonist. In hindsight however, the actions of the colonists and the colonial administration were vindicated by the perpetuation of a *terra nullius* mentality. Henry Reynolds observed that:

> Despite coming under the protection of the common law, over 20,000 Aborigines were killed in the course of Australian settlement . . . and neither lawyers nor judges appear to have done much to bring the killing to an end.

The courts gave Indigenous peoples no protection against the acts of the colonists. The reciprocity of responsibility and protection under the law was corrupted.

Regardless of any natural law rights to retain even private rights or possession, in Australia prescriptions for peaceful settlement would not be observed in practice as the battles for land were already being fought and lost at the hands of the colonists. The settlers and squatters were aware of the claims of Indigenous peoples to particular tracts of lands but they had the intellectual affirmation of superiority and the sanction of the state, later reinforced by the law. What should not surprise, given the arguments put thus far about the willingness of the law to legitimate exercise of power by the state, is the judicial characterisation of the Indigenous peoples, as without land tenure system or ownership, divested of all pre-existing rights upon the assertion of sovereignty by the Crown.

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77 See for example, public debate over the trial of Wi War in Western Australia in January 1842, discussed in Reynolds, *Sovereignty*, op. cit., pp. 64-8.

> Whoever agrees that robbery is a crime, and that it is not lawful to take away the property of another, will admit without further proof that no Nation has a right to drive another from the territory which it inhabits in order itself to there.
The development of the settlement thesis

The protection of the private rights of Indigenous people that had been alluded to in the early decisions was not pursued by the judiciary. Indeed, the denial of any continuing rights has been a distinguishing feature of Australian law until recently. The Australian legal system can be credited with an ignominious originality:

the distinctive and unenviable contribution of Australian jurisprudence to the history of relations between Europeans and the Indigenous people of the non-European world . . . was not to provide justification for conquest or cession of land or assumption of sovereignty - others had done that before Australia was settled - but to deny the right, even the fact, of possession to people who had lived on their land for 40 000 years.

The colonial courts sought to draw a distinction between the Indigenous peoples in the Americas and those of New South Wales. The basis of the distinction was a test of social organisation as the threshold for the recognition of Indigenous peoples’ sovereignty and rights as well as laws.

There are a number of ‘justifications’ for non-recognition that have been used by the courts to deny Indigenous law. For example, in MacDonald v Levy, Burton J denied that Indigenous peoples had laws at all. Instead the inhabitants of the colony were described as ‘the wandering tribes of its natives, living without certain habitation and without laws . . .’ The ‘scale of organisation’ test, as we have seen, had become a useful tool for denying Indigenous peoples’ sovereignty in international law. This particular interpretation of the test allowed the courts to ignore the fact of a self-governing and sovereign people with their own laws. In effect, the absence of an Indigenous legal system became an irrebuttable presumption.

Alternatively, it was thought that whether or not a system of laws had operated in the newly acquired lands prior to the introduction of the common law, any such system ‘gave way’ upon the assertion of sovereignty by the Crown. The justification for this

81 See discussion of R v Bon Jon (SCNSW, Willis J, Port Phillip Gazette, 18 September 1841) above.
83 (1833) 1 Legge 39, at p. 45. The same reasoning led the Privy Council to conclude that ‘there was no land law’ existing in the colony at the time of colonisation: Cooper v Stuart (1889) 14 App Cas 286, at p. 292.
view was that the Crown had acquired sovereignty over the territory making the
Sovereign the sole source of laws. The introduction of the common law therefore
extinguished the laws of the Indigenous people. Surprisingly, this view has
persisted. In 1976 Rath J, of the New South Wales Supreme Court, stated that
‘[u]pon Settlement there was, in the colony, only one sovereign, the King of
England, and only one law, namely the English law’.84 On this view, the denial of
Indigenous peoples’ rights under their own law and the imposition of the law of the
coloniser were a corollary of the assumption of sovereignty. As a result, Indigenous
peoples possessed only those rights recognised by the Crown.

The most pervasive justification has been based upon assumptions of superiority of
the English law over any other system of law. While the courts recognised that a
system of laws operated, it was held to be inferior to, and not cognisable to, the
common law. This approach differs slightly from that taken by Burton J in
MacDonald v Levy.85 In that case there was a presumption that the Indigenous
inhabitants had no law at all. Here, while the Courts accepted that some system of
laws operated, Indigenous society was assumed to be so inferior that the British law
became the universal standard.

The Judicial Committee of the Privy Council gave credence to this view in Cooper v
Stuart an appeal from the Supreme Court of New South Wales.86 The Court
distinguished New South Wales as ‘a colony which consisted of a tract of territory
practically unoccupied, without settled inhabitants or settled law’.87 Without
representation from the Indigenous peoples of New South Wales and without the
benefit of any evidence, the Privy Council concluded that ‘[t]here was no land law or

84 R v Wedge (1976) 1 NSWLR 581. Rath J followed the decision in R v Jack Congo Murrell (1836)
1 Legge Rep 72, where Burton J used similar reasoning:
the Aboriginal natives of this colony are amenable the laws of the colony for offences
committed within it against the person of each other and against the peace of our Lord -
the King.
Hookey, op. cit., referring to a longer unreported judgement, p. 3.
85 (1833) 1 Legge 39, at p. 45.
86 (1889) 14 App Cas 286.
87 Cooper v Stuart (1889) 14 App Cas 286, p. 291, reaffirmed at p. 292.
tenure existing in the colony at the time of its annexation to the Crown'. The notion that Indigenous peoples possessed any rights after the assertion of sovereignty was flatly rejected in *Cooper*.

In *In re Southern Rhodesia*, the Privy Council reaffirmed this view:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of a transferable rights of property as we know them.

For the Privy Council, the Indigenous people possessed neither sovereignty nor rights and were relegated, in effect, to merely a practical obstacle to the appropriation of territories. Their rights, customs, laws and autonomy would be only those recognised or granted by the Crown. Indigenous peoples’ rights, then, were contingent upon the pleasure of the Crown. Under this ‘contingent rights’ approach, Indigenous self-government and sovereignty could only exist through constitutional amendment or to the extent it is given force by legislative or executive action. The essence of this approach is that all rights arise from legislative grant, at the pleasure of the Crown, and not from the prior sovereignty of the peoples.

The assumption of the supremacy of the coloniser, perpetuated through the settlement thesis, was of itself a denial of the independence of Indigenous peoples and hence an assertion of the state as sole possessor of sovereignty. The frontier expansion was supported by the law in the adoption of a test of the level of social organisation, in accordance with European assumptions of cultural superiority. The ranking of peoples had an established history in European political theory. The decision in *Cooper* ignored the reality that Indigenous peoples in New South Wales

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88 ibid., p. 292. This case gave rise to the notion that issues of sovereignty and the recognition of self-determination claims were matters of law regardless of the facts.
89 *In re Southern Rhodesia* [1919] AC 211 (Privy Council), per Lord Sumner, at pp. 233-4.
90 This is the basis of the dissenting opinion of Dawson J in *Mabo v Queensland* (1992) 175 CLR 1, see for example p. 159.
91 See Asch and Macklem, op. cit., p. 502.
92 See discussion at pp. 49-51 above.
were organised in societies with laws regulating the use of resources, distribution of
property and social interactions. The fundamental contradiction between law and
fact created a dilemma for future courts in which evidence was actually adduced. In
1971 a single judge of the Supreme Court of the Northern Territory struggled with
the incongruent fact and legal fiction. Milirrpum v Nabalco was the first case in
which Indigenous peoples brought evidence of their continuing ownership of
traditional lands, seeking a declaration of their title.

In that case, the Yolgnu peoples brought an action against the Nabalco Company and
the Commonwealth for recognition of their right to control access to lands on the
Gove Peninsula over which mining leases had been granted. Justice Blackburn
respectfully noted the claimants, the land they spoke for and the people they came to
represent. The first plaintiff, Milirrpum was a representative of the Rirratjingu
people. The Gumatj and Djapu peoples were also represented. Justice Blackburn
began his judgement thus: ‘the meaning of [the] phrase ‘Rirratjingu land’ is one of the
deepest questions in the case’. For Blackburn J, the evidence revealed:

a subtle and elaborate system highly adapted to the country in which the
people led their lives, which provided a stable order of society and was
remarkably free from the vagaries of personal whim or influence. If ever
a system could be called ‘a government of laws, and not of men’, it is
shown in the evidence before me.

Despite this admission, Blackburn J felt compelled by the decision in Cooper v
Stuart, given the paucity of decisions on this issue in Australian jurisprudence to
disregard the facts and arguments before the court.

Earlier courts had not heard evidence from Indigenous people and instead based their
findings on injudicious characterisations of Indigenous societies. However, in the

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93 On the political and social organisation of Indigenous societies in this regard see Reynolds,
Sovereignty, op. cit., pp. 16-59.
94 Milirrpum v Nabalco (1971) 17 FLR 141.
95 ibid., p. 146.
96 ibid.
97 ibid. Further, at p. 267, Blackburn J stated that, ‘the natives had established an elaborate system of
social rules and customs which was highly adapted to the country in which they lived and provided a
stable order of society remarkably free from the vagaries of whim or influence.’ See also pp. 223,
250.
Milirrpum case the evidence of 'an elaborate system' of laws was uncontrovertible.98

In order to legitimise the fiction upon which the assertions of the colonising state were based, Blackburn J held that:

"the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers to perceive or comprehend, it is beyond the power of this court to decide otherwise than that New South Wales came into the category of a settled or occupied colony."99

Blackburn J perpetuated the fictional claim to title by relegating the facts into irrelevance, reasoning that the characterisation of the colony was a matter of law, not of fact.100 Blackburn J followed the Privy Council decision and concluded that a common law doctrine of communal title did not form and 'had never formed part of the law of any part of Australia'.101

This is an example of the responsibility that the courts bear for the current status of Aboriginal law in Australian society. The choice was there for the courts to acknowledge Aboriginal law to some degree. In the United States the Marshall Court had established the 'domestic dependent nation' doctrine under which the Indigenous peoples of North America were regarded as sovereign, within a hierarchy. Thus their laws continue, subject to the imposition of a level of jurisdiction in the federal government.102 While this approach should not be considered a model, it places the Australian courts' approach in a contemporary context. The Australian courts were aware of the Marshall decisions, as is evidenced by comments of Willis and Burton JJ in the 1830's.103 However, the courts chose to distinguish the case in Australia with reference to the 'level of social organisation

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98 ibid., per Blackburn J, p. 266. See also p. 268: 'I hold that I must recognise the system revealed by the evidence as a system of law'.
99 ibid., p. 244.
100 ibid., p. 267.
101 ibid., p. 245.
102 This was the case for example in India and even closer to home with regard to Papua New Guinea: see Administration of Papua v Daera Guba (1973) 130 CLR 353, at p. 397, per Barwick CJ. The decision in Daera Guba is particularly interesting given Barwick's criticisms of the High Court's Mabo decision.
103 See R v Bon Jon (SCNSW, Willis J, Port Phillip Gazette, 18 September, 1841), and R v Jack Congo Murrell (1836) 1 Legge Rep 72, discussed above.
The approach of the United States Supreme Court was also distinguished on the basis of the settlement and conquest doctrines. In *Milirrpum*, the classification of the colony as settled was considered sufficient to deny a sphere of operation for Aboriginal law.

Important implications of the settlement fiction reverberate through current doctrines. Just as the principle of equality of peoples was disregarded in favour of a universal and superior British law, the ideals of responsibility and protection and the notion of moral culpability were also disregarded. Assimilation became the justification for the punishment of morally innocent people, in line with government policy. Justice Kriewaldt thought it would be a ‘serious reflection on our capacity to assimilate the aboriginal part of our community’ if they were not punished for breaches of British law. For Justice Chamberlain in *R v Skinny Jack*, as assimilation was the goal, ‘their first lesson should be to obey our laws’.

The fictions of terra nullius, settlement and absolute Crown ownership that denied Indigenous peoples continuing rights to land were a direct result of the Court’s deference to the power of the state and the assertion of sole sovereignty. While the law maintained the appearance of consistency through this hall of mirrors, the gross abuse of rights perpetrated under its protection remain the ‘darkest aspect of the history of this nation’. Justice Blackburn’s decision in *Milirrpum v Nabalco* remains perhaps the best illustration of the fracture between law and fact that has characterised much of Australia’s legal history.

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104 Willis J in *R v Bon Jon* (SCNSW, Willis J, Port Phillip Gazette, 18 September 1841) is a notable exception.

105 (1971) 17 FLR 141, at p. 244.


107 (unreported decision, 13 July 1964), cited in Daunton-Fear and Frieberg, op. cit., p. 60.

108 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 109, per Deane and Gaudron JJ.
III. Recognition of Indigenous peoples in Australian law

With the authority of the Privy Council, the law had seemed settled by the 1850s, and particularly in light of Milirrpum a century later. The decision in Cooper v Stuart clearly asserted the settled status of the Colony of New South Wales and the implication of settlement for the introduction of British law. There, it was stated that:

the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the Law of England must prevail. . .

Lord Watson went on to cite Blackstone’s Commentaries, in which the accepted consequences of ‘settlement’ were set out.

However, in the years following Milirrpum, the High Court hinted at the possibility that it would be willing to hear an argument on the issue. In Coe v The Commonwealth, the High Court foreshadowed its willingness to hear argument on the implications of the Crown’s assertion of sovereignty. In addition, various judges questioned the correctness of the findings in Cooper. While the case was rejected on its pleadings, some members of the High Court intimated that they would be prepared to consider the implications of the colonisation of Australia. Jacobs and Murphy JJ both agreed that argument should be heard on the issue of whether Australia was a conquered territory. Murphy J felt there was sufficient material to support the argument and Jacobs J noted that no decision of an Australian court had confirmed the categorisation.

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109 Until the passage of the Australia Acts 1986 (Cth), the Privy Council had been the highest court of appeal for Australian cases.
112 (1979) 53 ALJR 403, at p. 408, per Gibbs J (with Aicken J), p. 411, per Jacobs J, and p. 412, per Murphy J.
113 ibid., per Murphy and Jacobs JJ. Contrast Gibbs J, at p. 408. In particular, note comments by Murphy J, p. 412, that ‘The statement by the Privy Council may be regarded as having been made in ignorance or as a convenient falsehood to justify the taking of Aborigines’ land.’
114 ibid., at p. 411, per Jacobs J, stated that ‘while the view has generally been taken that Australian
While rejecting the statement of claim, most of the judges fell short of rejecting the idea of prior sovereignty of the Aboriginal peoples. While Justice Murphy noted that the decision in *Cooper v Stuart* was no longer binding on the High Court, in contrast, Gibbs J reaffirmed the test of social organisation established in *Cooper*, and again distinguished the recognition of sovereignty in the United States:

> the history of the relationship between the white settlers and the aboriginal peoples has not been the same in Australia and the United States . . . They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth or of a State or Territory, might confer upon them.

The formulation of the contingent theory of Indigenous peoples’ rights by Gibbs J denied both the existence of prior and continuing sovereignty of Indigenous peoples and, in doing so, legitimated the claims of the state to sole sovereignty.

In *Gerhardy v Brown*, Justice Deane expressed grave reservations about the law as it stood:

> The common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall CJ, in *Johnson v McIntosh*, accepted that subject to the assertion of ultimate dominion . . . by the State, the ‘original inhabitants’ should be recognised as having ‘a legal as well as just claim’ to retain the occupancy of their traditional lands.

By this time proceedings were under way in the most important case in relation to Aboriginal land rights in this country.

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115 ibid., at p. 411, per Jacobs J. Murphy J at p. 412, went so far as to admit that the Indigenous peoples of Australia ‘had a complex social and political organisation; that their laws were settled and of great antiquity’.

116 ibid., at p. 412, per Murphy J. The *Australia Acts* 1986 (Cth) terminated the line of authority from the High Court of Australia to the Privy Council.

117 ibid., at p. 408.

Reclaiming title in Mabo's case

In June 1992 in the case of Mabo v Queensland [No. 2] a majority of six judges of the High Court agreed that traditional Indigenous titles to land continued after the colonisation of the continent, with the recognition and protection of the common law.\(^1\) The claim by Eddie Koiki Mabo and the Meriam peoples of the Torres Strait claimed title to their lands under a system of Meriam land law, including Malo's law.\(^2\) The settled status of the colonies was not contested, but the Court was prepared to review the implications of 'settlement' for the recognition of Indigenous law and rights. The view taken by the majority was in accord with the arguments put by many academic commentators for a re-evaluation of the settlement doctrine.\(^3\)

All of the judges, with the exception of Dawson J, agreed that a concept of native title existed at common law. The source of that title while it lies outside the common law, in the traditional connection to the land, enjoys the protection of the common law. The content of native title is to be determined in each case by the nature of the traditional laws and customs of the native titleholders. The order of the Court declared that the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.\(^4\)

However, native title can be extinguished by a valid exercise of governmental power, which demonstrates a clear and plain intention.\(^5\)

The Court dismissed the earlier doctrine, which denied the rights of Indigenous peoples based on a supposed scale of social organisation, as unjust and discriminatory.\(^6\) The theory was acknowledged as 'false in fact and unacceptable in

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\(^1\) (1992) 175 CLR 1.
\(^2\) For background to the litigation see pp. 121-2 above
\(^3\) See, for example, Hookey, op. cit.; Garth Nettheim, 'Judicial revolution or cautious correction?: Mabo v Queensland', University of New South Wales Law Journal, vol. 16(1), 1993, Michael Detmold, 'Law and difference: Reflections on Mabo's case', Sydney Law Review, vol. 15(2), 1993; and Mark Walters, 'British imperial constitutional law and Aboriginal rights: A comment on Delgamuukw v British Columbia', Queen's Law Journal, vol. 17, 1992. In answer to criticism that the decision was a deviation from settled law, Frank Brennan, 'The implications of the Mabo decision', Reform, No. 65, 1993, p. 11, argued that the High Court 'did not invent a legal fiction called native title, they destroyed one called terra nullius'.
\(^4\) ibid., p. 217, per Order of the Court.
\(^5\) Mabo v Queensland [No. 2] (1992) 175 CLR 1, at p. 64, per Brennan J.
\(^6\) ibid., at p. 42, per Brennan J.
our society'. The High Court also rejected the defendant’s argument that all interests in land were abolished upon the acquisition of sovereignty, except those specifically recognised by the Crown. Brennan J affirmed the view of the Privy Council in *Amodu Tijani* [1921] ‘that a mere change in sovereignty does not extinguish native title to land’. In this regard, the Court sought to remove the distinction between Indigenous peoples of a settled colony and those of a conquered or ceded colony for the purposes of recognising their rights and interests in land. Also in *Mabo* the High Court gave legitimacy to Indigenous peoples’ claims to sovereignty. The decision was specifically concerned with title to land and while the Court relied on the Marshall cases and their derivatives in the United States, Canada and elsewhere, the decision did not explicitly recognise the continuing sovereignty of Indigenous peoples or any self-government or autonomy rights. However, the Court recognised the pre-existing rights and interests of the Indigenous peoples, Brennan J referring specifically to ‘a change in sovereignty’ occurring when the British annexed the colonial territories.

