Chapter 1

Introduction

I. The approach and scope of the thesis
II. The structure of the thesis

Australia remains the only common law country never to have entered into a treaty with Indigenous peoples. Since colonisation, numbers of Indigenous and non-Indigenous Australians have called for the state to enter into this type of relationship. In tracing the development of Indigenous status from contact to the present, my thesis essentially argues for the establishment of such a treaty relationship.

Before I outline my argument, I begin in a general, personal sense. I am a 'whitefella', an Anglo-Australian of the post baby-boomer, 'Generation X', born in Sydney two hundred years to the day after James Cook first landed in this country. Like most of my contemporaries, I grew up blissfully ignorant of most things Aboriginal – save for the brief history lesson on the noble but ultimately doomed Bennelong, and more regular, less

troubling exposure to Aboriginal sportspeople. It was only after the ubiquitous two years overseas that I became interested in investigating Aboriginal culture, history, and later, politics. I gradually came to see solving 'the Aboriginal problem', as it has been conveniently defined, as the single most significant feature of this country's history. Just as my own *personal* pride in my homeland was tempered by increased exposure to descriptions of the Aboriginal experience, most profoundly through the work of Kevin Gilbert,[1] so too did I begin to note the link between this issue and that of the *national* identity, and our sense of self. I have come to believe that to achieve a 'relaxed and comfortable' Australia,[2] Indigenous people in this country must receive social justice. As with others before me, I formed the view that the relationship between Aboriginal and other Australians needed to be reformed – not just in terms of the obvious and well-tried 'welfare' style approaches, but more deeply, on a level which recognised Aboriginal peoples as holders of distinct rights. Only then will it be possible to develop a society with 'new appeal'. As Gilbert poetically described,

> The human metals melt and melting down
> Strike fault in fault and shattering neath the steel
> The two base metals scream a new appeal.[3]

The thesis is guided by the understanding that to comprehend the complex relationship between peoples – the 'two base metals' of Australia – it is necessary to look not just at where we are today, but to develop a profound understanding of where we have come from.

---

[1] Amongst a diverse body of work, see particularly, *Because a White Man'll Never Do It*, Angus and Robertson, Sydney, 1973; *Living Black: Blacks talk to Kevin Gilbert*, Angus and Robertson, Sydney, 1977; and *Aboriginal Sovereignty: Justice, the law, and land*, Kevin Gilbert, Canberra, 1988.

[2] Before being elected in 1996, the current Prime Minister John Howard was asked about the kind of country he would like to see under his stewardship. He (in)famously replied a 'relaxed and comfortable Australia.' For an explanation by the Prime Minister as to the phrase's intended meaning, see the transcript of a speech given to a Liberal party function in Newcastle, 16 July 1997.
www.pm.gov.au/news/speeches/1997/pattdins.html

[3] Gilbert, *Because a White Man'll Never Do It*, p.203.

Examining relations between peoples over time from a political perspective is complex. It encompasses a multitude of complicated, interrelated issues. Analysing the history, philosophy and politics of relationships is like peeling back layers of an onion. Addressing one layer in isolation may be relatively easy, but it would fail to give anything like a complete picture. Yet one cannot hope to describe comprehensively, let alone analyse, all facets of this multilayered phenomenon.

A key assumption developed in this thesis is that Aboriginal aspirations have been effectively contained by what I call a 'colonial mentality'. To refer to Aboriginal people specifically as 'a people' is just, accurate, and appropriate. But more than this, a fundamental alteration of the colonial mindset is deemed necessary to facilitate real change. It would place consideration of the critical question of Aboriginal status – 'the definition of who or what they are in the wider society'[4] – in its proper context. This entails a departure from dominant statist conceptions which are only able to view Aboriginal people as a minority within the state. We should consider status in terms of 'the legal/political relationship between Indigenous peoples and non-Indigenous society.'[5] This is what I refer to, following the United Nations treaty study, as 'the Indigenous

[4] Jeremy Beckett, 'Aboriginality, citizenship and the nation-state', in Beckett (ed.), *Aborigines and the State in Australia*, special issue of the *Journal of Cultural and Social Practice*, no. 24, December 1988, p.3.
[5] Garth Nettheim, ''The Consent of the Natives': Mabo and Indigenous Political Rights', *Sydney Law Review*, vol. 15, no. 2, June 1993, p.223.

problematique'.[6]

Dealing with this *problematique* is an inevitable consequence of the processes of colonialism. However, when Aboriginal peoples are recognised only as a(nother) minority within the state, this issue is misrecognised as 'the Aboriginal problem'. This is a 'problem' for the state to solve, within its borders, by its own methods, with as much (or as little) consultation as it determines. Yet, I agree with UN rapporteur Isabelle Schulte-Tenckhoff's suggestion that 'the full meaning of the term "indigenous" only becomes apparent in the context of an international political and juridical debate'.[7] While focussed firmly on Australia, this thesis makes frequent international comparisons, particularly with Canada, in order for the Australian situation to be viewed as part of, not distinct from, the international Indigenous experience. The attempt here is also to 'lift' discussion of the Indigenous *problematique* above the relatively mundane context of much current consideration. At all times, I am cognisant of the need for theoretical discussion to be accessible to Aboriginal people themselves, politicians, bureaucrats and the general public.

I. The approach and scope of the thesis

We should be alert to an issue already raised above – terminology. Who is 'Aboriginal', or 'Indigenous'? Is every one else 'non-Aboriginal'? Who, or what, are 'peoples'? Would a 'compact', 'agreement' or 'social contract' be as effective an instrument as a 'treaty' in transforming relations? Here I tread the first of a number of fine lines. Terms are important, not least for the way they influence and direct discussion. This point is

[6] Miguel Alfonso Martínez, Special Rapporteur, *United Nations Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, E/CN.4/Sub.2/1999/20, 22 June 1999, Par. 31.
[7] Isabelle Schulte-Tenckhoff, 'Interview – Meeting Point', *The Courier*, January-February 1999, p.3.

particularly salient for Aboriginal people who are often forced to present their claims in what is effectively a foreign language and tradition. That said, my primary focus is on the discussion itself rather than the terms. For example, in presenting an argument for a 'treaty relationship', it is the nature of the relationship I am really interested in, rather than promoting a particular mechanism for its own sake. While I am not wedded to the term 'treaty', it is favoured because, as I will argue, it is the most appropriate vehicle for bringing about the fundamental transformation of relationships I believe is necessary.

The nature of treaty can be determined by those party to it. The suggestion is made that not only has much of the political theory we use today aided the colonisation of Indigenous peoples, it actually emerged to directly facilitate this project. While I am a political scientist, not an historian or philosopher, this thesis involves much historical research and philosophical investigation. I engage this way, not to display some expertise in these areas, but to provide the necessary context for the political discussion which forms the bulk of the work. I do not pretend to provide definitive historical and philosophical analyses, but hope to illustrate how such additions are necessary to gain an holistic viewpoint of the basis for relationships, how this has changed (or not), and why fundamental reform in the guise of a treaty relationship is needed.

A treaty with who?

Who, exactly, are the parties to this relationship? In various ways, engaging with this apparently simple question forms the bulk of my research. As such, I refute the suggestion that any thought of a treaty should be abandoned simply because it raises difficult questions that won't be readily resolved. The debate surrounding a treaty process may well

raise elements of paradox and ambiguity that defy immediate resolution, and which we must learn to live with. My aim is not to present treaty as *the* solution, but rather as providing a framework through which to pursue new ideas, perspectives and conversations. The process of decolonisation is seen as requiring such new thinking.