The judgements rejected the approach of the Privy Council in *Cooper* and Gibbs J in *Coe*. Importantly, *Mabo’s case* affirmed the inherent nature of Indigenous rights, based in prior sovereignty, and disapproved of the assumptions of cultural superiority that underlie any test of social organisation. Specifically, the High Court expressed the opinion that social organisation and concepts, in this case of land ownership, need not be confined by reference to ‘European modes or legal

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125 ibid., at p. 40, per Brennan J, and per Toohey J, at pp. 182, 187.
126 ibid., at p. 57, per Brennan J, at p. 81, per Deane and Gaudron JJ, and p. 184, per Toohey J.
127 ibid., at p. 57, per Brennan J, referring to *Amodu Tijani v Sec'y, Southern Nigeria* [1921] 2 AC 399 at p. 407. See also, *Adeyinka Oyekan v Musediku Adele* [1957] 1 WLR 876, p. 880; [1957] 2 All ER 785, at p. 788, per Lord Denning for the Privy Council: ‘The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected’.
128 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, at p. 57, per Brennan J, hence the reliance on *Amodu Tijani*, op. cit.
129 This reading of the decision is supported by other commentators, see for example Nettheim, *Judicial revolution...,* op. cit., p. 48. Others argued that the decision specifically denies continuing sovereignty. See, for example, Reynolds, *Sovereignty*, op. cit., p. 3. However, the issue was not argued.
130 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, at p. 57, per Brennan J.
131 ibid., at p. 36, per Brennan J.
notions'.\textsuperscript{132} The source of authority for Indigenous land titles was identified as emerging from the rights of Indigenous peoples prior to colonisation.\textsuperscript{133} Therefore, they are neither contingent upon nor sourced from the Crown.

Acceptance of the prior sovereignty of the Indigenous peoples and rejection of the need for legislative or executive recognition of rights implies an acceptance of the inherent nature of Indigenous peoples’ rights. Moreover, it is the pre-existing sovereignty, which continues as a source of rights and of laws, that is the foundation of the title.\textsuperscript{134} As a result, the common law recognises that:

> [native title] has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory.\textsuperscript{135}

This recognised Indigenous society as a source of rights and of laws. In this way it is also an acknowledgement that the title, while recognised by the common law, has its source in the community, and exists apart from the common law protection.\textsuperscript{136} This reasoning reflects an acceptance of the rights of Indigenous peoples to their lands, and the right to determine the laws and customs attributable to the territory, as inherent rights.

Therefore the \textit{Mabo} decision moves Australian jurisprudence toward a theory of inherent Indigenous rights, that accepts that Indigenous peoples’ rights ‘inhere in the very meaning of aboriginality’.\textsuperscript{137} Asch and Macklem argued that the reproduction of Indigenous identity and social organisation requires a system of rights and obligations that reflect and protect what is essential to, or inheres in, the unique relations that Indigenous people have with nature, themselves and other communities.\textsuperscript{138} In this sense, sovereignty describes the totality of powers and

\begin{itemize}
\item \textsuperscript{132} ibid., at pp. 85-6, per Deane and Gaudron JJ, and p. 40, per Brennan J.
\item \textsuperscript{133} ibid., at p. 60, per Brennan J.
\item \textsuperscript{134} ibid.
\item \textsuperscript{135} ibid., at p. 58, per Brennan J. See also Deane and Gaudron JJ, at pp. 87-8.
\item \textsuperscript{137} Asch and Macklem, op. cit., p. 502.
\item \textsuperscript{138} ibid, pp. 502, 506.
\end{itemize}
responsibilities necessary or integral to such a process. Indigenous peoples’ sovereignty, then, is the source from which Indigenous peoples’ rights are defined.

The approach taken toward rights over country has implications for all self-determination claims. For if rights to self-determination are also inherent then the failure to recognise these rights is merely temporal, existing only in the colonial law. This approach is also consistent with arguments put forward in earlier chapters that the law and legal reasoning are culturally relative. While some values may be truly universal, the way those values are reinterpreted into rules and behavioural norms is highly specific to each society.

Discussion of inherent rights unavoidably raises the issue of a universalised group of rights. However, the acknowledgment of universal rights and principles of justice is not an acknowledgment of the universality of a particular legal regime. The often-cited criticism of Indigenous Law is the suggestion that the common law could never apply laws that are ‘morally repugnant’. This criticism can merely disguise an assertion of cultural superiority, and a denigration of Indigenous society. It denies that Indigenous peoples have the capacity to demonstrate the values of equality and justice as Western societies understand them. Western democracies, and Australia in particular, can make no claim to an irreproachable system for the protection of rights.


140 Although such rights still require recognition by the courts in order to be enforceable against the state. This argument will be explored in greater detail in the following chapter.


However, Kenneth Maddock observed that what is considered law ultimately depends upon the lawyer.\textsuperscript{143} For example, on one view, cognisable law requires distinctive features of legislative, judicial and coercive bodies. This view was reflected in \textit{Coe v Commonwealth} where Chief Justice Gibbs suggested that Indigenous people must be subject to the laws of the Commonwealth and the States, because 'they have no legislative or judicial organs by which sovereignty may be exercised'.\textsuperscript{144} Ample evidence exists and, in fact, existed at the time of colonisation to show that highly developed systems of law and government were operating in the territories.\textsuperscript{145}

A more inclusive view would characterise law as 'any rule of human conduct which is regarded as obligatory'.\textsuperscript{146} On this interpretation it has been argued that any stable society, utilising scarce resources develops a system of law and government. Moreover, Frank Brennan argued that any society that organises itself on such a level is self-governing and is entitled to be respected in its sovereignty.\textsuperscript{147} This approach recognises that sovereignty inheres in Indigenous peoples by virtue of their existence as distinct peoples and respects Indigenous peoples as a constitutional entity, rather than a mere minority.\textsuperscript{148}

The Indigenous system of laws did not simply 'give way' to the colonial system but survived.\textsuperscript{149} This argument was successfully asserted in relation to property laws in \textit{Mabo v Queensland}. The form of title recognised by the High Court in \textit{Mabo’s case} is not merely a recognition of private, or individual, rights to land. Rather, the Court

\textsuperscript{144} (1979) 53 ALJR 403, at p. 408.
\textsuperscript{145} Reynolds, \textit{Sovereignty}, op. cit., p. 19. Others have argued that irrespective of such evidence, the existence of a recognisable legal system should be a self-evident presumption. Moreover, the social organisation and institutions of a people should be assumed rather than proved. See for example, Asch and Bell, op. cit., p. 526.
\textsuperscript{146} Maddock, op. cit., p. 213, quoting A. L. Goodhart. Of course there are other views, for example, Maddock, p. 214 contrasts an Austrian view of the law as merely the command of the King.
\textsuperscript{147} Frank Brennan, The Indigenous people, op. cit., p. 34. See also, Asch and Bell, op. cit., p. 524.
\textsuperscript{149} There is evidence to suggest that the Indigenous law has been far more accommodating of British legal concepts than has been reciprocated. See Daunton-Fear and Friberg, op. cit., pp. 70-3, with regard to the evolution of payback remedies.
affirmed a communal title that carried with it the power to determine the law and custom applicable to land. Therefore, native title is a collective right that carries with it the power to make laws. In this way, the decision of the High Court in *Mabo* is an acknowledgment of the continuation of Aboriginal law and of Indigenous society as a source of authority. It is a recognition of the people as law makers and law keepers.\(^{150}\)

In this context, the importance of the *Mabo* decision for Indigenous self-determination movements has not been underestimated. Michael Dodson argued that despite the limitations of the *Mabo* decision it represents ‘a possible turning point in the recognition, by the imposed Western legal system, of Aboriginal law’.\(^{151}\) The *Mabo* decision changed the law but importantly demonstrated a change in the approach of the courts to the claims of Indigenous peoples. The High Court rejected the contingent approach to Indigenous peoples rights and embraced an inherent rights approach. The High Court recognised prior sovereignty and the continuing authority of Indigenous societies recognising Indigenous peoples as law makers. All of these are signs of respect for the authority of Indigenous peoples and demonstrate a commitment to a non-discriminatory legal response to self-determination claims including recognising the equality of Indigenous peoples as a basis for assessing the legal consequences of acts of the colonial state.

### The emergence of ‘act of state’ in Australian law

Among those who embraced the High Court’s decision in *Mabo v Queensland [No. 2]* there has been debate over whether the decision was a ‘judicial revolution or cautious correction’.\(^{152}\) It was an important precedent for the assertion of self-

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\(^{150}\) Brennan, The Indigenous people, op. cit., p. 34.


\(^{152}\) Nettheim, Judicial revolution or cautious correction, op. cit., p. 2. The title of this paper was a direct challenge to an early collection of papers by the University of Queensland Law Review, M. A.
determination claims in Australian courts. However, reliance on a doctrine emerging from the *Mabo* decision requires a measure of caution. While rejecting the notion of superiority in relation to the use of land and, in the same context, the nature of political and social organisation, the courts have refused to hear argument on the inherent and continuing sovereignty of Indigenous peoples. Cases following *Mabo* illustrate the inconsistency in the Australian courts’ approach to self-determination claims that challenge the assertion of sovereignty.

Despite the apparent commitment to an inherent rights approach to self-determination claims in *Mabo*, the test of social organisation remains the foundation of Australian sovereignty. Paul Patton has argued that because of the failure to consider issues of sovereignty directly, the hierarchy of cultures and powers established at colonisation remains essentially intact. The Court artificially separated issues relating to land title from other aspects of Indigenous society. Michael Dodson criticised this aspect of the decision, saying that ‘[t]he Australian legal system must take the further step of accepting that native title is inseparable from the culture which gives it meaning’.

For self-determination claims, questions of land are intimately connected to questions of government and jurisdiction. Rights, which flow from an identification with traditional lands, are also claims to cultural survival. The collective rights that determine titles to land also control access to lands and resources. All of these derive from prior sovereignty and the continuing collective rights of Indigenous peoples. They can be considered inherent in that they exist irrespective of recognition by the state. Therefore, a consistent accommodation of Indigenous rights would incorporate the notion of self-direction and control over the

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153 Patton, op. cit., p. 111.

154 Dodson, From Lore to Law, op. cit., p. 2.

future of the people. The basis for respecting Indigenous rights of self-government is the same as that which requires respect for title to land.

The *Mabo* judgment recognised public or collective rights of Indigenous peoples to determine the distribution of property rights and other associated rights.  Frank Brennan has argued that this recognition of the existence of Aboriginal law and land rights has provided a jurisprudential basis for self-determination on Aboriginal lands. While this may be the case, it is important to distinguish between the jurisprudential basis for future claims of self-determination that involve self-government and sovereignty rights, and the limits of the reasoning in the *Mabo* decision and later cases that attempt to construct doctrinal walls to such recognition.

For example, the scope of the recognition of Indigenous society as a source of public, or collective, rights has been limited by the High Court’s unquestioning acceptance of the Crown as sole sovereign. While issues of sovereignty remain to be fully argued before the Court, a major limitation was foreshadowed in the notion that the sovereignty of the State is non-justiciable. The High Court reiterated the view that any assertion of sovereignty was a challenge to the legitimacy of the state that could not be heard by a municipal court.

While the classification of the colony of New South Wales as settled was confirmed, the judges argued that the classification had no impact upon the rights of the

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156 Importantly, native title laws need not be analogised to the English law or notions of private property: *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 87, per Deane and Gaudron JJ.


158 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 69, per Brennan J; and p. 78-9, per Deane and Gaudron JJ. Compare *Isabel Coe* (1993) 118 ALR 193, per Mason CJ.

159 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at pp. 31, 33, 69, per Brennan J; and pp. 78, 95, per Deane and Gaudron JJ. However, sovereignty was not explicitly challenged in that case. See also *Coe v Commonwealth of Australia* (1979) 53 ALJR 403, at p. 408, per Gibbs J. Compare Kent McNeil, ‘A question of title: Has the common law been misapplied to dispossess Aboriginals?’, *Monash University Law Review*, vol. 16(1), 1990, p. 99, who compiled an extensive survey of Australian and English decisions which support the view that acquisition of sovereignty by whatever means the Crown chooses is an act of state the validity of which cannot be questioned in the Courts: *Cook v Sprigg* [1899] AC 572, at p. 578; *Vajesinghi v Sec’y of State for India* (1924) LR 51 IA 357, at p. 360; *Coe v Commonwealth of Australia* (1979) 53 ALJR 403, at p. 408, per Gibbs J. See also *R v Kent Justices* [1967] All ER 560, at p. 564; and *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.
Indigenous peoples to retain their lands. Yet, settlement remains not only the justification for acquisition of sovereignty without consent but also for the denial of other rights. This creates an inconsistency in the treatment of rights. Michael Mansell has argued that:

The Court refused to follow precedent on the issue of *terra nullius* for to do so would be to maintain a legal fiction based on political convenience. Yet the very same convenience was relied upon by the Judges to shut the door to any Aboriginal hopes for arguing Aboriginal sovereignty in the courts. This aspect of the judgement is pure hypocrisy.

While embracing an inherent rights approach in relation to land title, the Court has sought to avoid one of its implications, that is, a recognition of inherent Indigenous sovereignty, which gives the land title its content and meaning.

The courts have recognised that Indigenous peoples’ rights to land exist outside common law or legislative recognition, but the judges in *Mabo* specifically asserted that the state has power to divest those rights unilaterally, without consent or recompense. The basis for this is the claim that the underlying title of the state may be perfected by the exercise of complete dominion. The doctrine creates a property interest unique to Indigenous people, but places them in a position of dependence in relation to the state. Therefore, the judgement does not adequately reflect the fact that the Indigenous people are the original inhabitants of the territories of Australia whose prior sovereignty is reflected in continuing collective rights.

The structure of native title does not replicate the aboriginal rights doctrine of Canada nor the domestic dependent nation doctrine of the United States, yet all three share a common deference to the state’s power to unilaterally extinguish Indigenous rights. The majority of judges in *Mabo* held that past ‘acts of state’ adverse to the

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160 *Mabo v Queensland [No. 2] (1992) 175 CLR 1*, at pp. 33, 58, per Brennan J.
162 *Mabo v Queensland [No. 2] (1992) 175 CLR 1*, at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (although compare p. 92); and pp. 194-5, per Toohey J.
163 Macklem, ...Borders of the Canadian legal imagination, op. cit., p. 397.
164 *Mabo v Queensland [No. 2] (1992) 175 CLR 1*, at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (but compare comments at p. 92); and pp. 194-5, Toohey J. See *Johnson v*
rights of Indigenous peoples to their land were not wrongful. In this way, the common law legitimates the divesting of rights without consent. Michael Dodson criticised these limitations:

The Mabo decision does not recognise equality of rights or equality of entitlement: it recognises the legal validity of Aboriginal title until the white man wants that land... For the vast majority of Indigenous Australians the Mabo decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation for its loss.

Thus the native title doctrine establishes a hierarchical relationship between Indigenous interests and the interests of others, reinforcing the dependency of Indigenous rights on the good will of the state.

The courts have been reluctant to accept self-determination claims that challenge the state’s assertions of sovereignty and jurisdiction over Indigenous peoples and their territories. Australian courts have assumed that jurisdiction over Indigenous peoples is situated wholly with the Crown. The imperial assertion of the Crown as sole source of law within the state is translated into a denial of any other source of authority. The rejection of Aboriginal law by the courts could only be founded upon the fiction that Australia was a political and legal vacuum. The implications for Indigenous people, at the time of colonisation, and into the present, has been the denigration of Indigenous society through the usurpation of authority and the imposition of alien legal norms and structures.

Blackstone’s formulation of the settlement thesis stated that British subjects settling an uninhabited land carried the English law with them as their birthright, but only so

\[\text{M'Intosh v Georgia} \ 21 \text{US (Wheat.)} \ 543 \ (1823) \text{ at p.} \ 588, \text{ Cherokee Nation v Georgia} \ 30 \text{US (5 Pet) 1} \ (1831), \text{ at pp.} \ 557-62, \text{ US v Sandoval} \ 231 \text{US 28} \ (1913), \text{ at pp.} \ 46-7; \text{ in Canada, see St Catherine's Milling and Lumber Co. v The Queen} \ (1887) \ 13 \text{SCR 577 but compare the fiduciary duty doctrine in Guerin v The Queen} \ [1984] \ 2 \text{SCR 335.} \]

\[165 \text{Mabo v Queensland [No. 2] (1992) 175 CLR 1, loc. cit. Compare Deane and Gaudron JJ, p. 92, who initially commented on wrongful extinguishment, but reverted to the power of the state at pp. 94 and 100. Toohey J, at pp. 194-5, was the only judge to affirm the rights of Indigenous peoples against arbitrary exercise of power by the state. The brief judgement of Mason CJ and McHugh J confirmed the ratio of the case in this regard..} \]

much as was ‘applicable to the conditions of the infant colony’. 167 Similarly, Deane and Gaudron JJ argued in *Mabo* that even the *Cooper v Stuart* formulation could allow for the recognition of Aboriginal law: 168

The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was ‘reasonably applicable to the circumstances of the Colony’. This left room for the continued operation of some local laws and customs among the native people and even the incorporation of some of those laws and customs as part of the common law. 169

It was upon this basis that the Aboriginal law regarding land was recognised by the common law. It has been argued that the more complex approach to settlement would also recognise that Aboriginal law operates for Indigenous communities where appropriate. 170

The survival of Indigenous peoples and of their law is a reality that the colonial legal system has had to confront from the outset. Judges who deal specifically with the interaction of the two legal systems have made various accommodations. 171 In some circumstances judges have called for the strengthening of traditional authority. In other circumstances the courts have encouraged Indigenous communities to deal with their own members. 172 In some circumstances consultation with the community has occurred to determine appropriate sanction. 173 In mitigating the harshness and discrimination of the imported law, judges have paid regard to Aboriginal law, particularly in determining sentences. 174 Yet very few changes to substantive law

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167 ibid.
168 See also Nettheim, *Judicial revolution...*, op. cit., and generally, Walters, op. cit.
169 (1992) 175 CLR 1, at p. 79, per Deane and Gaudron.
170 Nettheim, *Judicial revolution...*, op. cit., p 10. See also Walters, op. cit.
171 See generally, Daunton-Fear and Freiberg, op. cit.
172 See for example, *R v Buller and Ors* (unreported decision, Muirhead J, SCNT Nos 170-6 of 1975).
173 See for example, *R v Puruntatameri* (unreported decision, Forster J, SCNT No 104 of 1974); *R v Goodwin* (unreported decision, Forster J, No. 191 of 1975); *R v Inginginjini* (unreported decision, Muirhead J, SCNT No. 6 of 1975); *R v Lim* (unreported decision, Muirhead J, SCNT Nos. 7-9 of 1975); and *R v Bullen and Ward* (unreported decision, Muirhead J, SCNT Nos. 127-30 of 1975).
174 Of particular interest is the different approaches taken to the likelihood of traditional punishment. In one instance, the decision of a Western Australian judge to impose a longer sentence to avert the payback system was overturned on appeal. The Chief Justice stated that the gesture was ‘kindly but inappropriate’: *Jameson v R* (unreported decision, Full Ct, 7 April 1965). In contrast, two decisions in the Supreme Court of Western Australia, *R v Ferguson* (unreported decision, Burt J, 8 April 1970) and *R v Fazeldean* (unreported decision, Wallace J, 21 Dec 1973), being aware of the problem of double punishment, imposed minimal (or nominal) minimum terms. See also *R v Skinny Jack and Ors.* (unreported decision, 13 July 1964); *Jacky Anzac Jadjurin v R* (1982) 44 ALR 424; 7 A Crim R
have been made. In 1986, the Report of the Australian Law Reform Commission on the Recognition of Aboriginal Customary Law reviewed the current approach but failed to recommend any material changes to the status quo with respect to the common law.

Increasingly, pressure has been brought to bear for greater reform in the law. Daunton-Fear and Frieberg commented on the changing notion of equality that lies at the heart of calls for change:

the answer to the problem of pluralist values has been a centralist legal system which, from a position of power, has assumed the right to subjugate those who are less articulate and less organised . . . In the culture of the ‘melting pot’, equality meant homogeneity, but in recent times the concept of equality has come to denote more the right to be different, the right to retain and enjoy ones own values. This has entailed a penetrating reconsideration of the role of law in society.

There are difficulties of course in accommodating two legal systems. The survey by Daunton-Fear and Frieberg, however, has shown concrete examples of interaction that have been mutually satisfactory. For these examples to exist suggests an implicit acceptance by the judiciary of the continuing authority of Indigenous peoples.

Recently, however, a claim for explicit recognition of a sphere of authority of Aboriginal law, in the operation of criminal laws was rejected by Chief Justice Mason in the High Court of Australia. The case concerned a well-known Aboriginal

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175 The exception has been to incorporate a person’s culture as a factor in determining the reasonableness of actions. Rather than a recognition of Aboriginal law, this accommodation is merely a non-discriminatory application of a general rule. See R v Aboriginal Louie Barry Muddarubba (1956) NTJ 317; R v Skinny Jack (unreported decision, 13 July 1964); and R v Patipatu (1951) NTJ 18. Compare the decision in Police v James Galarraway Yunupingu (unreported decision, Mr Gillies SM, NT Court of Summary Jurisdiction, No. 9709243 of 1998, 20 February 1998), at pp. 12-13, where the common law and Criminal Code defence of a claim of right was recognised to protect the exercise of obligations imposed by Yolgnu law, that is, Galarrawuy had acted in the honest belief that he had a right to do so when he acted to prevent photos being taken of Yolgnu children on Yolgnu land without permission.


177 Daunton-Fear and Frieberg, op. cit., p. 77.

activist, Denis Walker, who was charged with assault while protecting a sacred site at the behest of the Bunjalung elders. In *Walker v The State of New South Wales* Counsel for Walker argued that the effect of *Mabo v Queensland* was that Aboriginal customary criminal law survived the acquisition of sovereignty by British settlement in the same way as the customary law relating to land tenure. In response, Mason CJ made a number of assertions that affirmed historical barriers to recognition of Indigenous law.

In coming to terms with the injury in our past, the High Court in *Mabo* accepted responsibility for the denial of rights to land. In *Walker* Mason CJ had the opportunity to accept that same responsibility for the denial of law. Instead, in asserting the authority of the Crown to make laws that bind Indigenous people, Mason CJ criticised the claim for asserting that a 'new source of sovereignty resides in the Aboriginal people'. Further, Mason CJ denied that there is an ancient and persisting sovereignty in the Indigenous peoples of this country who seek to assert that sovereignty to varying degrees. As we have seen, the *Mabo* decision affirmed Indigenous society as a source of laws. Yet in *Walker*, Mason CJ asserted that *Mabo* is entirely at odds with the notion of Indigenous sovereignty. Moreover, where in *Mabo* the principle of 'equality before the law' was used to justify the recognition of Aboriginal law, Mason CJ used the same principle to deny any operation to Aboriginal law that conflicts with Australian criminal law. Dodson commented on the contradiction, arguing that *Walker* creates an 'absurd position if our title to land is recognised but the laws and customs which give meaning to that title are treated as if they don’t exist'.

Like the *Mabo* decision, *Walker* reinforced the cultural hierarchy by affirming the
unrestrained authority of the state. Mason CJ refused to question the legislative competence of the state over Indigenous peoples, on the basis that the state is the sole source of sovereignty. The notion of consent for the imposition of laws by the legislature was rejected and the recognition of laws in *Mabo* was limited to those not inconsistent with the common law.

Rather than develop the recognition of Indigenous peoples as lawmakers, the judgement affirms historical barriers to recognition of Indigenous law. Mason CJ cited with approval the comments of Griffith CJ in *Quan Yick v Hinds* that ‘it has never been doubted’ that the imperial criminal law was introduced to the colonies. As we have seen there was considerable doubt about how far the law extended into relations with Indigenous peoples. But, as Foster noted, ‘of course, in law the claim that there was “never any doubt” is often a sign of distant rumblings’. Indeed, Asch and Macklem have argued that the phrase ‘never any doubt’ is a clear indicator of a legal fiction. In this instance, the assertion of exclusive jurisdiction over peoples has been given new life through the *Walker* decision.

The decision in *Walker* is premised on the value of equality before the law. Rather than affirm equality, the *Walker* decision disregards the values of equality before the law, moral culpability and trial by ones peers. Instead the criminal law was treated as an end in itself, rather than a means to justice. The evidence is uncontrovertible that the uniform imposition of the criminal law in Australia has not resulted in equality before the law, and certainly not in justice. Rates of arrest, over-representation of Aboriginal people in Australia’s jails, deaths in custody and juvenile recidivism are clear indicators that the Australian criminal justice system is not universal. Moreover, it has not treated Indigenous peoples of Australia well, and certainly not equally.

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186 See for example, Willis J of the South Australian Supreme Court discussed above.
187 Foster, op. cit., p. 346.
188 Asch and Macklem, op. cit., p. 509.
189 See the Royal Commission into Aboriginal Deaths in Custody (Elliot Johnston QC, Commissioner), *Final National Report*, 5 vols., AGPS, Canberra, 1989. The failure of governments
Since *Mabo v Queensland* the assertion that sole sovereignty resides in the state has been challenged more directly before the High Court in *Isabel Coe v the Commonwealth*. Isabel Coe sought a declaration on issues that had not been raised in the *Mabo case*, specifically putting forward alternative models for the recognition of sovereignty. The statement of claim asserted the sovereignty of the Wiradjuri nation or, in the alternative, domestic dependent nation status under the Marshall model. A third alternative was a broad claim of autonomy:

the Wiradjuri are a free and independent people entitled to possession of those rights and interests (including rights and interests in land) which, as such are valuable to them.

The claim did not set out the basis or purposes for the assertion of sovereignty in any detail and it was not a well prepared case in this respect. This case, like *Walker*, was rejected on its pleadings, that is, it was held not to show a valid claim. Interestingly, Mason CJ, who heard the case, also rejected the pleadings in the *Paul Coe* case. Mason CJ argued that a claim based on grounds that challenged the sovereignty of the state were 'untenable'. However, Mason CJ did not rely on the non-justiciability of a claim of sovereignty. Rather than suggest that the court was incapable of hearing such a claim, Mason CJ went further to reject the assertion of any form of sovereignty persisting in the Indigenous peoples of Australia:

*Mabo [No. 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal peoples of Australia. The decision 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 (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, State of New South Wales and the common law. *Mabo [No. 2]* denied that the...
Crown’s acquisition of sovereignty can be challenged in the municipal courts of this country.194

This is significant because in coming to a conclusion about the absence or otherwise of adverse sovereignty, Mason CJ has opened the issue for debate. While the Isabel Coe decision is not a positive step in itself, the comments of Mason CJ provide a point of criticism and argument for future challenge. The decision does not restrict itself to the issue of justiciability but makes a positive argument against the sovereignty of Indigenous peoples. In this regard Mason CJ made his determination without access to comprehensive arguments on the matter. Future courts will have to assess the conclusions of Mason CJ on the existence of sovereignty and the extent to which it resides in the Indigenous peoples of this continent. In light of the cursory treatment of the issues in Isabel Coe, an opportunity could exist for full argument of continuing Indigenous sovereign authority.

The Australian courts may be asked to revise their approach to the assertion of sole sovereignty and exclusive jurisdiction. While alternative approaches exist within the common law world, the inconsistencies and hierarchies that characterise them suggest a novel approach is needed.195 Australian courts are faced with an interesting route for the future. In recognising the prior sovereignty of Indigenous peoples, they have undermined the discovery doctrine and the settlement thesis. Moreover, in recognising the continuing rights, laws and authority of Indigenous peoples the courts have recognised a sphere of authority that can legitimately be claimed to be sovereign. The foundations exist in the Mabo decision for an accommodation of the self-determination claims of Indigenous peoples in a way that respects their distinct identity and authority as peoples.


195 For example, though many commentators have proposed the domestic dependent nation model, Johnson v M'Intosh (1823) 21 US 260, has been described by Flanagan, op. cit., p. 84, as an 'uneasy compromise' between the Indigenous peoples view of themselves as sovereign peoples and the colonial view of them as 'uncivilised populations subject to the imposed sovereignty of colonising powers'.
However, the inconsistent treatment of the theory of inherent Indigenous rights has meant that Indigenous sovereignty is excluded from the scope of rights that can be claimed before the courts. While the tenor of recent judgements appears respectful of Indigenous peoples, the law they set down still contains vestiges of the assumptions of superiority. The requirements of proof, of social organisation, and traditional connection since the assertion of sovereignty, as well as the emphasis on tenure history and extinguishment, are all examples of the way in which the law has subordinated Indigenous society. An approach that begins from the premise that all peoples are equal, and that their rights are worthy of protection against the excesses of the state, would produce a different picture. The focus would be on the relationship of the land, and other rights being claimed to the existing communities social and political life, resulting in a presumption of ownership and other social, political and cultural rights.196

The fiction that the assertion of sovereignty by the Crown extinguished the sovereignty of Indigenous peoples is the sole reason for its exclusion from the scope of the rights that can be asserted under the common law. This fiction is in turn supported by the assertion that the Crown is the sole possessor of sovereignty. Neither of these fictions are sustainable in the light of either the reality of Australian politics or, indeed, existing decisions of the Australian courts.

Illustrating the commonality of the Indigenous experience in common law countries, Williams lamented that:

Legal doctrines . . . continue to be asserted today to deny respect to the Indian vision and to assert its truths in a world which has not yet learned that freedom is built on my respect for my brother’s vision and his respect for mine.197

The assertion of state as sole sovereign relies on the settlement thesis and therefore a contingent approach to Indigenous peoples’ rights. In the Canadian context Asch and Macklem argued strongly that:

196 Asch and Bell, op. cit., p. 530.
197 Williams, Algebra, op. cit., p. 299.
[this approach] does violence to fundamental principles of justice and human rights in the modern world, such as the assumed equality of peoples, especially in their ability to govern themselves, and the basic rights of a people to self-determination. We believe it abhorrent that Canada was constituted in part by a reliance on a belief in inequality of peoples and that such belief continues to inform political and legal practice.198

The assumption of sole sovereignty was achieved through the exercise of power but not necessarily through the exercise of legitimate authority. Sovereignty was asserted without consent and without respect for the equality of peoples. Regardless of the assertion of sovereignty by the colonising state, and regardless of the failure of the state to acknowledge Indigenous sovereignty, the right persists as an inherent right to exercise the powers and responsibilities necessary to maintain an identity as Indigenous peoples.

Conclusion

The common law has been responsible for inculcating the policies of the state and has perpetuated injustices against Indigenous peoples in Australia and throughout the common law world. Michael Dodson observed that ‘the machinery of the Australian legal system has acted as the legitimising arm of colonialism’.199 This criticism is echoed in the United States by Robert Williams Jr.:

law regarded by the West as is most respected and cherished instrument of civilisation, was also the West’s most vital and effective instrument of Empire during its genocidal conquest and colonisation of the non-Western peoples of the New world.200

198 Asch and Macklem, op. cit., p. 510.
199 Dodson, From Lore to Law, op. cit., p. 2.
200 Williams, ...Discourses of Conquest, op. cit., p. 6.
Through legal fictions, such as terra nullius and the doctrine of discovery, the courts have given unquestioning adherence to assertions of sole sovereignty and superiority by the more powerful colonising state. These assumptions are also reflected in the construction of specific doctrines of Indigenous peoples’ rights such as native title.

Both American and British courts created legal fictions to justify the acts of state in assuming sovereignty of Indigenous peoples and their lands. Chief Justice Marshall was frank in admitting that the compromise doctrine promulgated by his decisions in the Cherokee cases was based more on political expediency and the policy needs of the state than on the law of nations or indeed on the facts.\(^{201}\) These same compromises have been reached in the emerging common law of native title in Australia.

Notwithstanding the importance of the recognition of common law native title rights, the courts continue to assume the inferiority of Indigenous sovereignty and Aboriginal law.\(^{202}\) George Mye, Commissioner for the Torres Strait on the Aboriginal and Torres Strait Island Commission forewarned that the Mabo decision ‘. . . has not quenched our thirst for unconditional justice.’\(^{203}\) An approach based on fiction cannot, of course, be reconciled with fact, and is as ignorant of Indigenous reality now as it was in 1788. Arguments for recognition of Aboriginal law are as salient now as they were in the 1800s and yet continue to be ignored.\(^{204}\)

The piecemeal approach of the courts to recognising Aboriginal law is a reflection of the tension between the fictions that support assumptions of the state as sole sovereign and the fact of Indigenous authority, which continues to play a significant part in the lives of Indigenous peoples. It appears that the greater the threat to the established hierarchy the greater the reluctance of the courts to recognise Indigenous

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\(^{201}\) See *Fletcher v Peck* 10 US (6 Cranch) 87 (1810); *Johnson v M’Intosh* 21 US (8 Wheat.) 543 (1823); and *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831). See discussion pp. 150-4 above.


self-determination claims. This has led the courts to acknowledge rights to land, but only subject to the superior sovereignty and plenary power of the state.

The courts have acknowledged that, although vulnerable, these rights are inherent because their source is not the state but a pre-existing source of authority. The failure of the courts to accommodate greater degrees of self-determination in, for example, recognition of jurisdiction and government powers, cannot be reconciled with an inherent rights approach to Indigenous peoples’ claims. However, the recognition of the least threatening of self-determination claims gives reality to Indigenous sovereignty, carving out a sphere for the operation of Indigenous law. Macklem described these admissions as ‘moments of transformative possibility’ which represent opportunities for expanding and transforming the law.205 Macklem argued that:

even if the law is partially responsible for the current status of native people, this fact alone ought to be sufficient justification for re-imagining law’s relation to [Indigenous peoples] . . . It is possible for the law to reform itself so as to become an instrument of native empowerment . . . the legal imagination contains moments of possibility that could facilitate the realisation of native self-government.206

The process of transformation had a languid evolution, which has allowed centuries of injustice. The Mabo decision was a beginning. In disposing of the fiction of terra nullius, some hope has appeared for Indigenous peoples to maintain control of their traditional lands. However, similar action has yet to be taken against other fictions that limit the recognition of Indigenous sovereignty. If the recognition of Indigenous peoples’ rights is based on respect and equality of peoples, then sovereignty and autonomy are among those rights protected. That is, the sphere of authority from which Indigenous collective rights emerge should be respected in the same way as rights to land.207

205 Macklem, ...Borders of Canadian legal imagination, op. cit., pp. 394-5.
206 ibid, pp. 453-5.
Future claims asserting greater self-determination goals cannot rely solely on the development of a doctrine of native title, the foundations of which reassert inequality. Future claims must question the legitimacy of the hierarchical relationship built into native title, questioning the entrenched position of authority of the Crown. Otherwise, the result, as we have seen with tensions in the domestic dependent nation doctrine, is simply to 'reproduce the dependency in new form'.

The following chapter explores in greater detail how future claims might be argued in a manner that could be accepted by the courts in order to overcome the barriers discussed here.

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208 Macklem, ...Borders of the Canadian legal imagination, op. cit., pp. 410, 414. Macklem, p. 412, argued that decisions which build upon these foundations (for example, the fiduciary duty) frustrate rather than facilitate a greater degree of self-determination.
Chapter 5

Indigenous Self-determination and Equality of Peoples

The cultural and institutional limitations of the courts constrain their ability to understand the self-determination claims of Indigenous peoples. Existing legal doctrines too provide serious hurdles to utilising the courts and the common law. The discussion thus far has highlighted the way in which assumptions of superiority and universality of European institutions have become entrenched in the law. Indeed, Peter Kulchyski argued that the challenge posed by Indigenous peoples' rights is precisely that they force a re-examination of the foundations of law.1 However, the strategic value of asserting claims through the courts have led many Indigenous peoples to utilise the courts in their self-determination strategies. To this end, many commentators have argued that despite the 'ugly realities' of the colonial law there are aspects of the legal system that can be advantageous to Indigenous peoples.2 Moreover, in the same way that the law has been manipulated to justify exclusion and legitimise prejudice, it can be appropriated by Indigenous people to

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1 Peter Kulchyski, Unjust Relations: Aboriginal Rights in Canadian Courts, Oxford University Press, New York, 1994, p. 17. Kulchyski, p. 19, suggested that the recognition of 'aboriginal rights', in Canadian law, is 'the mark, within the established order, of what has not been established'. Mabo v Queensland [No. 2] (1992) 175 CLR 1, and Calder v Attorney General of British Columbia [1973] SCR 313; (1973) 34 DLR (3d) 145 are cases in point.