The key assumption underlying my argument for a treaty relationship is that there were people – long resident in the territory we now know as Australia – who were organised in distinct, complex societies, with their own laws, philosophies and traditions. As Justice Judson said in the seminal land rights case in Canada, the *Calder* case of 1973:

> the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...[8]

In Canada and elsewhere, Indigenous people were subsequently colonised, without consent, by people originally from Britain. These newcomers disregarded the rights and status of the original inhabitants in becoming the dominant members of a new society, one which came to reflect overwhelmingly their European traditions. The relationship I discuss is that between the Aboriginal people on one hand, and the non-Aboriginal people on the other. I do not, therefore, deal extensively with the relationship between Aboriginal peoples and multiculturalism, except to argue the distinct difference in the types of claims made by 'First Peoples' and ethnic minorities.[9]

Introducing the issue of multiculturalism indicates one of the difficulties with assuming Australia to be made up of 'First' and 'settler' peoples. Yet I argue such a categorisation captures enough of the Australian reality – particularly our historical reality – to be an

[8] *Calder et al v A-G B.C.* (1973) 34 DLR p.328.
[9] Schulte-Tenckhoff touched on one aspect of this difference when she identified a 'core aspect of the indigenous issue is a people's historical relationship with the land, whereas in the case of minority groups, this aspect is not fundamental...Consequently, [Indigenous] claims are also very different from those made by minorities.' *op cit,* p.3.

accurate and workable premise on which to base my study. Nonetheless, at the outset, two major objections to this classification must be addressed. Firstly, there is the suggestion that there are not two peoples in Australia, but one. While there are people of different cultural backgrounds resident in this state, the argument goes, in terms of political arrangements we should look no further than a shared identity of 'Australian citizen'. Secondly, and in marked contrast to the first objection, is the suggestion that there may in fact be more than two peoples in Australia. The demarcation of 'an Aboriginal people' and 'a non-Aboriginal people' fails to capture the diversity inherent within both groups, particularly within 'Aboriginal Australia'.

The first objection can be dealt with relatively easily. The assertion that 'we are all one people' is simply that – an assertion. It *assumes* Aboriginal people to be part of political arrangements in the same way as everyone else, without explaining how this came to be. It fails to address any of the key claims made by Aboriginal people that they are a distinct people, with distinct cultural ways and rights that continue, and should be reflected in some way in political arrangements to which they are subject. It obliterates the past, with its ongoing legacies, in favour of a newly asserted 'level playing field' philosophy which insists all Australians should be treated 'equally'. While instinctively attractive and politically popular, this 'equality argument' actually confuses substantive equality with 'sameness' by treating Aboriginal people as if they were a recently arrived minority rather than a dispossessed people still resident in their homeland. While official support (from the Prime Minister down) has helped maintain its popularity, the death knell for the 'one people, same treatment' argument was effectively delivered by the *Mabo [No. 2]*[10] decision of

1992.

[10] *Mabo v Queensland [No 2]* (1992) 175 CLR 186. This case will generally be referred to in the text as *Mabo*.

Mabo recognised (not, it must be stressed, created) a distinct Aboriginal interest in land it described as native title. Native title, in turn, recognises an *inherent, Aboriginal* right.[11] As Brennan J stated:

> 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. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[12]

The High Court recognised Australia as the home of not one, but two distinct systems of law - not one, but two *peoples*. The implications of this decision have yet to be fully explored. As if frightened by the complexities of deep diversity the case raised, it seems the nation (or state) currently prefers to deny and close off, rather than mutually explore, the possibilities opened up by the Mabo case.

The second objection to the 'two peoples' thesis cannot be so easily dismissed. It is conceded at the outset that demarcating 'an Indigenous people' and 'a non-Indigenous people' involves a degree of artificial construction. This points, in part, to the inadequacy of our current terms and signifiers in capturing an essentially complex and fluid reality. The question of Indigenous diversity, including the use of the term 'Indigenous' itself, is discussed below. Yet, diversity exists on the non-Indigenous side as well.[13] People have come from all parts of the world and call Australia home. How do we refer to them? They are not all 'European', they are not all 'white', and particularly since the mass immigration of the post-second world war period, they are not all 'Anglo'. Does the term 'settler'

---

[11] For discussion of the notion of native title as a 'space of recognition' between traditional laws and customs and the Australian legal system, see Christos Mantziaris and David Martin, *Native Title Corporations: a legal and anthropological analysis,* Federation Press, Leichardt, 2000, pp.9-11; and Noel Pearson, 'The concept of native title at common law', in G. Yunupingu (ed.), *Our Land is our Life: Land Rights – past, present and future,* University of Queensland Press, Brisbane, 1997, pp.152–155.

[12] *Mabo* (1992) 175 CLR 1 at 58; 107 ALR 1 at p.42.

[13] Interestingly, in his draft treaty document, Kevin Gilbert described the treating parties as 'the Aboriginal people', and 'the non-Aboriginal peoples' (plural) of Australia. See his *Aboriginal Sovereignty: justice, the law and land,* p.14.

capture the diversity of all those who have come to this land in the last two centuries? How can the negative referants 'non-Indigenous' or 'non-Aboriginal' be the expression of a positive sense of identity? These latter terms, along with 'whites' and 'white society', are chosen not because they reflect the self-expression of the majority of Australians, despite the fact that we may be 'one of the whitest nations on the planet'.[14] They are neither ideal nor concise. They are used throughout for want of a better term to differentiate those whose heritage, ancestry and traditions can be traced outside of Australia. We have no equivalent to the New Zealand term 'Pakeha', which may be useful in describing not just an ethnic identity but also a personal and political one which seeks to engage with, not shy away from, the complexities of decolonisation.[15]

In a similar sense, it could be argued that the term 'Indigenous' fails to capture the diversity of

'Aboriginal' Australia. A treaty between 'the Aboriginal people' and 'the non-Aboriginal people' is inappropriate some say, because there is not 'one Aboriginal people' with whom the Australian government can treat,[16] or that Aboriginal peoples should first be treating amongst themselves. In the spirit of supporting self-determination, I am sympathetic to suggestions that Aboriginal groups be able to come to intra-state agreements, though the question is not addressed here.[17]

---

[14] This suggestion was made by George Megalogenis after reviewing census figures. He found 'almost 9 in every 10 residents (89.24 per cent) is Anglo-Celtic or Continental.' 'Census figures reveal a whiter shade of pale', *Australian,* May 9, 2002.

[15] See Michael King, *Being Pakeha Now: reflections and recollections of a white native,* Penguin Books (NZ), Auckland, 1999.

[16] For this argument, and general critiques of 'Aboriginal separatism', see a number of papers by Keith Windschuttle at http://www.sydneyline.com/Separatism.htm

[17] For discussion of this issue see Kevin Dillon, 'A Treaty Between Ourselves First of All?', paper delivered to the *Treaty – Advancing Reconciliation* Conference, Perth, 26-28 June 2002.

Who are the Indigenous people?

Both 'Aboriginal' and 'Indigenous' are terms originally imposed on local inhabitants, rather than being born of their own traditions. In many ways, it would be more appropriate to refer to Indigenous peoples by the names they have chosen for themselves: the Ngunnawal people, the Wiradjuri people, the Wik, the Arrente, the Yorta Yorta, and so on. In recent years, Aboriginal people themselves have also introduced, after long and bitter battles, collective terms such as Koori in New South Wales and Victoria, Murri in Queensland, Nyoongar in the South West, Noongar in South Australia, Yolgnu in the Northern Territory, and Palawa in Tasmania. Torres Strait Islanders were officially accorded a distinct status in 1994, and South Sea Islanders in 2000. The importance of these terms lies not just in their specificity, but in the fact that they are terms of self-identification. Where possible, I use local clan, language, or 'nation' names as appropriate. However, the focus of this thesis is on the treaty process as a catalyst for a new way of thinking about and, more importantly, *with*, Aboriginal people *as a whole.* It looks at the concept of treaty, rather than proposing any particular model. Having said that, it is sympathetic to those suggestions that envisage some form of national framework agreement which may form an 'umbrella' over subsequent statewide, regional and local agreements. How then do we refer to a broader, collective sense of Aboriginality, and is it appropriate to do so?