2 For example, Colin Tatz, 'Aborigines and the civil law', in Peter Hanks and Brian Keon-Cohen (eds), Aborigines and the Law, Allen & Unwin, Sydney, 1984, p. 111, argued that 'the law and legal processes are perhaps a more effective means of asserting rights than conventional politics'. More forcefully, Tatz, p. 104, argued that the Australian political system has nothing to offer Indigenous peoples.
their purpose, to support self-determination claims and to agitate for reform. The usefulness of the courts to Indigenous peoples may not always be measured by the success of particular claims. Here, however, I wish to concentrate on strategies aimed at achieving significant recognition of self-determination through successful court action. The aim of this chapter is to identify aspects of the law that can be harnessed to facilitate the recognition of Indigenous peoples’ claims. The focus of this examination is the way in which self-determination cases have been successfully argued and presented before the courts.

In part one of this chapter, I argue that the courts require familiar concepts upon which to base their reasoning. The doctrine of *stare decisis* and the role of principle in judicial decision-making are key foundations for the development of the common law. Part two concentrates on an aspect of the common law tradition that is capable of accommodating the principle of self-determination. This is the principle of equality before the law, or as it is sometimes described, equality of respect. Therefore, I suggest that judicial reasoning in self-determination cases that has as its guiding principles non-discrimination and the equality of peoples can accommodate the claims of Indigenous peoples. The approach in this chapter takes seriously the challenges to the courts’ legitimacy that are posed by Indigenous peoples’ claims. As a result, in part three I contrast the equality approach with one which uses the assertion of sovereignty as the centrepiece of the argument. In particular, I examine

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3 See, for example, Guntram Werther, *Self Determination In Western Democracies: Aboriginal Politics in a Comparative Perspective*, Greenwood, Westport, 1992, pp. 50-1. See also Tatz, p. 111. Tatz did not gloss over the part that law has played in the oppression of Indigenous peoples, at p. 110, arguing that ‘[l]aw it must be admitted, has been the creator of the Aboriginal condition and the impediment to their aspirations.’ Compare Kirby P, in *Williams v Min, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, at p. 515: ‘The law which has often been an instrument of injustice to Aboriginal Australians can also, in proper cases, be an instrument of justice in the vindication of their legal rights.’

4 Michael Detmold, Leeth’s case: Constitutional equality of respect, paper presented to the Social and Political Theory Group Workshop on Legal Interpretation, Research School of Social Sciences, Australian National University, 12 September 1996, argued that it is equality of respect with which the law is concerned, citing, for example, the fundamental precepts of contract law that the courts’ role is not to determine the value of the contract but to ensure that the contract was made under conditions of equal respect, that is, with no exploitation of relations of unequal power.
the sovereignty claims of Isabel Coe and Denis Walker determined in the wake of *Mabo v Queensland [No. 2]*.5

Equality may seem a curious concept upon which to rely, particularly when equality is so often used as the justification for rejecting or objecting to Indigenous peoples claims. However, the argument in part four seeks to explain how the principle of equality supports rather than undermines Indigenous self-determination claims. I do not deny the importance of the assertion of sovereignty at the heart of all self-determination claims, but I seek to draw a distinction in the way such claims are argued. Therefore, inherent sovereignty is explained in the context of equality of peoples to provide a focus more familiar to the courts.

I. Familiar concepts in judicial reasoning

To varying degrees, strategies for asserting self-determination claims in the courts demand a revision of current law. The differences in approach may be said to be pragmatic assessments of the possibilities for achieving change given the strictures of judicial decision-making. It is therefore useful to examine the role of doctrine in judicial reasoning, as the courts look for familiar concepts upon which to base their decisions. I discover the broad areas of agreement amongst the varying approaches by exploring the flexibility within the constraints of doctrine and precedent.

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Revising the content of the law

The most common level of analysis in academic commentary is concerned with extending the recognition of Indigenous claims through current doctrines. Of particular interest to Australian commentators has been to compare the position here with doctrines in other jurisdictions and in some cases to seek to transplant doctrines such as the doctrine of continuity of Aboriginal rights from Canada or the 'domestic dependent nation' doctrine from the United States. This type of analysis extrapolates the elements of existing doctrines that can 'advantage' Indigenous peoples in Australia. The value of this approach is said to be in attaining specific self-determination goals within the existing regime. Reliance on existing doctrines may be criticised for failing to take sufficient account of the inherent racism of current doctrines. The danger is that gains made under current legal doctrine will be pyrrhic victories.

Often those who reject current doctrines as a basis for further development are dismissed as the radical fringe of legal analysis. This criticism is misleading as

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6 See, for example, Richard Bartlett, 'Inherent Aboriginal sovereignty in Canada and Australia', *Australian-Canadian Studies*, vol. 11, Nos. 1 & 2, 1993, pp. 1-16, or Camilla Hughes, 'The fiduciary obligations of the Crown to Aborigines: Lessons for the United States and Canada', *University of New South Wales Law Journal*, vol. 16(1), 1993, pp. 70-96. For an explanation of the doctrine of continuity, see Brian Slattery, *Ancestral lands alien laws: Judicial perspectives on Aboriginal title*, Studies on Aboriginal Rights No. 2, University of Saskatchewan Native Law Centre, 1983, p. 10. Aboriginal rights based on prior occupation are presumed to continue, having survived the change of sovereignty, unless expressly abrogated. This is the model of native title in *Mabo's case*. On the domestic dependent nation doctrine, see Philip Frickey, 'Marshalling past and present: Colonialism, constitutionalism and interpretation in federal Indian law', *Harvard Law Review*, vol. 107(2), 1993, pp. 381-440.

7 The recognition of land rights can be seen as both an end in itself - as a pragmatic measure to regain control of at least some traditional lands - and as a means to a greater end - 'as part of an attempt to reshape and redefine the settler-Indigenous relationship through peaceful means': Brian Keon-Cohen and Bradford Morse, 'Indigenous land rights in Australia and Canada', in Hanks and Keon-Cohen, op. cit., p.75.


9 See, for example, Patrick Macklem, 'First Nations self-government and the borders of the Canadian legal imagination', *McGill Law Journal*, vol. 36, 1991, p. 393. See also Hamar Foster, 'Forgotten arguments: Aboriginal title and sovereignty in the Canada Jurisdiction Act cases', *Manitoba Law*
many of those same commentators argue forcefully for the potential of the law to embrace an Indigenous vision of the appropriate structuring of political and legal relationships between two peoples.\textsuperscript{10} This is not necessarily a romantic vision but a recognition of the central role played by the law in determining the current circumstances of Indigenous peoples. Robert Williams, for example, focused on the history of the law as a barrier to a more inclusive jurisprudence, yet recognised the potential for the law to embrace Indigenous values and Indigenous sovereignty.\textsuperscript{11}

Increasingly, commentators have adopted a more selective approach to current doctrines in a search for what was eloquently stated by Patrick Macklem as:

> moments of transformative possibility which, if taken from the margins of legal discourse and placed at the centre of the law governing native people, could assist in the realisation of First Nations self-government.\textsuperscript{12}

This approach admits the problematic foundations of current doctrines that create inconsistencies and hierarchies of rights and acknowledges that without clear reform in the fundamental assumptions of the courts, the common law is a dangerous ally.\textsuperscript{13}

However, it is argued that there are threads within the doctrines and precedents that are salvageable and can form the basis for the future development of the law.\textsuperscript{14}

Approaches that call for a revision of the law are not necessarily radical or


\textsuperscript{11} Williams, Algebra ..., op. cit., p. 291. See also p. 222.

\textsuperscript{12} Macklem, First Nations ..., op. cit., p. 387.

\textsuperscript{13} ibid. Although note a later article in which Macklem presented an argument that departed from current doctrine in order to justify the rights of self-government. This later article provides considerable support for many of the ideas in this thesis and in this chapter particularly. See Patrick Macklem, 'Distributing sovereignty: Indian nations and equality of peoples', \textit{Stanford Law Review}, vol. 45, 1993, p. 1311.

\textsuperscript{14} An example of this is the discussion of inherency versus contingency in existing doctrine and recent cases. See, for example, Michael Asch and Patrick Macklem, 'Aboriginal rights and Canadian sovereignty: An Essay on \textit{R v Sparrow}', \textit{Alberta Law Review}, vol. 29(2), 1991, p. 499. See also, discussion at pp. 171-7 above.

\textit{Journal}, vol. 21, 1992, p. 388; and Kevin Worthern, 'Sword or shield: The past and future impact of Western legal thought on American Indian sovereignty (Book Review: Robert A. Williams Jr., \textit{The American Indian in Western Legal Thought, 1990})', \textit{Harvard Law Review}, vol. 104, 1991, p. 1382, who criticised Robert Williams specifically, saying that '[t]his absolutist position ignores the compelling role that settled expectations play in any non-anarchic society'. In contrast, Williams, op. cit., pp. 441-2, criticised the myopic vision of 'hardassed empire builders, or their descendants, who enjoy the material as well as intellectual legacy of their labours'. See also Michael Mansell, 'Can White law accommodate Black demands?' \textit{Aboriginal Law Bulletin}, vol. 1(23), December 1986, p. 10.
revolutionary. Rather, they demonstrate an understanding of the ability of the common law process to reform itself. It would be misleading to suggest that 'the law has no clear mechanism for rewriting its wrongs'.15 On the contrary, the law has shown a capacity to adapt and reformulate its doctrines. For example, in *Mabo's case* Justice Brennan expressed the High Court's view of the ability of the common law to rejuvenate itself and disentangle itself from racist doctrines. In that case it was stated that 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights'.16 Moreover, without such revisionary change, artificial barriers to self-determination and inconsistencies in the treatment of claims will continue as the courts struggle to reconcile common law values with an historical deference to power and precedent.

**The development of the common law**

The question remains whether there is any reason to argue a doctrinal approach at all. We have seen how inconsistencies and assertions of superiority and sole sovereignty that are inherent in current doctrines stand in the way of Indigenous peoples' self-determination claims. Perhaps we should disregard existing doctrines entirely and argue on principle alone. Here, however, we meet the limits of the flexibility of the law, or more correctly, of judicial decision-making.

Greg McIntyre, Counsel for the Meriam people in *Mabo's case*, insisted on the necessity of a doctrinal basis for Indigenous peoples' claims, arguing that doctrinal support was imperative to the success of the case.17 The reason for McIntyre's insistence lies in the nature of judicial decision-making and the methods used for developing the common law. The courts are not completely free to depart from

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16 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 30, per Brennan J.
17 Greg McIntyre, interview, 3 December 1996.
established principles of law. The doctrine of *stare decisis*, the foundation of common law decision-making, demands that consideration be given to the need for stability, consistency, coherence and, importantly, predictability in the law through adherence to precedent.\(^{18}\)

The reasons for judicial restraint were stated by Justice Mason in *SGIC (SA) v Trigwell*:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of common law on the ground that it is ill-adapted to modern circumstances . . . But there are powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court’s facilities, techniques and procedures are adapted to that responsibility.\(^{19}\)

In *Mabo’s case* the relationship between principle and doctrine in the development of the common law was considered. Brennan J explained that the legal system ‘can be modified to bring it into conformity with the contemporary notions of justice and human rights, but it cannot be destroyed’.\(^{20}\) Brennan J expressed concern that if any doctrine of the common law were to be rejected the effect on the ‘skeleton of principle’ that forms the basis of Australian law would have to be considered.\(^{21}\)

However, as an illustration, in the *Mabo* decision itself the accepted doctrines of state property ownership, including the doctrine of terra nullius, that underpinned the property law of Australia were not considered so fundamental that they justified adherence to racist doctrine.\(^{22}\) This reasoning reflects the balancing of the principles

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\(^{18}\) Mason, *Future directions ..., op. cit.*, p. 150.

\(^{19}\) (1979) 142 CLR 617, at pp. 633-4. It is interesting to contrast this statement with the judicial creativity, or activism, that is seen as the ‘legacy’ of the Mason Court. See for example, P. H. Lane, ‘The changing role of the High Court’, *Australian Law Journal*, vol. 70, 1996, pp. 246-51, and D. A. Smallbone, ‘Recent suggestions of an implied “Bill of Rights” in the Constitution, considered as part of a general trend in constitutional interpretation’, *Federal Law Review*, vol. 21, 1993, pp. 254-70. On whether the traditional view of the courts ‘facilities and procedures’ reflects what they actually do, see Abram Chayes, ‘The role of the judge in public law litigation’, *Harvard Law Review*, vol. 89(7), 1976, pp. 1281-1316, especially pp. 1282-3. See discussion at pp. 111-16 above.

\(^{20}\) *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 30, per Brennan J.

\(^{21}\) ibid.

\(^{22}\) The doctrine of absolute beneficial ownership persisting in the Crown over the whole of the lands of Australia was rejected when adherence to such a doctrine required denial of Indigenous rights to property which existed prior to the Crown’s assertion of sovereignty: *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, for example, at pp. 25-31, per Brennan J, especially pp. 29-30. See also Deane and Gaudron JJ, at pp. 82-7.
of judicial decision-making, that is the adherence to precedent and the need to adapt laws to the circumstances of contemporary society.

For some time, the Australian courts were strongly influenced by the concept of 'strict and complete legalism' which saw a subordinate role for the courts in applying and interpreting already existing law.\(^\text{23}\) While this classical view is often raised in debates by politicians and by the general community, it is a view no longer held by lawyers and judges.\(^\text{24}\) Mason CJ argued that '[i]t is now accepted that, at the appellate level at least, judges do make law when they extend, qualify or reshape a principle of law'.\(^\text{25}\) It is unrealistic to suggest that courts do not give consideration to policy issues when making the simplest of determinations.\(^\text{26}\) This movement away from 'the traditional methodology of legal formalism' has resulted in greater acknowledgment of the courts’ law-making role and greater openness in the consideration of 'underlying policy, moral and ethical' questions.\(^\text{27}\)

Therefore, the law is not necessarily 'the prisoner of history' through doctrine and precedent.\(^\text{28}\) The need to keep the law in good repair and to overturn unacceptable or outdated precedent is presented as the balance to the rigidity of \textit{stare decisis}. However, justice remains the paramount concern in both achieving stability and

\(^{23}\) This phrase was used by Sir Owen Dixon, Swearing in of Sir Owen Dixon as Chief Justice, \textit{Commonwealth Law Reports}, vol. 85, 1952, p. xiv. This view was consistent with the Diceyan notion of parliamentary sovereignty, requiring absolute judicial restraint. The theory denied any role for the court in making law. See also Sir Owen Dixon, 'The law and the Constitution', \textit{Law Quarterly Review}, vol. 51, 1935, p. 590.


\(^{25}\) Mason, Future directions ..., p.158.

\(^{26}\) Indeed, Sir Anthony Mason, 'The role of the Court in a federation: A comparison of the Australian and United States experience', \textit{Federal Law Review}, vol. 16(1), 1981-2, p. 5, suggested that there is a danger that "strict and complete legalism" will be a cloak for undisclosed and unidentified policy values'.

\(^{27}\) Mason, Defining the framework ..., op. cit., p. 1. See also Mason, Future directions ..., op. cit., pp. 155-63.

\(^{28}\) Compare Brennan J in \textit{Mabo v Queensland [No. 2]} (1992) 175 CLR 1, at p. 29:

\begin{quote}
Although our law is a prisoner of its history, it is not now bound by the decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies . . . Here rests the ultimate responsibility of declaring the law of the nation.
\end{quote}

predictability as well as in the development of the law to respond to changing circumstances.\textsuperscript{29} To this end, Sir Anthony Mason argued that:

Fortunately, \textit{stare decisis} is so flexible, for so much depends on what is 'settled principle', that we can preserve a balance between the demands for law that is predictable and law that is adaptable and therefore responsive to social necessity.\textsuperscript{30}

The common law by its nature is a developing system of laws. That development is not determined entirely by reference to historical precedent. Rather, judicial decision-making is guided by values and principles of justice that temper adherence to doctrine and precedent.\textsuperscript{31}

Similarly, Justice Toohey argued that the role of an independent judiciary is to give effect to those principles, within the rule of law, as best it can.\textsuperscript{32} Moreover, Paul Finn argued that these fundamental principles are manifest in abstract ideals, rights and, finally, rules that form the substance of common law doctrines.\textsuperscript{33} At the same time, the common law relies upon the identification of fundamental principles to maintain the stability and coherence of the body of law as a whole.

However, as Alexander Bickel has suggested, '[p]rinciple, ethics, morality, these are evocative, not definitional, terms; they are attempts to locate meaning not enclose it.'\textsuperscript{34} In this search for meaning, 'fundamental values' are increasingly being invoked to justify judicial decision-making, particularly where a reassessment of precedent has led the courts to change the direction, scope or form of individual rules and

\textsuperscript{29} Mason, Future directions ..., op. cit., p. 158, suggested:

[Judges] must have an eye to the justice of the rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.

\textsuperscript{30} ibid., p. 150.

\textsuperscript{31} Sir Harry Gibbs, on the occasion of his swearing in as Chief Justice of the High Court of Australia, 12 February 1981, \textit{Commonwealth Law Reports}, vol. 148, 1981, p. xi, reflected on the responsibility of the courts 'to develop the law in a way that will lead to decisions that are humane, practical and just'.


\textsuperscript{33} Finn, Of power and the people, op. cit., p. 281.

doctrines. Members of the High Court have suggested that the fundamental principles upon which the common law should be developed can be determined with reference to values accepted by the community, rather than those personal to a judge.

This community values approach to judicial decision-making has been strongly criticised. In essence, concern over the use of community values is that while speaking in terms of objective truths, judges are ‘likely to be discovering, whether they realise it or not, their own values’. In this sense, community values are seen as merely a new veil behind which personal opinion is expressed. The danger is that such decision-making would follow a systematic bias in favour of the interests of the dominant culture, from which most lawyers and judges are drawn. The reasons for this need not appear sinister, for as Ely stated, ‘people understandably think what is important to them is important’. The judge’s own assumption would therefore go unquestioned.