In arguing for a treaty relationship, I necessarily assume the existence of another group with which the state can treat. The description of 'an Aboriginal people' is undoubtedly problematic. At first glance, it reflects a homogenising 'discourse of domination'. Of course, there never was one homogeneous people resident in the territory we now know as the state of Australia. The life of the Arrente, roaming over hundreds of kilometres in the

central desert region, could hardly have been more different to that of the Yorta Yorta in the fertile south east of the country, who were relatively sedentary. Ongoing processes of colonisation have only added other layers to the complex question of Indigenous identity. This complexity has been captured by Marcia Langton. She described contemporary Aboriginality as 'a field of intersubjectivity in that it is remade over and over again in a process of dialogue, of imagination, of representation and interpretation'.[18] It is not my aim to explore the nature of 'Aboriginality', a project perhaps better left to Indigenous people themselves.[19] I simply proceed with the belief that such an identity exists, but do so on the assumption of an underlying diversity rather than any homogeneity.

Aboriginal people across Australia don't share the same language, traditions or even culture. Aboriginality is certainly not defined (from within) by skin colour or blood composition. (Such external 'features' were defining hallmarks for Australian bureaucrats for more than a century.) Perhaps the key element is that which appears to be under most under attack by conservative forces in this country, namely, history. When asked 'what is an Aborigine?', the late Shirley ('Mum Shirl') Smith referred to this shared experience when she replied emphatically: 'An Aborigine is anyone who knows what it was like down on Erambie Mission, West Cowra, thirty years ago.'[20] In similar terms, Nyoongah writer Mudrooroo suggested a strong collective identity of 'Us Mob' had formed in opposition to 'You Mob'.[21] While latter day non-Indigenous denialists refuse to acknowledge any distinct surviving contemporary Aboriginal identity,[22] more insightful white observers

---

[18] Langton cited in Darlene Oxenham [et al.], *A Dialogue on Indigenous Identity: warts 'n' all,* Gunada Press, Perth, 1999, p.5.

[19] For this argument see Oxenham, *ibid.* For an important discussion of Aboriginality by a prominent Aboriginal leader see Michael Dodson, 'The End in the Beginning: Re(de)finding Aboriginality', *Australian Aboriginal Studies,* no. 1, 1994. The speech can also be found at: http://www.hreoc.gov.au/speeches/social_justice/end_in_the_beginning.html

[20] Smith cited in Colin Tatz, *Obstacle Race, Aborigines in sport,* New South Wales University Press, Kensington, NSW, 1995.

[21] Mudrooroo, *Us Mob: history, culture, struggle: an introduction to Indigenous Australia,* Angus & Robertson, Pymble, NSW, 1995.

[22] This appears to be Keith Windschuttle's argument when he suggests Aboriginal people's 'sociological

have noted the complex nature of a 'modern' Aboriginal identity. The late anthropologist Diane Barwick spoke of an Aboriginal community 'bonded by shared experience, common memories and inherited legends of oppression as a despised indigenous minority'.[23] Given the importance of history to Indigenous identity, I regard historical investigation as critical not just to the transformation of a shared relationship, but also in the reappraisal of European-Australian identity that must also take place.

A people's struggle, a political struggle

Although the term 'Indigenous' was not originally one of Aboriginal self-expression, more and more Aboriginal writers, activists and leaders appear to be comfortable using it. It is used here to differentiate those people whose ancestors originate from this land from those whose ancestors originally came from elsewhere. I follow the growing convention of capitalising the term[24] so that it refers particularly to Aboriginal people rather than, as the Macquarie dictionary suggests, any person or thing 'originating in and characterising a particular region or country'.[25] Again, it is used more for its convenience rather than because it is an ideal term. However, if it is underpinned by an assumption of underlying diversity, rather than a denial of such diversity, it does have certain advantages.

Mohawk political scientist Taiaiake Alfred's observations about the term 'Indigenous' can be applied beyond the context he referred to, that is, North America. He suggested:

> All Indian peoples share certain commonalities that may serve a unifying function, particularly in efforts to explain the cultural basis of the movement's goals to

---

distribution does not support their separate political status. Indeed, it is a powerful argument against it.' Windschuttle, 'Why there should be no Aboriginal treaty', *Quadrant,* vol. 45, no. 10, October, 2001, pp.14-24.

[23] Cited in Tatz, *ibid.*

[24] Except where directly citing work which spells 'indigenous' with a small 'i'.

[25] *The Macquarie Dictionary,* A. Delbridge [et al.] (ed.), Macquarie Library, North Ryde N.S.W., 2001.

> non-indigenous people. Of course each community will have its own tactics and strategies; but the foundations of the movement and the driving force behind it are shared by almost all indigenous people; and the values embedded within indigenous traditions are very similar.[26]

Alfred uses the term 'indigenism' to describe a sense of shared Aboriginal identity and experience. Importantly though, it draws from, rather than papers over, the diversity present between Indigenous nations:

> Indigenism brings together words, ideas and symbols from different indigenous cultures... It does not, however, supplant the localized cultures of individual communities. Indigenism is an important means of confronting the state in that it provides a unifying vocabulary and basis for collective action. But it is entirely dependent on maintenance of the integrity of traditional cultures and communities from which it draws its strength.[27]

The broad Indigenous identity described by Alfred does not conflict with localised identities, but are mutually supportive. It is in this sense that the term 'Indigenous' is used here. So, is there one Indigenous people or many peoples? Perhaps the answer is 'both'. While a locally focussed identity may predominate, at other times, Aboriginal people have been seen to identify at a regional, and even national level. Larissa Behrendt identified this element of paradox in Indigenous identity when she noted that although Aboriginal peoples were 'intensely local', they remained the only Indigenous people in the world to gather together under the one flag.[28] This points to the 'relational' nature of identity described by political philosopher, Iris Marion Young.[29]

Alfred's quotation points to another key element in my approach. I am mindful of the fact that the dominant society has consistently failed to see Aboriginal peoples as political

---

[26] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, Oxford University Press, Oxford, 1999, p.88.
[27] Alfred, *ibid.*
[28] Larissa Behrendt, *Aboriginal Dispute Resolution: a step towards self-determination and community autonomy*, Federation Press, Leichardt, 1995, p.27.
[29] For discussion of Young's work see chapter 2.

entities.[30] I am primarily interested in the formation and deployment of these identities in the context of a political struggle against the state. I agree fundamentally with Richard Falk's suggestion that Indigenous peoples represent a competing nationalism within the state.[31] This is a state that has, through the processes of colonisation, come to be embodied by the recent arrivals. Non-Indigenous institutions and traditions dominate the day-to-day workings of the state, which take place in a non-Indigenous language against the backdrop of non-Indigenous traditions. If Aboriginal status is viewed only in the way suggested above by Barwick – as a minority *of* the state – their claims *against* that state cannot be heard. This is literally the case when the institutional structures and language of the state are effectively foreign to many Aboriginal people. This is doubly unjust when mechanisms purportedly aimed at recognition, such as the Native Title regime, actually foster misrecognition.[32]

For Indigenous people, the history of state formation has been a history of being defined from without as 'less than', and then being excluded on that basis. Initially, this was achieved via crude differentiations between human and subhuman, civilised and uncivilised, Christian and heathen, followed by arbitrary classifications based on 'preponderance of blood' and skin colour gradations. Yet, paradoxically, just as Indigenous people have asserted a positive value to a surviving and aggressively *collective* Aboriginality, the colonial dynamic has attempted to reassert white hegemony – not by asserting difference, but by denying it. Latterly, a history of differentiation is denied by the assertions examined above that 'we are all citizens', 'we are one people', 'we are one nation'.

---

[30] See Marcia Langton, 'Ancient Jurisdictions, Aboriginal polities and Sovereignty', paper delivered to the Indigenous Governance Conference, Canberra, 3-5 April 2002.
[31] Richard Falk, 'The rights of peoples (in particular Indigenous peoples)', in James Crawford (ed.), *The Rights of Peoples*, Clarendon Press, Oxford, 1988, p.18.
[32] See discussion in chapter 11.

One reason for this is that in an era which increasingly recognises not just individual but collective human rights, states wish to deny to Indigenous peoples those rights said to reside in all peoples – particularly that of self-determination. This is possible due, in part, to ambiguities that exist in this area. Frederick Harhoff points out there are no

> objective and substantial measures to identify the true beneficiaries of self-determination. What actually remains essential to the definition is the purely subjective criterion of the people's own 'self-conception' as a social and cultural entity with title to self-determination. Thus, 'peoples' is not a legal but rather a normative concept, the definition of which relies mainly on ethnic, local and subjective parameters.[33]

Clearly, a majority of Aboriginal leaders describe themselves as part of a people, or peoples.[34] International law expert S. James Anaya asserts in its plain meaning, 'the term peoples undoubtedly embraces the multitude of indigenous groups'.[35] The United Nations rapporteur on Indigenous-state treaties claimed the onus of proof should not lie with Aboriginal peoples to prove their 'peoplehood', but rather with those (states) who deny such a status.[36] When the rights of the Aboriginal people – as a people – are addressed in this way, the key questions refer to why *this* particular group should be discriminated against? Why should these peoples be denied what others enjoy, namely, their own identities, territories, and political institutions? Why should Indigenous peoples not be subject to decolonisation as those peoples ruled by overseas powers?[37]

---

[33] Frederick Harhoff, 'Self-Determination, ethics and law', in Gudmundur Alfredsson and Peter Macalister-Smith (eds.), *The Living Law of Nations*, N.P. Engel, Kehl, 1996, p.174.

[34] For discussion of this point see the analysis of Patrick Dodson's Wentworth Lecture, 'Beyond the Mourning Gate: Dealing with Unfinished Business'. The speech can be found at http://www.treatynow.org/docs/Wentworth_Lecture.pdf

[35] S. James Anaya, *The Rights of Indigenous Peoples,* Oxford University Press, New York, 1996, p.77.

[36] Miguel Alfonso Martínez, Special Rapporteur, *United Nations Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, E/CN.4/Sub.2/1999/20, 22 June 1999, par.285.

[37] Gudmundur Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 1993, pp.46-7.

The diversity of Aboriginal peoples should no longer be used as a means of denying rights to identity, self-determination, and political autonomy. I contend that the time has come where, at least for political purposes, and particularly for the negotiation of a national treaty or agreement, we conceive of 'the Aboriginal people' as a single, essentially political, unit, which is one of two parties in national negotiation. This does not preclude the fact that Aboriginal people may wish to identify with more localised identities. Similarly, the focus of this thesis on the 'idea' of treaty implies some form of national framework agreement which could facilitate, not prevent, subsequent regional and local agreements. Again, my aim is to provide much needed background to the treaty debate rather than advocating any particular model.

While such a conception of 'a diverse people' may seem novel to an Australian audience, it is far from new. As early as 1832, US Chief Justice John Marshall described Indigenous peoples of North America in these terms. Prior to European occupation, he suggested America was 'inhabited by *a distinct people, divided into separate nations,* independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws'.[38] This conclusion, together with that of Justice Lamer, indicates the importance of maintaining an international perspective on questions of Indigenous-state relations. While I advocate the development of local solutions to local problems, I stress the importance of Australians viewing themselves as a part of, rather than apart from, the global history of colonialism.[39]

To summarise: there are two major reasons for conceiving of a treaty as between two distinct peoples. Firstly, for at least the last 40 years, many Indigenous Australians have

[38] Marshall cited in James Tully, *Strange Multiplicity: constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995, p.117.

referred to themselves collectively as 'the Aboriginal people'.[40] This trend has accelerated since the 1970s, when a 'pan-Aboriginal' movement rallied under the banner of land rights. Beyond this, shared experiences of the history and consequences of colonialism have seen the growth of Indigenous internationalism.[41] The connection to, and relationship with, land, is of course, a primary element of shared identity which binds all Aboriginal peoples. However, as will be discussed, the cry for 'land rights' is no longer used to bring disparate Aboriginal peoples together in the same way. Treaty has the potential to act as an umbrella under which Aboriginal peoples may rally, consolidate their power, and gain a seat at the table. Unambiguously political negotiations surrounding a treaty or treaties may have the effect of re-politicising Aboriginal collectives – not in a way that current arrangements effectively promote fragmentation, but in a process that unifies and empowers Aboriginal people. This is especially so if, as is possible in a truly bilateral process such as treaty, true accommodation takes place whereby both cultures develop, agree to live with and modify institutions and institutional arrangements.

---

[39] In terms of defining 'colonialism', Beckett's definition is useful. He suggested colonialism 'refers to that aspect of Western expansion whereby new peoples are incorporated into a conquering state.' *op cit,* p.4. Colonialism is viewed throughout this thesis as an ongoing process, rather than a single historic event.

[40] For example, even a brief reading of Bain Attwood and Andrew Markus, *The struggle for Aboriginal rights : a documentary history,* Allen & Unwin, St. Leonards, 1999, reveals this trend. Aboriginal leaders and organisations who conceived of 'an Aboriginal people' included Joe McGuiness in 1963, who spoke of 'the Aboriginal and Island peoples' (p.196); The Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI) spoke of 'the Aboriginal people' in their background notes to the 1967 referendum (p.214), and in a 1968 pamphlet (p.226); as did Charles Perkins, (p.242); and the National Tribal Council policy manifesto 1970 (p.246). Along similar lines the National Aboriginal Congress submission to the Senate Standing Committee on Constitutional and Legal Affairs Inquiry into the Makarrata, 1982, suggested '...our nationhood is a matter both of fact and law...[this] nationhood is fundamental to our bargaining position if we are to entertain a Makarrata (Treaty).' (p.248). It also speaks of a Treaty as securing 'our basic rights as sovereign Aboriginal nations' (p.294); Kevin Gilbert's Draft Aboriginal Treaty directly called for 'recognition of Aboriginals as a People' (p.311); (Interestingly, Gilbert's draft treaty would be between 'the Sovereign Aboriginal People' on one side, and 'Non-Aboriginal Peoples' (plural) on the other (p.312)); more recently the Aboriginal Provisional Government papers speak of plans for 'the Aboriginal Nation' (p.323) and activists such as Irene Watson have adopted the rhetoric common elsewhere of Australian Aboriginal people as first nations peoples (p.330).

[41] For an overview of this development by a commentator involved at both theoretical and practical levels, see Peter Jull, 'First world' indigenous internationalism after twenty-five years', *Indigenous Law Bulletin,* vol. 4, no. 9, February 1998, pp.13-16; *Constitutional Work in Progress: Reconciliation & Renewal in Indigenous Australia and the World* (A background paper for Indigenous Law Centre, University of New South Wales, Sydney), Centre for Democracy, University of Queensland, Brisbane, August 11, 1998; and 'Indigenous Internationalism: What should we do next?'.
http://www.yukoncollege.yk.ca/~agraham/nost202/jullart1.htm

Secondly, there are reasons which refer to the transformative possibilities of such a categorisation. White Australians need to view their society as subject to the same winds of decolonisation blowing through other settler states. Some people portray Australia as fundamentally different – due to our lack of a history that included signing treaties with these peoples. Yet this confuses the issue. Aboriginal status as distinct rights-holders does not stem from the signing of treaties. Rather, treaties have been signed because colonial authorities recognised these peoples as distinct societies. Inherent rights are reflected in the treaties rather than being created by them. By the same token, Aboriginal peoples today retain the right to sign treaties with the state as the descendants of those people resident prior to colonisation. Indigenous claims, such as to land, should be the subject of explicitly constitutional dialogue between peoples, not just a feature of the state's property management.