However, Krygier and Glass argued that criticisms of the courts’ use of values are too simplistic. They concluded that the courts embark upon a different inquiry – into the nature of law itself. The courts, they argued, ‘are concerned with the law, with

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35 Finn, A sovereign people, op. cit., p. 6. See, for example, Dietrich v The Queen (1992) 177 CLR 292; Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case) (1992) 174 CLR 218; and, of course, Mabo v Queensland [No. 2](1992) 175 CLR 1.

36 Mason, Future directions ..., op. cit., p. 159. For example Brennan J, in Dietrich v The Queen (1992) 177 CLR 292, at p. 319, reiterated the ‘genius’ of the common law to adapt, but clarified this flexibility with reference to ‘relatively permanent values’.

37 It is argued that judges are not in a position to know what the community values are, nor do they have the capacity to decipher them. There is also criticism that values are essentially contested, particularly as between different cultures and legal systems, or at least, consensus could only be found at such a level of abstraction as to have little meaning at all and ‘once the Court supplies this context it will lose the moral consensus’. See Martin Krygier and Arthur Glass, ‘Shaky premises: Values, attitudes and the law’, Sydney Law Review, vol. 17, p. 390. See generally, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review, Harvard University Press, Massachusetts, 1980.

38 Ely, ibid., p. 44.

39 Peter Kulchyski, op. cit., p. 13, took this further, warning that: The values and traditions, most especially the material preconditions of the dominant society are totalizing. By this I mean that dominant Canadian society demands to understand everything in a form that suits the basic principles upon which the established order is premised.

40 Ely, op. cit., p. 59. This would explain the bias in favour of individual property rights.
clarifying it, pursuing its intimations, rendering it predictable, and indeed deliberating over values which inhere in it and which might enhance it'.

On this view, the premise that judges are making new law has incorrectly led to the conclusion that the answers are somehow coming from outside the law. The alternative is that the values that the courts refer to are drawn from the law itself. In this sense, 'legal traditions are densely textured and layered . . . they embody particular values, principles and commonplaces, whose implications have often been pondered and particularised over generations'. Therefore, it can be argued that reference to community standards is not a departure from the traditional common law concerns but an accentuation of them in changing circumstances. These traditional concerns with human, democratic and societal values are centred on the relations of power within the state.

The distinction drawn here between values intrinsic to the common law and community consensus becomes particularly important in the consideration of the rights and claims of minorities. Where rights of a minority are asserted against actions taken by the majoritarian government then the absurdity of appealing to the values of the majority for determination of the issue seems clear. This concern is reflected in Sec'y, Dept of Health and Community Services v JWB in which Brennan J argued that community standards may not be the appropriate standards where the 'tyranny [of the] majority opinion may impose on a weak and voiceless minority'.

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41 Krygier and Glass, op. cit., p. 395.
42 ibid., p. 387. See also Ely, op. cit., p. 72: 'no answer is what the wrong question begets', quoting Bickel, op. cit., p.103.
43 Krygier and Glass, op. cit., p. 392.
44 This approach is reflected in comments by Deane J in Dietrich v The Queen (1992) 177 CLR 292, at p. 329:

"circumstance [being] such that [a court] is entitled and obliged to reassess some rule or practice in the context of social conditions, standards and demands and to change or reverse the direction of the development of the law."

45 Finn, A Sovereign people . . ., op. cit., p. 8. See also Krygier and Glass, op. cit., p. 393.
46 For Ely, op. cit., p. 69, 'it makes no sense to employ the value judgements of the majority as a vehicle for protecting minorities from the value judgements of the majority'. Compare comments of McHugh and Kirby JJ during oral submissions by the Commonwealth in Kartinyeri v The Commonwealth (A29/1997 High Court of Australia, Transcript of Proceedings, 6 February 1998) at pp. 37-8.
47 (1992) 175 CLR 218 at p. 277. In response, proponents of the 'community values' approach have suggested that the values should be 'screened' for bias and prejudice. See, for example, Ely, op. cit.,
The direction of change and the basis upon which change is to be justified have come under significant scrutiny. The questions of accountability and legitimacy have led to an inquiry, both in academic circles and in the judiciary itself, to identify where these changes come from and how they identify the values and rights that are considered so fundamental as to warrant judicial recognition and protection.

The courts have been criticised for an increased, judicial ‘activism’ or ‘creativity’ that has seen a series of watershed cases substantially change the course of the law in Australia. Justice Kirby has observed that the apparent increase in judicial creativity may be more noticeable because of the earlier ‘abstinence’, in favour of absolute judicial restraint. Kirby J had this response to criticism of the High Court’s decision in Mabo’s case:

To those who say that the creative judiciary ought to have waited for the legislatures of Australia to correct this long standing affront to justice to an important section of Australian community – the question comes back: why had they not acted before now? How long must the courts wait before discharging their own constitutional duty to ensure justice under the law?

The failure of the legislature to concern itself with updating the law is an issue touched on by many commentators and judges. The need to respond to injustice, particularly in light of developments in international human rights, has led the courts to revisit the nature and extent of common law rights. To this end, Sir Anthony Mason argued that the exercise of judicial power in the development of the common law may well involve the ‘creation’ of new rights.
Mason argued that the underlying reasons for the evolution are directly linked, first, to the emergence of human rights as a matter of national and international concern and the need for judicial enforcement of such rights, and, second, by a 'resurgence of natural law philosophy'. Here Mason CJ referred to reaching back to first principles of justice in determining the future direction of the common law. Finn too, suggested that there is an acknowledgment that:

some values, some human, some democratic or societal, are to be regarded as intrinsic to the social and governmental order we have created in this country. It is this perhaps that is prompting the occasional suggestion that a species of natural law is re-emerging in Australian law.

Arguably, the return to natural law theory is more a re-conceptualisation of the values of the common law in terms of a broader understanding of human rights, in the context of state power.

In Australia, where rights are not enumerated in the Constitution, the common law plays a significant role in protecting the rights of citizens. There are well-founded concerns about the security of common law rights in the face of hostile governments. There is a tension for the courts in the need to protect human rights and the need to respect legislative judgement. The courts can only ensure that the legislature is
aware of the impact of its actions on people’s rights, by narrowly construing legislation where possible.\textsuperscript{58} The High Court has reinforced the presumptive rule of interpretation that, in the absence of unmistakable and unambiguous expression of intention, no statute will be read as authorising an abrogation or curtailment of a common law right and has extended the rule to cover a fundamental right, freedom or immunity.\textsuperscript{59}

In \textit{Mabo}’ case, the \textit{Racial Discrimination Act 1975} (Cth) offered the quasi-constitutional protection for common law recognition of Indigenous interests.\textsuperscript{60} Frank Brennan has observed that only while Australia maintains a legislature committed to non-discrimination and the \textit{Racial Discrimination Act} and international obligations, will the courts be free to exercise their duty to ensure equal protection for Indigenous peoples rights.\textsuperscript{61} However, Neil Löfgren has argued that the protection against non-discrimination is not vulnerable in this way because it has the force of international law.\textsuperscript{62}

Fundamental, or inherent, human rights have increasingly become part of the common law framework. Historically, the emphasis has remained on how these values can be promoted through individual rights.\textsuperscript{63} However, at both the

\begin{itemize}
  \item Thesis, Research School of Social Sciences, Australian National University, 1997, attributed this emphasis to the High Court’s preference for tracing protection to a textual basis within the Constitution. Evidence of this can be seen in the emergence of the ‘democratic principles’ argument to sustain judicial intervention. Specifically, see \textit{Australian Capital Television v Commonwealth} (1992) 177 CLR 106, at p. 134, per Mason CJ.
  \item Toohey, op. cit., p. 170, and Mason, Defining the framework ..., op. cit., p. 28. Areyh Neier, \textit{Only Judgement: The Limits of Litigation in Social Change Legislation}, Wesleyan University Press, Middleton, 1982, pp. 237-9, argued that the power of the legislature to nullify the courts findings is the ‘[o]ne aspect of any venture in judicial policy making [that] confirms their legitimacy’. Moreover, ‘the legitimacy of judicial policy-making power is validated by inherent judicial powerlessness’, where an institution like the court puts its own legitimacy on the line they heighten the degree to which they personify justice. Concomitantly, the necessity to persuade others of their authority is a powerful constraint on the courts.
  \item Mason Defining the framework..., op. cit., p. 28, and \textit{Coco v the Queen} (1994) 170 CLR 427, at p. 437.
  \item \textit{The Racial Discrimination Act 1975} (Cth), arises from Australia’s international obligations under human rights instruments: the \textit{International Covenant on Civil and Political Rights}, art. 26 and the \textit{Convention on the Elimination of all forms of Racial Discrimination}.
  \item Mason, Future directions ..., op. cit., p. 163. As we have seen, Mason has linked the protection of fundamental rights to responsible government:
\end{itemize}
international and domestic level the inability of individual rights to protect collectives within the state has necessitated a reconceptualisation of the rights regime. It is the rights of peoples, and, importantly, of Indigenous peoples, to self-determination that have come to the fore most recently. As we have seen, the right to self-determination and other rights that derive from it, are not merely amalgams of individual rights.\textsuperscript{64} The recognition of these rights is unfamiliar to the courts, but growing respect for the rights of collectives in international jurisprudence has been reflected in developments in common law countries. In Australia the recognition of the right of Indigenous peoples is beginning to establish itself in the judiciary. In 1985 Mason J stated that:

the concept of human rights, though generally associated in Western thought with the rights of individuals, extends also to the rights of peoples and the protection and preservation of their cultures.\textsuperscript{65}

The influence of international norms in fostering this appreciation has been of paramount importance. International law has always been a source of domestic law, although in Australia it does not automatically form part of the domestic law.\textsuperscript{66}

In keeping with the thesis that courts draw upon values that are intrinsic to the common law, Finn argued that, to some degree, the use of international and comparative materials by the courts has been strategic and selective.\textsuperscript{67} International
law, then, provides support for the values of the common law. To this end Michael Kirby argued:

It is usually where the issue for determination is uncertain that a judge will seek guidance of international legal material. Such uncertainty may arise where an established doctrine of the common law, by the passage of time, becomes inappropriate to the responsibilities and demands of modern society. Such was the case in Mabo.68

Kirby J argued that the decision Mabo v Queensland [No. 2] was the culmination of a ‘new found legitimacy’ for international law as a source of law.69 Justice Brennan stated, in Mabo that:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.70

This approach has been followed in later decisions.71 These cases have demonstrated that the use of international law is not necessarily limited to those instances where universal human rights are declared, but may be influenced by ‘legal authority,
policy, principle and applicable rules of international law’. Therefore common law rights or developments may also be influenced by the broader context of international debate.

Within a similar context, attention has also been given to comparative materials that are thought to reveal a ‘universal common law’. Increasingly, reference is being made to Canadian and United States decisions, as well as decisions of the European Court and Commission on Human Rights. Where it appears that there is universal acceptance of a right in other common law countries, there is pressure on the courts to make Australian law conform to international trends. Again, this was clearly the case in the Mabo decision.

Justice Kirby tied the recognition of international and comparative law to the role of the courts and the traditional concerns of the common law process:

insofar as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood.

In the eyes of the international community, it is recognised that modern notions of democracy measure the legitimacy of the government of a state not merely by its reflection of the will of the majority, or even the protection of individual rights, but by the respect shown for the rights of minorities.

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73 Finn, Of power and the people, op. cit., pp. 266-7, doubted the validity of a claim to universal common law but acknowledged the influence of trends in other common law countries.


75 Kirby, In defence of Mabo, op. cit., p. 43

The development of human rights has made reliance on discriminatory precedents even more contentious, further undermining adherence to traditional formalism.\textsuperscript{77} The common law recognition and protection of rights has fuelled public debate concerning the extent of the courts' law-making role. However, as Finn argued, recent developments do not necessarily represent a departure from the roots of the common law but perhaps the present 'ideology' of the common law has been more clearly revealed.\textsuperscript{78} As a result of the greater honesty in judicial decision-making the courts may be more open to the principled claims of Indigenous peoples for self-determination. Equally, where these claims present a challenge to existing doctrine, recognised common law principles can be used to justify a departure from precedent and serve as the foundation for future development of the common law.

\textit{Familiar foundations for reasoning}

It can now be said that judges do make law, and in doing so, they have regard to certain principles and values to guide the development of the common law. Responding to injustices that persist in 'the life and government of the community' has required greater specification of these principles in recent times.\textsuperscript{79} Protecting people against the arbitrary exercise of power by the state has come to define the role of the judiciary in promoting democratic government. This 'evolving concept of a modern democracy' encompasses a new notion of responsible government that goes beyond mere majoritarian government to respect fundamental rights.\textsuperscript{80}

\textsuperscript{77} Mason, Defining the framework ..., op. cit., p. 1, and Future directions ..., op. cit., p. 159.
\textsuperscript{78} Finn, A sovereign people, op. cit., p. 6, linked recent trends in reformulating the common law to the patriation of the common law since the demise of the line of appeal to the Privy Council. See also Finn, Of power and the people, op. cit., p. 272.
\textsuperscript{79} Mason, Defining the framework ..., op. cit., p. 1.
\textsuperscript{80} Mason, Future directions ..., op. cit., p. 163. See also Toohey, op. cit., pp. 172, 174, and Ely, op. cit., p. 87 (for a full discussion, see pp. 73-105). This emphasis can be seen in \textit{Australian Capital Television v Commonwealth [No. 2]} (1992) 177 CLR 106. See also \textit{Nationwide News P/L v Wills} (1992) 177 CLR 1 and \textit{Theophanous v Herald & Weekly Times Ltd} (1994)182 CLR 104. The relationship between the citizen and the state was also at issue in \textit{Minister for Immigration and Ethnic Affairs v Ah Hin Teoh} (1995) 183 CLR 273. See Sir Anthony Mason, The role of the judge at the turn of the century, Fifth Annual AIIA Oration in Judicial Administration, 5 November 1993. On relationships between citizens, particularly in relationships of unequal power, see Finn, A sovereign people ..., op. cit., pp. 7-8, and Finn, Of power and the people, op. cit., p. 257. Neier, op. cit., p. 24,
An understanding of the array of principles from which the courts will take reference, and their source, gives an indication of the types of argument that can be utilised in self-determination claims. Justice Kirby, while reflecting on the impact of international norms on the development of the common law, commented that:

As we enter a new millennium where there will be increasing international law of every kind, it is part of the genius of our legal system that our courts have found a way to take cognisance of international human rights jurisprudence in appropriate circumstances and by appropriate and familiar techniques of reasoning.81

These comments highlight an important element in asserting self-determination cases through the courts. That is, providing the courts with a familiar basis of reasoning, grounded in the traditions of the common law is imperative to achieving significant reform. Understanding the scope within which the courts can operate may provide useful clues as to how claims should be argued. The identification of fundamental principles does not mean that the foundation of current doctrines should be ignored. Nor does it mean that change requires a slow progression of development within existing doctrines. While assumptions of superiority and inconsistencies are necessarily highlighted, the doctrines provide the point of departure for the identification of principles.

Principles will be derived from precedent, however selectively that process may evolve. For, as Finn argued, the courts enter into an historical survey to discern principles or values intrinsic to the common law, rooted in the community and confirmed by ‘deep seated beliefs’ and fundamental human rights.82 Support is also drawn from comparative law and the ‘expectations of the international community’.83

In this way, doctrines play a role in the process of association or analogous reasoning

argued that without a way to deal with the interests of minorities that are effectively excluded from the political process by prejudice, the government cannot claim the consent of the governed.

81 Kirby, A law undergoing evolution, op. cit., p. 44. (typographical error corrected)

82 Finn, Of power and the people, op. cit., p. 268.

83 ibid., p. 269, referring to a phrase used by Brennan J in Mabo v Queensland [No. 2] (1992) 175 CLR 1, at p. 42. Finally, these foreign conclusions are screened by reference to perceived domestic considerations. This process was identified by Finn in numerous cases including Mabo v Queensland [No. 2] (1992) 175 CLR 1; Environmental Protection Agency v Caltex Refining Co Pty Ltd (1993) 68 ALJR 127; Sec'y, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 174 CLR 218; and R v L (1991) 103 ALR 577.
upon which the courts rely in making decisions. In this type of reasoning argument must proceed from:

ethical principles or conclusions it is felt the reader is likely already to accept to other conclusions or principles he or she might not previously have perceived as related in the way the writer suggests . . . [T]he inference proceeds, as it must, from one "ought" to another.84

Werther suggested that '[t]he trick here involves getting the courts . . . to interpret self-determination issues in a manner favourable to aboriginal people'.85 In this context, the 'moments' of recognition and respect in existing cases, particularly in Mabo's case, illustrate that it is within the power of the courts to make the changes that are being sought. With argument based on principles considered fundamental to the Australian common law, doctrinal barriers can be overcome by concepts with which the courts are familiar.

II. Equality as a fundamental principle of the common law

I have used the term 'self-determination claims' to encompass a broad array of claims by Indigenous peoples against the state. These claims are made collectively and are founded in the identity of, and status of, Indigenous peoples. Indigenous peoples make claims against the state for the recognition, protection and promotion of rights that inhere in them as Indigenous peoples. Self-determination is not necessarily asserted as a specific right because self-determination is better understood as the process of asserting rights as peoples. In their most particular form they include claims to their traditional lands, waterways, claims to carry on customary practices, and claims to regulate those lands, waterways and practices. In

84 Ely, op. cit., p. 54.
85 Werther, op. cit., p. 51.
addition claims are made for the right to retain the laws and institutions of their peoples and to control the nature and extent of interaction with others outside. Therefore, the principle of self-determination provides a foundation upon which more particular claims are asserted.

An acceptance of Indigenous peoples’ right to self-determination would provide a principle upon which the courts could rely to determine specific claims. However, the principle of self-determination is not currently understood by the courts as a principle or value upon which they base their decisions. This is not to say that it will never be recognised as such. Self-determination, while controversial, is a recognised principle in international law and is a recognised right of all peoples. Increasingly, the language of self-determination and the acceptance of legitimate Indigenous authority over lands and cultural issues have become more commonplace in political and public debate, though it is still vehemently contested by some.

In contrast to self-determination, the place of equality within the central tenets of the common law tradition is indisputable. Justice Gaudron observed that:

There is . . . one principle that is never questioned and never debated. I’ve sometimes heard that the principle was not applied. I’ve heard it said that it was not understood. But I’ve never heard it suggested that it was not a firm principle of the law . . . I speak, of course, of the principle that all are equal before and under the law, the principle of equality.