This process of realigning or escaping the colonial mentality is further facilitated because of the trajectory of a 'rights of peoples' approach which align it with notions of equality. In this context, Indigenous peoples claims can be viewed in the same way as the rights of other peoples. The norms of equality of peoples, consent and continuity dictate that the right of the Aboriginal people to self-determination should not be viewed as any less legitimate than the right of non-Indigenous Australians. Placing ourselves in an even broader context, Aboriginal rights can be viewed alongside those of other peoples fair-minded Australians recognise as just. Ian Brownlie suggests that 'the problems of the Lapps, the Inuit, Australian Aborigines, the Welsh, the Quebecois, the Armenians, the Palestinians, and so forth are the same in principle, but different in practice'.[42] Australians are unlikely to see themselves as bearers of oppression such as that felt by, say, Palestinian

[42] Falk, *op cit,* p.21.

Arabs. Yet in each of the above case, what is needed is a dialogue between peoples to determine just political arrangements.

Viewing the Australian state as being made up of at least two or three distinct peoples who must negotiate the co-existence of their rights actually brings us into line with the rest of the world. If the days of 'a state = a culture = a people' ever existed, they are gone forever. What Will Kymlicka refers to as 'the multi-nation state' is now the norm.[43] There are very few countries, like Iceland, with a conveniently homogeneous population that can correctly be termed 'nation-states' in the literal sense. The dream of a monocultural white ethnic or racial Australia can no longer be sustained. A major difficulty faced by the 'different peoples' position is that such a dream was officially abandoned only three decades ago. So much change has been expected of – and by – Aboriginal people in this short time, it is no surprise that they currently face great difficulty with what is being termed 'capacity-building'.[44] Their difficulties will only be increased by maintenance of the colonial mentality. That it continues to hold a powerful grip on the administrative, and the public imagination, is seen today in the continued popularity of the 'one nation' argument.

Yet the consistency of Aboriginal demands for recognition of a distinct status means we cannot continue to simply equate 'equality' with 'sameness'. The relationship between Aboriginal people and the state must be the subject of specific negotiation. A distinct Aboriginal status can never be completely recognised in 'the same' ways as other citizens. As Lisa Strelein pointed out:

---

[43] Will Kymlicka, *Multicultural Citizenship: a liberal theory of minority rights,* Clarendon Press, New York, 1995.

[44] On 16 July 2002, The House of Representatives Aboriginal and Torres Strait Islander Affairs Committee announced the 'Inquiry into Capacity Building in Indigenous Communities'. Committee chair Barry Wakelin suggested 'This inquiry aims to find strategies to build the capacity of Indigenous individuals, communities and organisations to identify, design and manage the delivery of services and facilities such as housing, roads and health care.' Terms of reference are available at http://www.aph.gov.au/house/committee/atsia/indigenouscommunities/inqinde.htm

> More than equal participation, Indigenous people seek distinct group survival and the freedom to determine their relationship with other groups, nations and States. The claim of Indigenous people cannot be adequately incorporated within the individual human rights or civil rights discourse (though they may appeal to those forms). Rather, they include unique rights as peoples, and, in particular, as first peoples whose sovereignty predates that of the state.[45]

II. The structure of the thesis

In a country with no historical memory of agreement making, my work seeks primarily to provide some of the conceptual background necessary to promote the dialogue which is needed to move Australia towards the establishment of a treaty relationship. In tracing the way the state has managed Aboriginal status, the aim is to develop an argument for the concept of treaty rather than any particular model. While this is, of course, important, it is regarded as a 'second order' question. Before looking at 'which treaty', Australians must first understand 'why a treaty?', and be comfortable with the range of answers possible to the question 'what is a treaty?'

While other works have sought to trace the development of Aboriginal status,[46] few have done so with specific reference to the treaty relationship. I believe this work is unique in the way it does this by drawing together elements of ancient and modern history, legal and political theory, as well as a critical analysis of contemporary political arrangements in Australia and Canada.

---

[45] Lisa Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate', paper delivered to Limits and Possibilities of a Treaty Process in Australia, AIATSIS Seminar Series, 20 August 2001, p.14.

[46] See for example, Ian G. Sharp and Colin M. Tatz, *Aborigines in the economy : employment, wages and training*, Jacaranda Press in association with Centre for Research into Aboriginal Affairs (Monash University), Brisbane, 1966; C.D. Rowley, *Outcasts in white Australia: Aboriginal policy and practice*, Australian National University Press, Canberra, 1971; 'Indigenous Australians and the state', AIATSIS Seminar series, May-September 1995, see especially Michael Mansell, 'The political status of Aborigines', 22 May, 1995; Tim Rowse, *Remote Possibilities : the Aboriginal domain and the administrative imagination*, North Australia Research Unit, Australian National University, Darwin, 1992.

Though not formally set out this way, the thesis can be broadly divided into two halves. Following this introduction, Parts II and III (chapters 2-6) address the 'why' of treaty, tracing both political theory and Australian history in order to develop the argument for a fundamental change in the relationship. Parts IV and V (chapters 7-11) move through treaty theory and the reality of contemporary political arrangements in Canada and Australia in looking at the 'what' of treaty.

I begin by reviewing the way three contemporary political philosophers have addressed the question of Indigenous status. This is done partly in an attempt to 'lift' consideration of the Indigenous *problematique* above the mundane realm of day-to-day policy where the question has historically received attention in this country. Each of the perspectives of Iris Marion Young, Will Kymlicka, and James Tully is felt to be useful in shedding light on the way the issue is thought of in Australia, perhaps illustrating the relatively nascent character of debate here. While Young's work can be viewed broadly in terms of a 'politics of difference' approach, Kymlicka has proven to be influential in articulating a liberal defence of distinct Aboriginal rights. It is Tully's approach, however, that I view as most useful in addressing the Australian situation because it refuses to be bound by the dictates of any particular theory. In considering the beginnings of current theory, Tully prefers the role of mediator, rather than 'truth seeker', or 'truth imposer' – appropriate for proposing a treaty relationship.

Following Tully's suggestion that 'the injustice of cultural imperialism occurs at the beginning',[47] chapter 3 traces the development of early 'discourses of domination', or at least the work of selected influential proponents. The purpose here is twofold: firstly, we discover a good deal of what we now take to be the starting point for debate and discussion

[47] Tully, *op cit,* p.34.

was actually itself the result of previous disputation. Not only this, but many of these conclusions emerged – or more accurately, were chosen – because of their usefulness to the colonial enterprise. The bedrock of some of the key concepts in the Western intellectual tradition – for example justice, equality, sovereignty – can be revealed as somewhat shaky when viewed from the perspective of conquered Aboriginal peoples. Secondly, revealing the debates over contact which occurred centuries ago also situates current disputes in Australia firmly as a part of, not distinct from, this tradition. It would be a cause for some alarm, or at least a deep challenge to liberal ideas of 'progress', if the contemporary political arrangements suffered in a comparison with those of previous centuries in terms of recognition of the rights of Aboriginal peoples.