In Leeth’s case Justices Deane and Toohey argued that at the heart of the obligation to act judicially (itself the essence of the judicial process) was the ‘duty to extend equal justice’, to treat those before the court fairly and impartially and ‘to refrain from discrimination on irrelevant or irrational grounds’. In that decision Deane and Toohey JJ emphasised the primacy of equality in the distribution of justice:

The essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally

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86 See pp. 57-8 above.
87 For discussion, see Dodson, Self-determination versus assimilation, op. cit., and Aboriginal and Torres Strait Islander Social Justice Commission, Fourth Report, AGPS, Canberra, 1996.
89 Leeth v the Commonwealth [1991-2] 174 CLR 455, at p. 487. See also Kruger v The Commonwealth 146 CLR 126, per Gaudron J.
beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government.\textsuperscript{90} The difficulty, Gaudron J suggested, is that despite the apparent simplicity of the notion, until relatively recently, ‘neither our law nor our legal theory seriously concerned itself with any analysis if what was meant by “equality”’.\textsuperscript{91} As a result, the law has at times talked of equality in a universal sense, where everyone is subject to the same law, regardless of ‘rank or condition’.\textsuperscript{92} But this interpretation was never firmly established in the law.\textsuperscript{93} Deane and Toohey JJ noted that the doctrine is a beneficial one, that is, it should not be construed so as to disadvantage a person or group.\textsuperscript{94}

Although the application of law may have focused on formal equality, as we understand it now, this was more a result of failing to understand what constitutes a relevant difference to be taken into account. Justice Gaudron examined the nature of the inquiry into equality before the law:

Although, modern legal theory turns out to be very ancient doctrine, its modern application poses particular challenges . . . It requires each of us to analyse what it is we are doing and for what reason. Only when that is done can we be sure whether we are or are not proceeding on the basis of a distinction. If we are, we must ask whether it is a relevant distinction and if so, what consequences properly attend it; if we are not, we must ask whether the failure to distinguish is not itself, the cause of injustice, either because it continues the effects of past discrimination or because it compounds underlying inequality.\textsuperscript{95}

These themes were picked up in the 1994 Australian Law Reform Commission Report on Equality Before the Law.\textsuperscript{96} The report discusses the harm caused by blanket application of a formal equality approach because it assumes that equal

\begin{footnotesize}
\textsuperscript{90} Leeth \textit{v} the Commonwealth [1991-2] 174 CLR 455, at p. 486. The primacy of the concept is not always stated as it is often taken for granted. See Mason CJ in \textit{Leeth}, at pp. 470-1.
\textsuperscript{91} Gaudron, op. cit., p. 83.
\textsuperscript{92} This was Dicey’s formulation of equality as an aspect of the rule of law. See A. V. Dicey, \textit{Introduction to the Study of the Law of the Constitution}, 8\textsuperscript{th} edn, McMillan, London, 1920, pp. 198-9.
\textsuperscript{93} As the law of equity and even of contract show. See Detmold, Seminar, op. cit.
\textsuperscript{95} Gaudron, op. cit., p. 88.
\textsuperscript{96} Australian Law Reform Commission, \textit{Equality Before the Law: Justice for Women}, ALRC Report No. 69, ALRC, Sydney, 1994. Chapter 3, titled ‘Understanding equality’ specifically concerns the different models of equality. The report outlines the ‘contemporary approaches’ to equality as (1) the formal equality approach; (2) the differences approach; and (3) the subordination/dominination approach.
\end{footnotesize}
treatment will achieve equality without regard to the standard against which treatment is measured. Moreover, formal equality cannot accommodate the many experiences for which there is no comparison in that dominant standard. Nor can formal equality identify institutionalised discrimination and disadvantage.\textsuperscript{97} Instead, the report advocates an approach that looks at how the law operates to maintain the relations of subordination and domination in society.\textsuperscript{98}

The idea that where relevant differences exist, there should be different treatment has become entrenched in the common law in more recent times.\textsuperscript{99} The principle of equality rejects uniformity. Instead, ‘it proceeds on the basis that artificial and irrelevant distinctions must be put aside, but that genuine and relevant distinctions must be brought to account’.\textsuperscript{100} This conception of difference has led to a greater understanding of equality, clarifying what constitutes relevant distinctions.\textsuperscript{101}

A conception of equality that respects Indigenous difference through recognition of the equality of peoples provides a foundation for self-determination in fundamental notions of justice.\textsuperscript{102} Different treatment can be understood as ‘a recognition of disadvantage, or culture, or language, or age, or gender, or other distinctive circumstance’.\textsuperscript{103} To treat people in relatively different positions equally is therefore as arbitrary as treating those in relatively equal positions differently.\textsuperscript{104}

\textsuperscript{97} ibid., para. 3.8-3.9.
\textsuperscript{98} ibid., para. 3.13.
\textsuperscript{100} Gaudron, op. cit., p. 88. Gaudron suggested that this is really nothing new, it merely reflects the duty to act judicially which has always required that proper weight be given to relevant factors. Indeed, Gaudron, p. 88, argued, ‘it is the duty to act judicially which is the cornerstone of equality before and under the law’. This approach echoed comments by Deane and Toohey JJ in \textit{Dietrich v The Queen} (1992) 177 CLR 292, at p. 486.
\textsuperscript{103} Robert Jansen, Arguing from first principles for separate Aboriginal Legal Services, unpublished manuscript, February 1997, p. 1.
The principle of equality proscribes ‘illegitimate’ differentiation and some will argue that differentiation on the basis of race is never a legitimate basis for the distribution of rights. However, ‘race’ is not the basis upon which Indigenous peoples claim rights. Indeed ‘race’ is a negative term that seeks to draw distinctions between peoples on the basis of cultural or biological characteristics. For Indigenous peoples, it was ‘racism’ that led to the denial of the rights of peoples to respect for their sovereignty and independence. The claims of Indigenous peoples demand equality of respect as peoples not different treatment based on biology, culture or ‘race’. In the broadest terms, all peoples should be shown equal respect and should therefore be treated equally unless there are valid reasons for differential treatment.

As with any Western legal concept, there is a danger of individualising the concept of equality. Indeed moving away from the individual as sole possessor of rights may well require a convincing argument. However, self-determination claims are collective claims. Macklem argued that while equal treatment of individuals may be appropriate for the distribution of political rights within a particular collective, it is an inappropriate basis upon which to assess the justice of distributions among collectives particularly in the distribution of sovereignty and government. It is the equal treatment of Indigenous peoples as a collective and as peoples that provides the justification of self-determination claims.

Indigenous peoples can appeal to the legal concept of equality in two ways, keeping in mind the inquiry set out by Gaudron J in Leeth’s case. First, formal equality requires that irrelevant distinctions cannot be relied upon to deny Indigenous

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107 Contrast Kymlicka, op. cit., p. 107, who justified self-government on the basis of individual freedom (culture as freeing choice rather than restricting). Kymlicka, p. 113, viewed the ‘unequal’ distribution of political rights within the polity as justified on the basis of the importance of cultural ties. Macklem, Distributing sovereignty, op. cit., p. 1355, suggested that the problem with this approach is that it includes Indigenous peoples in the very political structure they wish to be separate from.
peoples' claims and that relevant distinctions should be taken into account. Secondly, substantive equality justifies weight being given to improving the circumstances of the disadvantaged. It has been argued that in the past Indigenous peoples' difference has been taken into consideration in exactly the opposite manner to that required by the principle of equality.\textsuperscript{108} Substantive equality would justify many self-determination claims, particularly given this historical treatment.\textsuperscript{109} In this way, equality takes into account differences of power in relationships and recognises that aspects of Indigenous society may require protection from the dominant state. Similarly, Michael Dodson argued that 'inherent, unique characteristics which impact on a group's enjoyment of human rights must be adequately accommodated in order for that group not to be discriminated against'.\textsuperscript{110}

More simply though, Indigenous peoples should not be arbitrarily distinguished from other peoples, for example in the recognition of laws, institutions, culture, language, or religion.\textsuperscript{111} Upon closer examination the real objection to Indigenous peoples' self-determination claims appears not to be that they require distinct systems of government and legal systems. We live in a society accepting myriad different governance structures, all of which, it is generally accepted, respect the rights and freedoms of the individual.\textsuperscript{112} Rather, the objection is directed to the recognition of Indigenous authority. There is an unjustifiable skepticism in non-Indigenous people

\textsuperscript{108} Macklem, First Nations, op. cit., p. 392, suggested that Indigenous difference has been 'denied where its embrace would render problematic the current ways of knowing' and embraced where its denial would achieve the same.

\textsuperscript{109} Macklem, Distributing sovereignty, op. cit., pp. 1356-1, 1360-1.

\textsuperscript{110} Dodson, Discrimination, special measures ..., op. cit., p. 6 (original emphasis), see also p. 5. See also McKeen, op. cit., p. 288; and Macklem, p. 1362. See also ALRC, Report 31, op. cit., p. 117. In contrast, Kymlicka, op. cit., p. 109, argued that substantive justice measures are warranted to ensure individuals and minorities are free from disadvantage. See also Ronald Dworkin, 'What is equality? Part II: Equality of resources', Philosophy and Public Affairs, vol. 10(4), pp. 283-345; and John Rawls, A Theory of Justice, Oxford University Press, New York, 1971, p. 96. Webber, op. cit., pp. 151-2, argued that:

Our [non-Indigenous] standard of equality has to be sufficiently supple that it can take into account the fact that the justice system already treats Aboriginal people differently. It treats them worse. In order to treat them equally we have to recognize their difference

\textsuperscript{111} Macklem, Distributing sovereignty, op. cit., pp. 1356-7, formal equality also justifies an examination of past injustices, where the application of standards, for the recognition of laws and government for example, have taken difference into account in some instances and ignored difference in others.

\textsuperscript{112} Webber, op. cit., pp. 141-2.
that safeguards for the rights of individuals do not exist in Indigenous decision-making structures.\textsuperscript{113} This may be due in part to the collective nature of the claims. There are important issues that need to be considered arising from genuine concerns of this kind.\textsuperscript{114} However, these concerns are rarely raised as a wholesale rejection of Indigenous institutions. Indigenous cultures and laws are not static and, as Lois O’Donoghue conceded:

Some traditional practices of two hundred years ago are no more appropriate to the Aboriginal communities today than would some of the practices of the criminal law of Britain two hundred years ago in that country today.\textsuperscript{115}

The inclusion of cultural considerations in the design of institutions does not, of necessity, put individual rights at risk: Indeed, Webber has lamented that the cultural choices in our own law seem to have faded from our view and we have learnt to think that they are culturally neutral.\textsuperscript{116}

Indigenous peoples have been recognised as peoples within the common law in \textit{Mabo’s case}.\textsuperscript{117} Therefore, when equality is understood in a way that respects Indigenous difference, acknowledges historical disadvantage and recognises the equality of peoples, then equality is not in opposition to self-determination. This approach is supported by the decision in \textit{Mabo v Queensland [No. 2]}. There, the High Court founded the recognition of native title, a collective right, and the recognition of Indigenous land law on the concepts of ‘justice and human rights (especially equality before the law)’.\textsuperscript{118} This was not an attempt to treat Indigenous

\begin{itemize}
\item \textsuperscript{113} See, for example, Frank Brennan, ‘Self-determination: The limits of allowing Aboriginal communities to be a law unto themselves’, \textit{University of New South Wales Law Review}, vol. 16(1), 1993, p. 245; and Kymlicka, op. cit., pp. 152-72, on ‘illiberal minorities’.
\item \textsuperscript{116} Webber, op. cit., p. 143. See also Kymlicka, op. cit., pp. 69, 107.
\item \textsuperscript{117} The determination in \textit{Mabo v Queensland [No. 2]} (1992) 175 CLR 1, was directed to the Meriam people. More specifically, claims were accepted from the Wik peoples and the Thayorre people in the \textit{Wik case}. See \textit{Wik Peoples and the Thayorre People v Commonwealth} (1996) 187 CLR 1.
\item \textsuperscript{118} \textit{Mabo v Queensland [No. 2]} (1992) 175 CLR 1, at p. 30, per Brennan J, also p. 58.
\end{itemize}
peoples the same but to show equal respect for their rights as peoples and equal respect for their way of life.

*Mabo's case* also affirmed that where decisions are fundamentally flawed or no longer acceptable because of the assumptions and prejudices they encapsulate, then they should be rejected. The principle of equality was reiterated in the context of the common law commitment to non-discrimination. Justice Brennan stated this principle of common law development in relation to the rights and interests of Indigenous peoples:

> it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The fiction by which the rights and interest of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country . . . Whatever the justification advanced in earlier days for refusing to recognise the interests in land of the Indigenous inhabitants of settled countries, an unjust and discriminatory doctrine of that kind can no longer be accepted.119

Giving primacy to the principle of equality, Brennan J stated that ‘no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights’.120 To this end, the values of non-discrimination and equality before the law, supported by international norms, formed the foundation of the decision in *Mabo's case* justifying the rejection of significant legal fictions.

This understanding of equality was reinforced in *Western Australia v Commonwealth (The Native Title Act case)*.121 The High Court accepted that a law protecting Indigenous peoples’ unique rights over land was not merely a ‘special measure’ to overcome disadvantage but was not discriminatory because the distinct identity and status of Indigenous peoples were relevant distinguishing characteristics.122 *Mabo v Queensland [No. 2]* and other recent High Court decisions concerning rights, have

119 ibid., at pp. 41-2, per Brennan J.
120 ibid., at p. 30, per Brennan J.
122 ibid., at pp. 483-4. Compare Brennan J in *Gerhardy v Brown* (1985) 59 ALJR 311, at p. 339, where it was argued that ‘special measures may be necessary to achieve equality between groups’. See generally, Dodson, Discrimination, special measures..., op. cit., p. 10.
shown a willingness to take direction of the law, to embrace non-discrimination.

Previous doctrines of terra nullius and parliamentary sovereignty had subverted the jurisprudential basis for Indigenous self-determination claims. However, recent decisions in Australia, as well as international and comparative developments, provide a stronger basis for self-determination founded on the principle of equality of peoples. The principle of equality could lead to a recognition of Indigenous peoples as distinct constitutional entities, embracing claims to sovereignty, self-determination and self-government.123

Self-determination claims will still require a re-conceptualisation of the relations between Indigenous peoples and the state by the courts. In part this is due to the influence of past doctrines.124 However, the decision in Mabo’s case showed that these claims are not on completely unfamiliar ground. Justice Gaudron stated that:

The modern application of the doctrine of equality, particularly in relation to Aborigines, demands that we confront our preconceptions and our prejudices; it demands that we know ourselves. It is a formidable task, but one that inevitably attends judicial office in a society which tolerates social, economic or cultural inequality.125

The fact that racist foundations of current doctrines can be challenged before a court, with a degree of success, indicates the usefulness of the courts and the common law within the self-determination strategy of Indigenous peoples. Mabo’s case showed that if the unjust and discriminatory nature of the law is argued before the courts, change can be achieved and self-determination goals realised. The primary reason for this success is the familiar principle of equality upon which the courts can base their reasoning.

124 See Mason, Future directions ..., op. cit., p. 150: ‘Unfortunately precedent is sometimes transformed from legal doctrine into an attitude of mind’.
III. The difficulty of arguing sovereignty in the courts

In order to put forward a convincing argument for equality as the foundation for arguing self-determination claims before the courts, I must explain why I have not pursued the alternative approach, which places sovereignty at the centre of the argument. Indeed, it may require particular explanation in the context of this thesis where so much attention has been given to the concept of sovereignty.

I have argued that Indigenous peoples' self-determination claims, as I have used the term in this thesis, range from specific claims of authority over traditional lands or customary practices to broader claims of jurisdiction and government. I have also argued that an assertion of sovereign authority, in the sense of legitimate authority, by a people is implicit in the process of self-determination and lies at the heart of all the claims made by Indigenous peoples against the state. In this sense, sovereignty is the source of the rights asserted although it is not one of the rights themselves. This reflects a similar conception of self-determination as the process of asserting rights as peoples rather than identifying a specific right with a certain content.

The courts have, however, refused to entertain arguments that assert sovereignty. This judicial reticence is illustrated in current doctrinal barriers - some that can be traced back to the earliest decisions on Indigenous peoples' rights and others that have emerged more recently. An examination of the problematic foundations of current doctrines, though not intended to allocate blame or guilt, may reveal the underlying assumptions that inhibit the ability of the courts to accept arguments for sovereignty. In a damning critique of the doctrine of discovery, Robert Williams observed that modern common law doctrines, such as native title, are built upon doctrines whose 'premises, once revealed, would shame those who cite them'.

126 Williams, Algebra, op. cit., p. 299.
Similarly, Asch and Macklem identified the inconsistencies within current doctrines that emerge from the assumptions or premises upon which decisions are based. These assumptions are not essential to the common law. They are historical assertions whose bases are no longer acceptable. It is essential in arguing self-determination claims that the racist foundations of current doctrines are clearly contrasted to the facts of Indigenous sovereignty.

For example, while the *Mabo* decision contained a stated commitment to the principle of equality, there is a general acceptance in the native title decisions that Indigenous rights are more vulnerable under the law than those of the wider polity. The susceptibility to extinguishment and the subordination of native title to the rights of holders of other forms of title, places native titleholders in a position of powerlessness in the face of action by governments.127 In the same way, while recognising Indigenous society as the source of rights and entitlements to land, under the native title doctrine these laws are seen as lesser laws than those of the state. Indeed in cases after *Mabo* Mason CJ asserted that there was no source of law other than the Crown and sought to reaffirm the Crown as sole sovereign.128 The assertion of sole sovereignty and assumed superiority of the dominant legal system have resulted in the inconsistencies in doctrine that were outlined in chapter four. It was argued there that in seeking to present a coherent doctrine of the rights of Indigenous peoples, the courts have entrenched inconsistencies. Significantly, the recognition of the inherent nature of the rights of Indigenous peoples in relation to land is contrasted to the rejection of inherent rights in other contexts and in relation to jurisdictional issues.