Part III directly introduces consideration of Australia. Chapter 4 analyses the importation of discourses of domination developed in the course of the colonial enterprise. While there had developed, by the time of Australia's colonisation, both a coherent set of ideas to justify colonialism as well as 'just' methods of recognising the rights of indigenous inhabitants, Australia came to rely upon its own discourses of domination, perhaps unique in the extent to which they denied the rights of Aboriginal people. This chapter illustrates that debates over Indigenous status did take place for some 50 years, and included proponents both of the recognition of Aboriginal sovereignty as well as the establishment of a treaty relationship. However, the period of establishing an emerging Australian state – and critically a national identity – was a time which relegated any consideration of equal status for Aboriginal people. In a sense, this development reaches its zenith with the *Milirrpum* case in 1972,[48] where the court can actually recognise the prior existence of organised Aboriginal societies as a matter of fact, but deny this any significance when examined against the dominant European law.

[48] *Milirrpum v Nabalco* (1971) 17 FLR 141.

In chapter 5, I examine in greater detail the strategies used by the state to maintain its denial of a distinct (political) Aboriginal status in the last three decades. A certain circularity is revealed as the period both begins and ends with demands for (and denials of) a treaty. I argue the state has managed representations of this 'difference', via a logic which denies its political manifestations that unsettle unitary conceptions of the state. Chapter 6 acts as a summary of the thesis to this point, illustrating the choice confronting Australia at the beginning of the new century: to look back to the discourses of domination to deny Aboriginal status and maintain the colonial relationship, or to look forward to fundamentally realign the Indigenous-state relationship on the basis of inclusion and negotiation. The chapter analyses the arguments of Prime Minister Howard which, in promoting this homogeneous view of Australia's political community, are said to rely heavily on the discourses of domination. As such, Howard's position is felt to epitomise those elements of Australian society that have always acted to deny recognition of Aboriginal people as a distinct polity in their own right. Under this view, the concept of a treaty is not just undesirable, it is incoherent. This position is contrasted with the argument contained in Patrick Dodson's Wentworth Lecture wherein he seeks to marry concepts of a distinct Aboriginality with citizenship via the establishment of a treaty relationship. This chapter relates the previous historical and theoretical analysis directly with the issue of treaty discussed in later chapters.

Having developed the argument that there needs to be a comprehensive change to the whole basis of the relationship between Indigenous and non-Indigenous people in Australia, Part IV begins the section which presents 'treaty' as the mechanism which may facilitate that change. This part examines the theory of treaty, with chapter 7 exploring the question of definition, positioning this against what are described as 'Australian

misconceptions' as to the nature of treaty. Chapter 8 examines the treaty relationship in detail. The aim is to investigate the political conditions whereby the just position of both Aboriginal and non-Aboriginal peoples can be secured, via the development of what Pat Dodson described as 'the proper protocols'.[49] Again, there is an element of paradox at play. It is held that it is necessary to recognise Australia as home to distinct, different peoples in order to nurture a truly united, inclusive Australian people.

Part V analyses the experience of treaty and treaty-like mechanisms. Chapters 9 and 10 describe in detail the approach of the British Columbian treaty process to construct such 'nation to nation' relationships. Canada, of course, differs from Australia in significant ways with respect to the relationship of Indigenous peoples and the state. Perhaps of most significance are a history of treaty making, and the constitutional recognition of Aboriginal rights which occurred in 1982. Despite this, British Columbia (BC) is felt to be an apt comparison because, like Australia, it had a long history of denying Aboriginal rights and title. This only came to an end with the establishment of the BC treaty process in 1990. While perhaps inevitably falling short of the ideal described in the previous section, it is felt the experience in BC nonetheless provides a number of salutary lessons for Australia – including ample illustration of the fact that establishing such a process is certainly no quick fix or panacea.

Following the investigation of treaty theory, and then international practice elsewhere, chapter 11 investigates the potential for existing agreement making to act, as some have suggested, as a *de facto* treaty-making process in Australia. I particularly focus on the negotiation of Indigenous Land Use Agreements taking place under the Native title regime. Again, this process falls far short of the ideal of a treaty relationship described by political

[49] Dodson, *op cit.*

philosophers such as James Tully. Yet, when compared with the dynamics of relations examined in previous chapters, optimism is still possible. Flawed as it is, for the first time in Australia we are witnessing the development of a political culture which treats seriously the position of Aboriginal rights as those that must be negotiated – not out of feelings of grace and favour, but out of law. This thesis suggests such recognition necessitates the negotiation of a people-to-people relationship – a treaty relationship.

Chapter 2

Theorising About Aboriginal Rights: Framing the Question of Status

I. Iris Marion Young – relational difference and determining the self
II. Will Kymlicka – protecting 'national minorities'
III. James Tully – contemporary constitutionalism
IV. Conclusion

The status of Aboriginal peoples in 'settler' states is the subject of much debate. At the beginning of the twentieth century, Indigenous peoples in Canada and Australia were widely seen by the dominant European majority as remnant populations, destined only for disappearance at the hand of unseen, unstoppable forces. Yet, at the end of the twentieth century, these states were deeply engaged in processes of accommodating the demands of these peoples who not only celebrate survival of their cultures and societies, but continue to assert their rights as distinct peoples. Such assertions raise deeply complex theoretical questions for disciplines of inquiry such as political science and philosophy. Historically, these disciplines have facilitated the denial of rights of Indigenous peoples, yet they now seek to

understand and redress those denials. The position is somewhat analogous to that of Indigenous peoples themselves. They are a part of wider societies that have grown up around them, yet also, in some senses, are in conflict with them. They assert their rights from within the states that, having sought to exclude them, now claim to represent them; yet at a fundamental level, those claims must be able to be understood as demands or claims *against* such states. The fact is that Aboriginal peoples had their own societies, these societies were colonised, and unlike other peoples, they have not yet experienced any real form of decolonisation. It is assumed here that Indigenous peoples, as peoples with distinct historical experiences and values, do indeed possess the inherent right – as with other peoples – to determine their own social, political and economic status. Here I examine the question of Aboriginal status, and the rights accorded that status, as it has been addressed by a number of political theorists.

Taken together, the work of Iris Marion Young, Will Kymlicka, and James Tully can be seen as an attempt to explain a new direction in relations between Indigenous peoples and the state. While important differences in the mechanisms of colonisation between Canada and Australia must be recognised, particularly with regard to treaties, it is possible to assume, as these writers do, a certain commonality between these cases as exemplars of settler-state colonialism. Given this portrayal of the Indigenous *problematique*, it is implicitly assumed here that previous justifications for the colonial status of Aboriginal peoples that relied upon asserting the inherent superiority of Europeans are currently no longer acceptable. Within these states, relationships involving Indigenous peoples, other peoples and the state itself, are in the process of redefinition – or perhaps more accurately, reimagination.

Many Aboriginal peoples wish to assert a distinct political status – one that is assumed here to be just, given the history of colonisation. This does not necessarily mean, however, that Aboriginal peoples are seeking 'special rights' that would breach the deeply-held liberal equalitarian traditions of Canada and Australia, inevitably provoking opposition and requiring sustained justification. The assertion of a distinct Aboriginal status need not mean that consideration of Aboriginal claims must take place in its own normative realm. I question those approaches which seek to pursue Aboriginal rights (for example, to land and self-government) on the basis of a perceived or actual cultural or other 'difference'. Such approaches deny the ultimate familiarity of the Aboriginal claim (to the Western traditions and institutions that must hear it), and may force Indigenous peoples toward embracing an identity that is ultimately defined from without. Despite apparent cultural differences, a distinct Aboriginal status is argued here to flow from the notion of the equality of all peoples. They, as with any other peoples, have the right to determine their own social, economic, and political status. Given Aboriginal peoples' particular historical relationship with (and against) the state, their current circumstances, as well as distinctive cultural beliefs such as to land, the expression of this right, which may be termed a right of self-determination, will vary in particular circumstances. However, the (different) nature of its expression should not be used to obscure the (same) source of the right – that of being 'a people'. The juxtaposition of 'sameness' and 'difference' is subtly illustrated by Richard Spaulding. He argues that 'while Aboriginal societies have a unique basis for their territorial claims, their moral status as peoples, and the basic substance of the rights they claim, are the same as those of other peoples having different norms of territorial connection.'[1]