Sovereign rights do not depend on recognition by the state or the legal system. They emerge from Indigenous peoples' own authority. For those rights to be enforceable, however, Indigenous peoples depend upon at least judicial cognisance. This should

127 Comparative jurisprudence rests on the same assumptions of superiority and hierarchy. See chapter four, above.
not be confused with a contingent rights argument, which suggests that the only rights that exist are those recognised by the state. Instead, the extent of recognition is a measure of the relationship between Indigenous peoples and the state. In this way it has been argued that doctrines such as native title provide a 'recognition space' between Indigenous sovereignty and the sovereignty of the state. This understanding provides an interesting context in which to consider the meaning of extinguishment, and current debates concerning the 'revival' of native title. The two sovereign spheres are seen as running parallel and the extent of mutual recognition and interaction will be changeable.

In the Mabo decision the High Court purported to embrace the inherent nature of Indigenous peoples' title to their land. The judgements asserted the source of the title in the Indigenous community and acknowledged that the title predated colonisation. Moreover, it was accepted that the title was not contingent upon recognition by the colonial system of law or government. Indigenous peoples' rights to country were recognised to inhere in the Indigenous peoples themselves. Yet, as many commentators have argued, the courts continue to deny one of the most fundamental implications of an inherent theory of rights and that is the recognition of sovereignty.

To accept that titles to land inhere in the Indigenous community is to implicitly accept a number of important points. First, it is a recognition of an alternative source of law in the Indigenous community. It is also a recognition of the prior sovereign authority of the Indigenous community. Finally, it is a recognition of the Indigenous community as lawmakers and law keepers. Mabo's case recognised Indigenous

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129 See Noel Pearson, 'Concept of native title', Proceedings of the Northern and Central Land Councils, Land Rights – Past, Present and Future Conference, Canberra, 16-17 August 1996, p. 120. See also, Paul Patton, Aboriginal or Indigenous sovereignty, unpublished manuscript, 1997, who argued that a concept of sovereignty could also be conceived in this way.

130 Kirby J tried to grapple with this idea in the Wik case, in response to argument by Counsel for the Thayorre people. See The Wik Peoples and the Thayorre People v Queensland and the Commonwealth (1996) 187 CLR 1, per Kirby J. See also oral submissions by Sir Maurice Byers.

peoples as a source of law, distinct from, and indeed prior to, the state. The recognition of native title is a recognition of a ‘discrete and underived’ sphere of authority in the Indigenous peoples.\textsuperscript{132} Taken together, the implicit acknowledgments that are made in accepting that the rights are inherent, embraces the Indigenous community as peoples. A pre-existing sovereignty that has survived and continues to exist is an inescapable conclusion from these acknowledgments. This sovereignty describes the sphere within which Indigenous peoples assert their right to be self-determining.

There is a long history, predating \textit{Mabo}, of implicit recognition of the continued sovereignty of Indigenous peoples. Indigenous law and jurisdiction have been recognised by the courts in the recognition of customary law.\textsuperscript{133} The sovereignty of Indigenous peoples has also been recognised by governments through land rights legislation, the establishment of land councils and a statutory authority committed to self-management – the Aboriginal and Torres Strait Islander Commission. Patrick Macklem has argued that this sort of delegated authority is a recognition of the remnant authority that Indigenous peoples continue to exercise. The response of the courts to claims of sovereignty and jurisdiction is therefore inconsistent with political realities.

There have been two cases since \textit{Mabo v Queensland [No. 2]} that have sought to extend the recognition of Indigenous sovereignty. The first, \textit{Isabel Coe v The Commonwealth} was a claim for sovereignty on behalf of the Wiradjuri nation.\textsuperscript{134} The second, \textit{Walker v NSW}, was a claim against the exclusive criminal jurisdiction of the New South Wales Parliament.\textsuperscript{135} Both were spectacular failures, struck out on their pleadings. However, the \textit{Isabel Coe} and \textit{Walker} decisions have not closed the issues of sovereignty and jurisdiction. An examination of the claims and the

\begin{itemize}
\item \textsuperscript{132} Frank Brennan, The Indigenous people, op. cit., p. 38.
\item \textsuperscript{133} See discussion at pp. 180-1 above.
\item \textsuperscript{134} \textit{Isabel Coe on behalf of the Wiradjuri People v The Commonwealth} (1994) 118 ALR 193.
\item \textsuperscript{135} \textit{Walker v the State of New South Wales} (1994) 126 ALR 321.
\end{itemize}
judgements of Mason CJ (who decided both cases) reveal the balance involved in the successful assertion of self-determination claims.

The statement of claim in the Isabel Coe case sought a declaration of the sovereignty of the Wiradjuri nation. This posed two problems for the courts, in accordance with the methodology set out here. First, there is little precedent to support a claim of sovereignty, apart from the United States domestic dependent nation doctrine, and this status was distinguished in the statement of claim. Second, the claim did not provide the court with a familiar basis from which to reason. A successful claim must build upon recognition in current doctrines, leading the court from the familiar to accept claims that extend to self-government. The statement of claim in Isabel Coe asserted a series of absolutes: that the Wiradjuri people are a sovereign nation, and if not then they are a domestic dependent nation and if not they are self-governing and if not the are native title holders. The direct challenge to the sovereignty of the state was a significant hurdle for Chief Justice Mason.

Similarly, in Walker the statement of claim challenged the legitimacy of the state by questioning the legislative power of the state. While Mason CJ expressed explicit deference to the value of equality before the law in Walker, the Chief Justice fell into the danger identified by Justice Gaudron of not paying sufficient regard to the meaning of equality. What the judgement in Walker highlighted was not equality before the law but equal citizenship and the universality of the laws of the state. Moreover, Mason CJ gave no serious regard to the issues of self-determination that were raised by the claim.

The form of the claims allowed Chief Justice Mason to make a determination based, ironically, upon an error that the judge himself had identified in 1987, that is:

[transforming precedent] from a legal doctrine into an attitude of mind, so that the search for an answer to a legal question begins and ends with

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136 See Statement of Claim, para. 6.
137 See Statement of Claim, para. 7.
the quotation of a Delphic utterance by another judge on another occasion directed to another question.\textsuperscript{139}

This error is manifest in the decision of Mason CJ in \textit{Isabel Coe} and reiterated in \textit{Walker}. In \textit{Isabel Coe} Mason CJ referred to Gibbs J in the \textit{Paul Coe case} that:

\begin{quote}

to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided for in the Constitution, or that there is an Aboriginal nation which has sovereignty over Australia, it cannot be supported.\textsuperscript{140}
\end{quote}

Gibbs J went on to characterise Indigenous peoples as without recognisable institutions and as without any rights except those granted by the Crown. Chief Justice Mason’s reliance on this passage was a disappointing aspect of the \textit{Isabel Coe} decision. The proposition that the \textit{Mabo} decision was ‘entirely at odds with the notion that sovereignty . . . resides in the Indigenous peoples of Australia’ incorrectly draws a link from the non-justiciable issue of international statehood to determine that sovereignty, in the sense of the internal distributions of power and authority within the state, did not include Indigenous peoples.\textsuperscript{141}

The distinction between the \textit{Isabel Coe} claim and the suggested basis for argument here may not be apparent from the outset. However, I have suggested claims may be more successful, if while based on Indigenous sovereign authority, they did not necessarily assert a claim for sovereignty itself. It would have been less confrontational to move from the claim that the Wiradjuri people are traditional owners of their lands and therefore native titleholders.\textsuperscript{142} Native title is based on recognition of the equality of peoples. Indigenous forms of title and law are deserving of equal respect in relation to the colonial law. As such, they are self-governing at least to the extent of their traditional land laws. The same arguments that support the recognition of Indigenous land law support the recognition of all Indigenous law and warrant a recognition of broader rights of self-government. This

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\textsuperscript{139} Mason, Future directions ..., op. cit., p. 150.
\textsuperscript{141} \textit{Isabel Coe v Cth} (1994) 118 ALR 193, at p. 200.
\textsuperscript{142} I acknowledge that it may well have been the plaintiff’s intention to be confrontational.
\end{flushleft}
is a recognition of a sphere of inherent sovereignty. The distinction is subtle, but it may be an important distinction for the successful assertion of self-government claims.

A recent decision of Justice Kirby of the High Court was criticised as ‘another failed sovereignty claim’. The claim, which sought a declaration of fiduciary duty and the instigation of international proceedings was, like *Walker and Isabel Coe*, struck out on its pleadings. Kirby J stated that to the extent that the plaintiff, Mr Thorpe, raised similar questions of sovereignty adverse to the Crown, the case would ‘obviously encounter the same difficulties’. Rather than wholeheartedly endorse Chief Justice Mason’s conclusions in the earlier cases, Kirby J reaffirmed the role of the courts in providing a forum for Indigenous peoples claims against the state. Kirby J acknowledged that the courts must give serious consideration to such claims as they come before them and remain mindful that:

as the decisions of this Court in *Mabo [No.2]* and *Wik Peoples v Queensland* demonstrate, sometimes Australian law (including as it affects Aboriginal Australians) is not precisely what might have been expected or predicted. Australian law at this time is in the process of a measure of readjustment, arising out of the appreciation, both by the parliaments and the courts of this country, of injustices which statute and common law earlier occasioned to Australia’s indigenous peoples.

Kirby J reaffirmed earlier statements that it was neither ‘just or reasonable’ to close the door in the face of claims, which may, in time, contribute to this readjustment. Instead, such claims, whether they succeed or fail, should be heard in full.

Success through the common law still requires an argument that will overcome the

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144 *Thorpe v The Commonwealth [No. 3]* (1997) 71 ALJR 767, at p. 779. Kirby J found that the pleadings failed to raise a ‘matter’ on which the court could exercise its judicial powers. It was stressed that the mere involvement of a political or controversial issue did not necessarily mean the court lacked jurisdiction. See *Gerhardy v Brown* (1983) 159 CLR 70, at p. 139 or *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, at p. 82. However, in the issues raised by the pleadings, Kirby J felt that they sought an advisory opinion on a theoretical issue and were not sufficiently grounded in an ‘immediate right, duty or liability’ amenable to judicial determination.

145 ibid., p. 5.

146 ibid., p. 8.

doctrinal barriers to the recognition of self-determination claims. To challenge the doctrines and their racist foundations is to challenge the very assertions upon which state power is based. That is, the assertion of sole sovereignty, the assertion of exclusive jurisdiction over lands and peoples and the assertion of the universality of uniform legal and political institutions. The unquestioning acceptance of the Crown or the state as the sole repository of sovereignty has led to the denial of rights and undermining of Indigenous self-determination. This assumption is inaccurate in a federal system such as Australia, where powers are divided amongst many sovereign authorities within different spheres of autonomy. Yet it remains the most significant barrier to the recognition of Indigenous sovereignty, and therefore to government and jurisdiction rights. The continuing impact of past perceptions, prejudices and assumptions has much to do with the nature of legal reasoning. In many respects, this legitimising exercise could only be achieved by the development of legal fictions, such as discovery and terra nullius, which ‘border on fantasy’.¹⁴⁸ Or, as Foster argued, by repeatedly repressing alternative arguments, so that over time they become ‘unsayable in legal language’.¹⁴⁹

Chief Justice Mason’s approach in Isabel Coe and Walker raised significant concern that native title would be the extent of the recognition of Indigenous rights. It seemed that the High Court, having ‘prodded’ the government into consideration of the issues, was going to retire to a less active role in the recognition and protection of Indigenous rights. This concern should be understood in the context that current doctrines concerning Indigenous rights, here and in other common law jurisdictions, have emerged from established relations of power. The common law methodology

¹⁴⁸ Werther, op. cit., p. 49. See also Williams, ...Discourses of Conquest, op. cit., and Algebra, op. cit., on the doctrine of discovery.

¹⁴⁹ Foster, op. cit., pp. 383-4. Foster, p. 383, explained:

Law achieves its clarity partly by constructing an orthodoxy determined more by political theory than historical accuracy, an orthodoxy that masks competing views... As the colonial machine grinds forward through time and space, the law tends to repress alternatives rejected by power, sometimes even to deny they existed. If this ‘legitimising’ enterprise is so effective that it makes what was once a coherent and competing view unthinkable, then it has succeeded most admirably. And by succeeding, distortion ceases to distort: bad history becomes good law.'
of *stare decisis* suggests that once decisions have been made they form part of the doctrinal history of the law. This does not, however, make them irreproachable.

IV. The relationship between sovereignty and equality

Recognition of inherent sovereignty would allow Indigenous peoples to assert control over the form, content and direction of their distinct collective identity, to have their independence respected and to be treated equally. Moreover, understanding sovereignty as the heart of the claim to self-determination highlights the right to be treated on an equal basis. This does not mean that Indigenous peoples will be treated exactly the same as other sovereign entities - but to be treated justly, that is with equal respect as peoples.

While it is necessary to ground the claims of Indigenous peoples with a foundation in the common law, it is important to retain sight of the source of Indigenous peoples’ claims. Any strategy or analysis must ensure that the integrity of these claims is not compromised by an approach that focuses on the traditions of the courts. In the end the equality approach must be compatible with the principle of self-determination. The principle of equality of peoples, while familiar to the courts, is also a concept in which Indigenous peoples’ vision of themselves is reflected.

Any society with collective rights to land is self-governing and sovereign at least to the extent that it formulates and enforces rules for individual relations to land and others. Moreover, as has already been discussed, the recognition of laws and

Similarly, the courts are able to justify a particular outcome by the language they employ. See Asch and Bell, op. cit., p. 511.

150 Macklem, Distributing sovereignty, op. cit., p. 1347.

151 Frank Brennan, The Indigenous people, op. cit., p. 35.
institutions relating to land cannot be severed from other societal rights. Dodson argued that 'the Australian legal system must take the further step of recognising that native title is inseparable from the culture which gives it meaning'.152 Indeed many commentators support the argument that self-government is a necessary implication of native title.153

There is a growing acceptance in legal discourse of the distinct status of Indigenous peoples within the state, not least by the High Court.154 For this reason, Paul Finn suggested that the decision in Isabel Coe's case has not stilled the issue of Indigenous sovereignty under the common law.155 Recognition of self-determination claims can be justified on two conceptions of sovereignty; first, in determining the distribution of authority within the state and second, based on the prior and continuing sovereignty of Indigenous peoples.156 On this latter view, Indigenous sovereignty is not just an incidence of the popular sovereignty of the state generally.157 Rather, Indigenous peoples constitute what Canadians have referred to as another inherent order of government.158 In the United States, too, it is suggested that popular sovereignty, or consent of the people, partly explains the recognition of the distinct sovereign authority of Indian Nations.159

Recognition of both prior and continuing sovereignty can be found in the recognition of native title. Importantly, native title was not merely recognising rights of usage

152 Dodson, From Lore to Law, op. cit., p. 2.
153 ibid., p. 2. See also Frank Brennan, The Indigenous people, op. cit.
154 Recognition of the Meriam peoples' rights was a beginning. While the Isabel Coe claim was accepted on behalf of the Wiradjuri nation, the Wik peoples' claim was accepted without a named plaintiff. See also Finn, A sovereign people, op. cit.
155 Finn, Of power and the people, op. cit., p. 256. But compare Finn in the more recent paper, A sovereign people, op. cit., p. 5, where it is suggested that popular sovereignty confirms a sovereignty lost by Indigenous peoples: 'Absent a new Constitutional settlement the indigenous peoples can only be regarded as participants in the collective [Australian] sovereignty'. Michael Dodson, in comments on an earlier draft of this chapter, criticised this approach saying that it is a myth and a nonsense to suggest that we are (willing) participants in a collective Australian Sovereignty.5
157 Compare Finn, A sovereign people, op. cit., p. 5.
159 Macklem, Distributing sovereignty, op. cit., p. 1316.
based on prior occupation.\textsuperscript{160} Native title recognises the laws of the peoples that existed prior to and survived colonisation.\textsuperscript{161} Patrick Macklem has identified the strength of the sovereignty claim, in that, 'it intimates that something more than the use and enjoyment of land was lost and ought to be restored.'\textsuperscript{162} In this way, the prior relations with each other, rather than merely presence on the land, becomes the focus. Moreover, this focus provides a closer link between the prior position and the current demands.\textsuperscript{163}

While I have argued that sovereignty is inclusive of Indigenous peoples claims, the concept of sovereignty has to a large degree become institutionalised in the international law governing relations between states. Sovereignty is therefore often considered in the sense of the bundle of international powers that attach to statehood.\textsuperscript{164} I agree with Patrick Macklem that the concept of sovereignty should not be equated with statehood, or with hierarchical power structures.\textsuperscript{165} Instead, the terms must be re-conceptualised to accommodate new ways of understanding relations between Indigenous and non-Indigenous peoples.\textsuperscript{166} For the courts it is important to change the focus, from sovereignty in the statehood sense, that has resulted in denying the authority of Indigenous peoples within the state.

The notion of a sphere of authority and autonomy is the clearest explanation of the nature of sovereignty.\textsuperscript{167} However, as Macklem argued, the meaning of sovereignty

\textsuperscript{160} Compare references in \textit{Mabo v Queensland (No. 2) (1992) 175 CLR 1}, e.g. pp. 182-8, per Toohey J, at pp. 42, 52, per Brennan J. For a more comprehensive discussion of why prior occupancy is not a sound basis for development of the law, see Macklem, Distributing sovereignty, op. cit., pp. 1328-34. Similarly, Jeremy Webber, op. cit., p. 134, suggested that self-government claims will not be treated like property claims. See also Kymlicka, op. cit., p. 123.

\textsuperscript{161} Macklem, Distributing sovereignty, op. cit., p. 1333.


\textsuperscript{163} Macklem, Distributing sovereignty, op. cit., p. 1334.

\textsuperscript{164} For this reason, some commentators are skeptical of the use of the term at all. See Menno Boldt and J Anthony Long, 'Tribal traditions and European-Western political ideologies: The dilemma of Canada's Native Indians', in Menno Boldt and J Anthony Long (eds), \textit{The Quest for Justice: Aboriginal Peoples and Aboriginal Rights}, University Toronto Press, Toronto, 1985, pp. 335-7.

\textsuperscript{165} Macklem, Distributing sovereignty, op. cit., p. 1349.

\textsuperscript{166} See Webber, op. cit., p. 136. While Indigenous peoples are understandably concerned about recognition of their status in the form of an international personality in international fora, the courts are unlikely to find such issues justiciable.

\textsuperscript{167} Sovereignty is infinitely divisible, at its most particular, liberal theory accords individual rights that demarcate a personal sphere of authority and autonomy. Federalist structures, too, illustrate the distribution of sovereign power within a state.
‘is not entirely shared across particular groups, societies, or cultures, nor does sovereignty’s meaning somehow inhere in the word’. While there may be disagreement over the uses to which sovereignty should be put, there is a shared value or meaning in sovereignty which can be universally understood. That shared value is ‘a legal space in which a community can negotiate, construct and protect a collective identity’. The value that a community attaches to that space is deserving of respect and deserving of the same protection and facilitation as that of the dominant community.

I argue that at the most fundamental level it was the failure of respect for the equality of peoples that lead to a failure to recognise Indigenous sovereignty. At the time of colonisation, Indigenous peoples were not treated as equal to the colonising peoples. In Australia, a further distinction was made between the Indigenous peoples of this continent and those of the United States who had their sovereignty partly recognised, though not fully respected. An inquiry based on equality demands investigation of the distinctions made between Indigenous peoples in Australia and both European and other peoples to determine if they were justifiable distinctions to make. The justification for ignoring the rights and sovereignty of Indigenous peoples was based on differences of culture, religion and the assumed superiority of the colonisers. Echoing statements by Brennan J in Mabo’s case, Macklem noted that while this may have ‘afforded an apology’ at the time, it cannot now be used as a reason for continuing to exclude Indigenous peoples from the distribution of sovereignty within the colonial state.

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168 Macklem, Distributing sovereignty, op. cit., p. 1346.
169 ibid., p. 1348. See also Patton, op. cit.
170 See Kymlicka, op. cit., pp. 108-113. Kymlicka argued that the separation between state and ethnicity is a lie. Every decision about language, boundaries, public holidays, even state uniforms and emblems recognise accommodate and support a particular cultural identity.
171 Cooper v Stuart (1889) 14 App Cas 286. See pp.163-5 above.
172 Coe v Commonwealth (1979) 53 ALR 403; 24 ALR 118; and R v Jack Congo Murrell (1836) 1 Legge Rep 72.
Recognition of sovereignty is justified by both formal and substantive equality.\textsuperscript{174} Despite the divergence over the content and meaning of sovereignty, its value to a people should be respected.\textsuperscript{175} Formal equality requires that Indigenous peoples be given equal respect in the recognition of their sovereign authority. In essence, it is argued that no relevant distinctions exist that justify their exclusion.\textsuperscript{176} As Indigenous peoples constitute identifiable communities that have been and continue to be oppressed by a variety of social and economic forces, a commitment to equality justifies recognition of differential rights, in particular the right of self-government.\textsuperscript{177} The underlying justification for all of these arguments remains the equality of peoples. Therefore, a commitment to equality as the basis for determining the relations between Indigenous peoples and the state must be firmly established within the common law approach to self-determination claims before sovereignty can be successfully asserted.

Robert Laurence criticised an approach based on equality of peoples as a ‘charming’ though perhaps unrealisitic vision.\textsuperscript{178} Instead Laurence propounded an argument for accepting ‘the actual state of things’. Laurence argued that it is possible to support a doctrine the roots of which you don’t respect, for Laurence does not feel personally ‘responsible for the history’.\textsuperscript{179} A comment by Milner Ball highlights the problematic nature of such an assertion, in that:

\begin{quote}
[it reveals] an incapacity for talking openly and honestly about the injury in our origin. Unless it is acknowledged and transcended, this original wrong can only be extended into the present and augmented.\textsuperscript{180}
\end{quote}

\textsuperscript{174} Macklem, Distributing sovereignty, op. cit., p. 1345.
\textsuperscript{175} On this view, distributive justice demands that sovereignty be distributed in accordance with equality of peoples. See Macklem, ibid., p. 1350.
\textsuperscript{176} ibid., p. 1357.
\textsuperscript{179} Laurence’s critique gave rise to an exchange between the two commentators in which Williams cut down Laurence’s ‘Promethean feats’:

\begin{quote}
here, the historical materialist in me naturally bridles at the liberal progressivism of a viewpoint which recognises the ‘smelly and unattractive’ nature of the legal structure but assumes that men and women of goodwill can come out smelling like roses if they apply, ‘with both brains and heart’, the few cleansed principles deemed worthy of saving from the deracinated structure.
\end{quote}

\textsuperscript{180} Milner Ball, ‘Constitution, court, Indian tribes’, American Bar Association Journal, 1987, 1 at p. 43. Curiously, this comment was reproduced by Laurence, op. cit., p. 422.
Robert Williams argued that, without uncontroverted acceptance of Indigenous peoples as equal sovereign peoples, the common law becomes, at best, a 'sometimes fair weather friend'. Respect for the equality of Indigenous peoples, must provide the basis for common law determinations otherwise decisions will perpetuate assumptions of superiority and universality.

The importance of recognition of the full array of self-determination claims cannot be overstated. Webber suggested that self-government and jurisdiction is about 'restoring continuity with Aboriginal ways of talking about society', within the structures with which Indigenous peoples must relate. The continued denial of Indigenous peoples' claims has devastating implications. Lois O'Donoghue expressed concern that the continued denial of Indigenous law:

has had a detrimental effect on all facets of Aboriginal community development and that it has substantially contributed to many of the social problems and varying degrees of lawlessness present today.

Recognition of Indigenous rights to self-government and jurisdiction has a primary role in overcoming the disadvantage suffered by Indigenous peoples at the hands of the colonial state. Acknowledging the impact of the colonial system on Indigenous peoples, together with the respect for Indigenous peoples' identity and status as peoples, provide the foundation for all self-determination claims.

A fundamental re-conception of relations between Indigenous peoples and the state, as it is construed through the law, is required. Respect for the equality of Indigenous peoples provides an appropriate foundation of this reformulation. The principle of

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181 Williams, ... Myopia, op. cit., p. 449.
182 ibid., p. 440.
183 Webber, op. cit., pp. 138, 139.
184 O'Donoghue, op. cit., p. 58, identified the importance of the Indigenous law to the social fabric of Indigenous societies:

The law is undoubtedly the most important means of social control which exists in any society. Any segment of that society which has no access to the regulation of social control will inevitably suffer far reaching consequences.

Aboriginal communities have been no exception. The loss of control experienced by many communities has had many far reaching non-legal consequences, including a high level of social deprivation.

This social deprivation itself resulted in further breakdowns of law and order which the general system of law could not, and cannot, adequately deal with.

equality and non-discrimination direct the court from familiar concepts to the equality of peoples, a principle more inclusive of collective assertions premised on prior and continuing sovereignty.

Equality of respect for the rights of Indigenous peoples, first requires the courts to affirm their recognition of Indigenous authority, but explicit recognition of continuing sovereignty of Indigenous peoples may need to come through the development of the common law. The arguments presented here are aimed at challenging the courts to recognise Indigenous sovereignty and sovereign rights over time through notions of justice and equality that are familiar. These notions are both a sound basis from which the common law can develop and to which Indigenous claims can be anchored.

**Conclusion**

The internal distributions of power and authority within the state, including Indigenous self-government and jurisdiction are justiciable issues. Moreover, they are matters with which the common law has traditionally concerned itself. In *Mabo*, the High Court recognised Indigenous peoples’ authority by recognising the community as the source of law underlying native title. Further advances toward significant self-determination goals will require affirmation of prior and continuing sovereign authority based on respect for the equality of peoples.

Returning to the concept of self-determination outlined in previous chapters, I recalled that the prior and continuing sovereignty and rights to self-determination as peoples lies at the heart of Indigenous claims against the state. And yet, as was illustrated in chapter four, current doctrines have generally refused to entertain
claims that assert sovereignty. The success in the *Mabo case* is in stark contrast to the decisions in *Isabel Coe* and *Walker*. However, I have argued that the principle of equality, and particularly the equality of peoples, provides a basis from which courts can come to recognise sovereignty despite the historical barriers created by current doctrines.

I have argued that recognition of equality of peoples is an appropriate methodology in judicial decision-making and in fact avoids the inconsistencies that emerge from reliance on doctrines whose assumptions remain unchallenged. At the same time, sovereignty, understood as a sphere of authority and autonomy, and the process of self-determination can find roots in the fundamental notion of equality of peoples, thus giving structure to self-determination claims.

The reasoning in the *Mabo* decision was based upon an approach that centred on the values of non-discrimination and equality before the law, rather than the unalterable compliance with historical precedent.¹⁸⁶ It reflects some acceptance by the judiciary of responsibility for the impact of past doctrines and is also an illustration of the scope within which the Court can operate, independently of the legislature.

The nature of the courts as a protector of rights against the exercise of power of the state, together with the flexibility of the common law and the role that the principle of equality plays in its development, ensure that the courts are a useful tool in the assertion of Indigenous self-determination. I have advocated a strategic use of doctrine and principle to overcome both the doctrinal barriers and the courts’ unwillingness to accept the inherent sovereignty of Indigenous peoples in Australia.

I argued that the use of doctrines cannot be rejected entirely because the courts rely on them in the development of the common law to identify traditions of the common law. In order to maintain the integrity of Indigenous peoples claims, I have

¹⁸⁶ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at p. 30, per Brennan J. Specifically, reaffirming the values of non-discrimination and equality before the law as ‘aspirations’ of the Australian legal system, to be upheld in the common law. Compare Hamilton, op. cit., p. 441, regarding the protection of the rights of particular classes of citizens.
suggested a predominantly principled argument based on the equality of peoples. The doctrines, or more specifically, their shortcomings - their inconsistencies, their racist foundations and their historical barriers - challenge the legitimacy of a court that tries to rely upon them. Yet, the moments of possibility displayed in these doctrines illuminate the courts' capacity to make the changes to the law that are sought by Indigenous peoples.

For this reason, while the principled argument builds upon assertions of inherent sovereignty to express more specific self-determination claims such as fishing rights or self-government rights, the doctrinal argument shows how these things emerge from what has already been recognised by the courts. The recognition of native title, for example, necessitates the recognition of rights to fish but also necessitates rights to govern the territory and jurisdiction over the rights exercised upon it.

Indigenous peoples' inherent sovereignty and sovereign rights of government and jurisdiction exist regardless of recognition by the state. The spheres of autonomy and authority that determine the relationship between Indigenous peoples and the state will require negotiation as well as acts of mutual recognition. However, there is a role for the courts in first recognition of jurisdiction and government rights, and in the recognition of the inherent equality of peoples as the basis for Indigenous rights. Success in the courts may result in recognition of Indigenous authority and autonomy and the recognition of Indigenous law creating an impetus for greater engagement.

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Conclusion

The self-determination of Indigenous peoples in Australia may seem a more distant and unattainable goal now, even in comparison with when I first began this project. Any willingness on the part of governments to recognise Indigenous peoples seems to have been lost. Despite this, Indigenous peoples continue to struggle for self-determination and recognition.

Arguing for an approach that utilises the most costly and time consuming institutions of government is a controversial strategy. Change through the courts can only be a slow and piecemeal process. The institutionalised biases seem to work against Indigenous claimants at every stage. However, the courts remain an integral part of the self-determination strategy of Indigenous peoples. Therefore, this thesis has examined the limitations and the advantages of the courts. Moreover, a greater understanding of the limits and possibilities of the courts can help to ameliorate the frustration of the clash of cultures in the courts. In short, the aim of this thesis has been to provide analysis of the utility of the courts for Indigenous peoples’ self-determination claims. Understanding the limitations of the courts is crucial for a realistic examination of the potential that lies in the courts.

In order to exploit the potential of the courts for principled and respectful consideration of self-determination claims, it is necessary to look to the area where the courts have the most freedom. This kind of consideration is most fully expressed in the common law. It is the common law response to self-determination claims, therefore, that has been the focus of this thesis. As important as exploring the
potential of the common law is to identify why this potential has not been realised. There is more to the historical denial of Indigenous claims than incapacity or unwillingness, and more than just the way the claims have been presented. Indigenous peoples' self-determination claims question the fundamental assumptions upon which the colonial state is structured. As such, they challenge the assumptions that non-Indigenous people hold about their place in the world.

Throughout the history of Australian colonisation Indigenous peoples have been patient with the non-Indigenous worldview but are, understandably, often bewildered by it. As a non-Indigenous person, part of the value of this project for me has been to identify the constraints on our ability to accept the injustice of our occupation. The more difficult challenge was to propose a way to reach beyond those barriers to a core of shared understanding based on equality and respect.

Self-determination is about Indigenous peoples having the ability to freely choose how they wish to structure their lives and control over decisions that affect them. Listening to Indigenous people expressing the injustices of the colonising system explains the concept of self-determination and the need for its recognition to secure Indigenous peoples' very survival. Chapter one showed that Indigenous people place the daily experience of every Indigenous person - of unemployment, ill health, poor education and housing - in the context of Indigenous identity.

Just as Indigenous people experience the relationship of colonial oppression as an individual, so must each non-indigenous Australian accept their position of relative power and advantage in the relationship. Equality and respect between people through mutual recognition and accommodation are the paths away from colonialism. As many of the Indigenous voices in chapter one revealed, until the relationship between Indigenous peoples and the state is structured around equality and mutual respect, Indigenous peoples will challenge the legitimacy of the state.
At a recent conference on Indigenous rights and political theory Michael Dodson drew an analogy between the High Court of Australia’s recognition of native title and Copernicus’ theory that the sun was in fact at the centre of the solar system, not the earth. Dodson observed that both were ridiculed for their ‘discovery’ or invention, but neither of them were changing reality. Rather, they had merely recognised the truth of what was already there. The analogy is apt and can be extended to assumptions of universalism that dominate political relations. Perhaps Western society is yet to realise that it is not at the centre of the universe. Chapter two showed that the theories of sovereignty and state building upon which our society and our institutions are based have, in their origin, an assumption of superiority and universality. International law reinforces the universalism of liberal democratic government and individual human rights in a way that gives primacy to the status quo. Sovereignty is linked to statehood in a way that obscures the injury in the past of many modern states. However, Indigenous peoples’ movements across the globe have brought to prominence the failure of modern states to secure the rights of Indigenous peoples and has given legitimacy to their claims. The international system is being forced to re-conceptualise their idea of the state as sole sovereign and the individual as the sole possessor of rights. Instead, they are moving to recognise the authority and autonomy and distinct identity of Indigenous peoples.

Where does this tie into the courts and the common law as a tool for the assertion of self-determination? Chapter three illustrated that the same political theory and assumptions of universalism influence the courts’ institutional structure. A cursory look at the perceived advantages of the courts shows an accessible forum, open to principled argument, where Indigenous peoples can have the opportunity to explain their truth and to assert their claims. Yet, success has been limited. One constraint is the institutional relationship between the courts and other institutions of the state that limit their capacity to depart from the will of the majority. The limitations are not insurmountable because the courts are not subordinate to other arms of government. They are capable of independent adjudication and have the capacity to recognise
rights under the common law. The more difficult obstacle is in the culture of the courts’ reticence to acknowledge that they are, indeed, a cultural institution. Aspects of the court process and judicial reasoning that appear on the surface to be accommodating and receptive are heavily laden with cultural bias. Just one example is the giving of testimony which many intuitively perceive as being suited to oral tradition but can, in fact, be quite exclusive of Indigenous peoples truth and law-ways.

Assumptions of universalism permeate through to the common law decisions themselves. Chapter four traced the history of exclusion, which began with the theories of superiority from political and international law theory. These theories were ‘domesticated’ in the common law of Australia as tests of social organisation. Recognition of non-European systems of law and governance was precluded. Theory became doctrine, and as such became a matter of law. By the time the Yirrkala people brought their claim before the Northern Territory Supreme Court in 1971 the facts of Indigenous law, land rights or authority were considered irrelevant to the inquiry. The idea that Australia was acquired by peaceful settlement of terra nullius meant that Indigenous people in this country were not recognised as law makers nor as owners and custodians of their lands.

Mabo’s case changed the way the courts approach Indigenous peoples’ claims. The High Court recognised that Indigenous peoples law relating to land continued with the protection of the common law unless abrogated by the legislature or executive. The theory of settlement was adjusted to acknowledge Indigenous peoples’ prior and continuing ownership subject to the power of the colonial state. This decision brought the Australian common law more into line with the law in other jurisdictions such as Canada, the United States and New Zealand although many of the limiting assumptions remain. The assumption of the superiority and universality of the colonial law was reinforced in Walker v Queensland and the conflation of sovereignty with statehood was reasserted in Isabel Coe and in Walker. As a result
the recognition of Indigenous peoples self-determination has been limited to rights over land.

The limiting assumptions identified in the emerging doctrine of native title are not fully theorised by the courts. Nor have Indigenous peoples had the opportunity to fully argue against the inconsistencies and false assumptions of hierarchy and homogeneity implicit in existing doctrine. However, if these doctrinal barriers are to be overcome, the argument must take into consideration the nature of judicial reasoning. I argued in chapter five that the court must be lead from familiar concepts and, by analogy and logical reasoning arrive at the evident and just recognition of Indigenous peoples autonomy and authority. It may seem to some that the courts should respond more easily to the claims of Indigenous peoples. However, I have argued that the assumptions that judges are being asked to question go to the heart of their worldview.

When I first began this project and I explained that my thesis was going to examine Indigenous sovereignty, the eminent Australian constitutional scholar, Leslie Zines, immediately warned that talk of sovereignty raises fears of separate statehood, and that to argue sovereignty in the courts would ‘scare the horses’ so to speak. This concern was proved true in the Isabel Coe and Walker cases. Self-determination claims that seek recognition of the authority and jurisdiction of Indigenous peoples cannot be confrontational if they are to succeed. Rather, arguments must be developed which draw upon the recognition of equality and respect for Indigenous peoples in Mabo’s case and which have resonance in other recent cases. The equality of peoples has similar implications for a full recognition of Indigenous self-determination claims and unpacks the baggage surrounding the concept of sovereignty. Sovereignty is instead built up from its foundations in a way that is inclusive of Indigenous claims but mindful that the legitimacy of the state cannot be expressly undermined by the courts.
Throughout the thesis I have tried to show that the courts are an imperfect ally in the struggle of Indigenous peoples for self-determination. Yet there is potential to further the goals of self-determination through common law recognition of Indigenous rights. Regardless of the limitations of Mabo’s case, it has probably cemented the role of the courts in Indigenous peoples’ self-determination strategies. The recognition of the rights of Indigenous peoples to own and make laws for their land was a pivotal moment in Indigenous–non-Indigenous relations in Australia because it was an expression of equality and respect. Mabo’s case also shows the potential of the common law to transform itself, to reject discriminatory doctrines and renew the law. It is possible for this renewal to continue and for Indigenous peoples to enjoy equal respect for all of their laws, for their legitimate spheres of autonomy and authority and to be recognised as equal and first peoples of this land.

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