[1] Richard Spaulding, 'Peoples as national minorities: a review of Will Kymlicka's arguments for Aboriginal rights from a self-determination perspective', *University of Toronto Law Journal,* no. 47, 1997, p.38. Similarly, First Nations leader Ted Moses argued, 'indigenous peoples ask to be accorded the same rights which the United nations accords to the other peoples of the world...We ask that the UN respects its own instruments, its own standards, its own principles. We ask that it apply these standards universally and indivisibly.' Cited in Gatjil

Young, Kymlicka and Tully share a vision of societies where previously inequitable relationships between peoples are re-examined. Indigenous identities are reaffirmed as a legitimate basis for membership of heterogeneous societies. The recognition of a number of identities critically informed by group membership is essential to ensuring states operate with reference to accepted notions of justice. Yet all respond in particular ways to the homogenising tendencies of modern societies which have historically failed to grant due recognition to the claims of diversity within. For the sake of my argument, they can be differentiated largely according to certain key differences in focus, with particular reference to the positioning of Aboriginal peoples in relation to the state – what is regarded here as 'Indigenous status'.

Tully's approach is favoured because his methodology allows the particularity of the Indigenous case to be examined on its own merits in a way that a politics of difference, or a liberal equality argument, ultimately does not. Perhaps just as important is the tone of Tully's inquiry. The role Tully sees for himself as theorist – that of mediator, rather than truth-seeker (or imposer) – seems most appropriate given the central focus of attention: the contemporary project of (re)negotiating political relationships between Indigenous peoples, the state, and the non-Indigenous peoples who have come to embody these states.

Djekurra, 'Indigenous peoples, Constitutions and treaties', a paper for presentation at A Dialogue on Indigenous Rights in the Commonwealth, Institute of Commonwealth Studies, London, 23 July 1999. www.treatynow.org/docs/gatjil.pdf

I. Iris Marion Young – relational difference and determining the self

As distinct from Tully, and to some extent Kymlicka, Iris Marion Young does not tend to concentrate on the specificities of Indigenous issues. Rather, she focuses on the broader topic of the politics of difference. In arguing for a notion of difference that is relational rather than oppositional, her theory can be used to shift the discourse surrounding Indigenous peoples beyond comfortable dichotomies. Young relies on an essentially fluid idea of identity as the basis of difference, an idea that is at once both appealing, yet possibly damaging to the Aboriginal case.[2] She argues that the characteristics of specificity – the borders between different groups – are actually undecidable. Whereas, historically, difference has been thought of in terms of Otherness, hierarchy and exclusion, Young denies the inevitability of an assimilationist or separatist identity, favouring a third possibility – the relational identity. While the identification of a 'relational other', rather than an 'oppositional other', has recently been suggested as one way to 'find a place to stand',[3] it will be argued here that maintaining a primary focus on 'difference' ultimately confuses the status of Aboriginal peoples and their rights. Further, the 'cultural revolution' in attitudes to difference that Young calls for may be facilitated by the process of giving substance to Aboriginal peoples rights as peoples.

---

[2] This removes Aboriginal peoples from the danger of being held to some essential, unchanging, perhaps archaic identity. Yet, some Indigenous people seek to claim just such essentials as at least part of their particular identity. See Mudrooroo, *Us Mob: history, culture, struggle: an introduction to Indigenous Australia,* Angus & Robertson, Pymble, 1995; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, Oxford University Press, Oxford, 1999.

[3] Michael Asch, 'Indigenous self-determination and applied anthropology in Canada: Finding a place to stand', *Anthropologica XLIII,* no. 2, 2001, pp.201-207.

Young's description of the exclusionary use of difference is particularly apposite to the Indigenous experience. Previous ideas of difference have privileged one group as against another. Thus, the dominant group signifies humanity, the subject, whereas the Other represents nature, the object; the privileged group is neutral and universal, while the Other is marked with an essence. The privileged judges by its own cultural standards, and finds the Other lacking, leading to dichotomies of mind/body, reason/emotion, civilised/primitive. Young characterises this as the logic of identity in Western thought when these exclusive oppositions – white/black – are aligned hierarchically, as good/bad. The identification of difference immediately locates the self or the group (or a self as the group) on a scale of superior/inferior. This process has clearly been part of Indigenous historical experience, and continues to be so. Charles Taylor regards this process where one's glory is dependent on another's shame as leading to a lack of unity in society, promoting separation and isolation.[4] Such an isolating approach appears inappropriate to a situation where two (or more) peoples must live together, sharing territory and jurisdiction. The process of decolonisation would appear to require the abandonment of approaches based on this logic.

By deconstructing these categories, which have become so powerful as to seem natural and thus go unquestioned, it can be seen that they rely on each other rather than exhibit a purely present reality. Young argues that a clear demarcation of categories becomes impossible: they are always dependent on shifts in context, purpose, relationship or perspective of those describing them.[5] Identities, which were previously thought of as fixed, become relations

[4] Charles Taylor, *Multiculturalism and 'The politics of recognition': an essay*; with commentary by Amy Gutmann (ed.), Princeton University Press, Princeton, 1992, p.48.
[5] Iris Marion Young, *Justice and the politics of difference,* Princeton University Press, Princeton, 1990, p.158.

which are differentiated.[6] Similarly, Taylor argues for a notion of identity that is determined 'dialogically' – that is, only in response to our relations with others.[7] Young's notion of difference is one that means 'heterogeneity rather than otherness, or opposition'. Different groups always potentially share the same attributes, undermining Aboriginal claims to a 'unique difference', yet reaffirming the possibility, in fact the inevitability, of an intercultural dialogue. Young's non-essentialised differences will then appear more or less salient, depending on particular circumstances. The exact nature of difference, the point where 'we' stop, and 'they' begin, the borders between groups, are not only not clearly defined, they *cannot* be defined. They are *unknowable.*[8]

This notion of relational difference allows Indigenous people a degree of freedom in defining themselves that dominant stereotypes prevent. Tribal and national (or state) affiliations remain prominent, though not mutually exclusive.[9] A person may be Wiradjiri, Koori, *and* Aboriginal. Young's concept recognises that the question of identity goes beyond either/or, but is contextual for Indigenous individuals, with local allegiances at times stronger or less prominent than a feeling of pan-Aboriginality at a national or international level. In terms of political strategy, this issue is becoming more and more prominent as questions of

[6] This is nowhere more true than with regards the terms we currently use for groups – Maori-Pakeha, Aboriginal, whitefella-blackfella. Indigenous reclamation of terms can politicise previously 'natural' and stereotyped categories.

[7] Taylor, *op cit,* p.7. Again, it may be necessary to examine whether such a characterisation can have the unintended consequence of undermining a strategically separate Aboriginal identity.

[8] There is a possible analogy here with new political arrangements. The starting point of shared membership of a state; emerging recognition of a different political system or institutions viewed as different (not inferior) in relation to each other; solidification of separate group identities through interaction; some (many?) attributes continue to be shared; while certain jurisdictions are separated, other borders will not be affirmed, and in fact cannot be, given the fluidity of group membership, and the interdependent nature of the groups.

[9] This point is suggestive of the 'differences amongst difference', with Indigenous peoples often disagreeing as to the priority of tribal or national identities below almost universal acceptance of self-determination. This diversity of opinion which has traditionally been used by colonial peoples to divide and conquer Indigenous groups, should not necessarily be seen as a negative thing, but merely indicative of the need for broad goals or aspirations to be worked out in detail at a local level.

representation are raised both at the stage of negotiation, and (particularly, perhaps in Canada and Aotearoa/New Zealand) in terms of allocating post-settlement resources. At times, Indigenous groups may find it expedient to negotiate nationally on a people-to-people basis, while other issues will demand discussions take place between, say, a local government authority and a particular tribe or nation. Treaty negotiations, for example, are likely to take place on these different levels. The great advantage of Young's argument here is she moves us away from a narrow, restrictive notion of Indigenous identity to one which recognises the wide range of positions available – not only within the group, but within the individual as well.

In Young's concept of relational difference, no group has an essential nature with attributes defining only that group. Yet, for Aboriginal peoples, this may be a double-edged sword. It allows Indigenous people the reality of a particular idea, feeling or set of beliefs – such as a communal 'caretaker' view of land – without demanding they become prisoners of that belief. Lest we fall into the trap of being essentialist or determinist with regard to groups and their membership, Young suggests they must be viewed as fluid, relational, and with no substantive essence. So, in a critique of the autonomous, unified self, Young proposes a concept of group difference that is multiple, cross-cutting, fluid and shifting. Yet such an assertion may also serve to strip Aboriginal people of the distinctiveness that is sometimes argued is present in particular characteristics or sensibilities. Given the consistent strength with which Indigenous peoples have fought assimilation over many centuries in a number of countries, it seems somehow improper to simply replace particular identities with a concept of 'shifting fluidity'.

This suggestion does appear to open up available options for the expression of Aboriginal identity and perhaps even self-determination. However, Young's conception may add to the

problem further by failing to assist in the development of practical political arrangements. In a conscious process of examination, the contextuality of unquestioned categories such as 'Aboriginal' and 'non-Aboriginal' is revealed. Yet Young's framework leaves little room in which to examine the *particular* contextuality of Aboriginal and non-Aboriginal relationships. These have inevitably been defined with reference to processes of colonialism. It is not enough for members of dominant groups to become aware of the constructed nature of the identities they attach to themselves and 'the other'. They must also be conscious of the power relationships that go along with this.

Young's conception of injustice in terms of institutional structures rather than merely redistribution of goods is useful in discussing the Indigenous experience. Her investigation of decision-making, division of labour, and especially culture, could provide a strong grounding for arguments for a separatist Aboriginal self-determination. Young does not take her own argument to this point. Viewing justice in terms of oppression and domination, which are institutionally entrenched, aligns with Indigenous arguments that persistent Aboriginal poverty demands more than a disempowering welfare style approach, currently favoured in Australia.[10] It requires real structural change, apparently more evident in Canadian attempts to establish a 'new relationship' via modern-day treaties.[11] However, in contrast to many Aboriginal leaders, Young favours the approach of total societal change rather than one that recognises Aboriginal sovereignty as the basis for some form of autonomous political domain.

Young does not attempt to argue for such a political space, focussing rather on the unjust societal position of some groups. She develops a particular notion of 'oppression' to determine

[10] For discussion of this approach under the label of 'practical reconciliation', see chapter 6.
[11] For discussion of these attempts in British Columbia, see chapters 9 and 10.

which groups may require differential rights in a society. By using a family of concepts and conditions to describe oppression, Young's conception retains a flexibility which allows the domination of different groups to be examined – not in a way that creates a hierarchy of misery, but in a way that leads to the recognition of the unique nature of each group's experience. Young's 'Five Faces of Oppression'[12] can indeed be used to describe many common features of the Indigenous experience:

- exploitation (especially at time of contact, but continuing in Indigenous overepresentation in lower paid employment);
- marginalisation (for instance, economic, but also in terms of a general positioning as 'legitimate' objects of invasive and arbitrary state policy);
- powerlessness (in decision making at both a micro and macro level);
- cultural imperialism (strongly aligned with the Indigenous experience, as the dominant culture is universalised, with aberrant consequences for both Indigenous individuals and culture); and
- Violence (both systematic, fear of random acts, often self-inflicted by the group on the group).

Young's concept firmly establishes the Indigenous peoples of Australia (and elsewhere) as oppressed groups, lending weight to subsequent arguments for distributive justice. She says she is merely providing a criteria for deciding if a group is oppressed, rather than offering a full theory of oppression.[13] This suggests the possibility of further pursuing her ideas. For example, Young's idea of 'institutional oppression' can be combined with the continuity of Aboriginal sovereignty to develop a strong argument for real and meaningful Aboriginal self-

[12] Young, *op cit*, pp.59ff.
[13] *ibid*, p.62.

determination. Young herself notes that any causal explanation for the oppression of a group must be particular and historical. So, too, any application of the concept of self-determination must also be contingent on the specificities of each particular case. Yet her description of Aboriginal 'groups', and the suggestion of their 'oppression' providing the basis for differential rights fundamentally misrecognises the status of Aboriginal peoples and, as such, ultimately damages the strength of their claims.

However useful this approach may be in examining the requirements of justice *after* recognition, it doesn't provide the means of recognising the particularity of Aboriginal claims. The claims, or demands, may ultimately seek resolution within the state, but at a deeper level must also be considered *against* the state. Describing Aboriginal peoples as 'groups' ultimately fails to do justice to the strength of their collective identity. When this classification is combined with a focus on 'oppression' rather than any form of positive political right, it is suggestive of an Indigenous status that may be equated with other groups of individuals who can be considered 'at risk' in a society – such as women, children, and disabled people. All of these groups may require some specific recognition in order to secure the rights of individuals within the group. However, Aboriginal peoples are seeking *recognition of the collectivity itself.* A theory based on securing 'group rights' for Aboriginal people on the basis of 'oppression' ignores the particular political aspects of Indigenous status, which currently sees them situated as 'peoples within'. This approach of viewing Aboriginal peoples as an oppressed minority is proving increasingly popular on the world stage – as seen both by moves at the UN to include Aboriginal rights with those of minorities, as well as in Canadian attempts to conclude modern 'treaties'.[14]

[14] See chapters 9 and 10 for discussion of the British Columbian treaty process.

Young is on firmer ground when identifying the possibility of racism surviving within overt commitments to equality for all. This point is critical when it is remembered that this commitment continues to be used to restrict recognition of Aboriginal rights. Despite apparent attempts to promote equality, substantive inequality continues 'in everyday habits and meanings of which people are for the most part unaware'.[15] These everyday norms are beyond the reach of law and policy, so these are an insufficient counter. There is currently wide agreement that what Amy Guttman calls the 'blind democracy' form of liberalism – that cultural identities can't and shouldn't be publicly recognised – is universalistic and wrong.[16] Similarly, Taylor argues that calls for 'sameness' negate identity by forcing homogeneity, which is worsened by the fact that this homogeneity inevitably reflects the hegemonic culture, so it is only minorities such as Indigenous peoples who suffer.[17] Young's response is to call for a society-wide 'cultural revolution'. This also entails a revolution in subjectivity, recognising selves as multiple and heterogeneous in our affiliations. She clearly envisions a transformation in society from the level of the individual up, rather than through recognition of Aboriginal status and rights through institutional means – the spaces where those everyday norms of racism are generated and reinforced.

It could be argued that this 'cultural revolution' could in fact be facilitated by greater promotion of the political autonomy Young fails to explore. Taylor argues that the politics of difference actually redefines non-discrimination as requiring differential treatment.[18] It appears that in the case of Aboriginal peoples, this could be extended to the creation (or

[15] Young, *op cit*, p.124.
[16] Guttman, 'Commentary' in Taylor, *ibid,* p.4.
[17] Taylor, *ibid,* p.42.
[18] *ibid,* p.37.

recognition) of differential institutions, and even governments. Why would some degree of 'measured separatism' necessarily simplify and freeze identity when some interdependence is inevitable, as Young herself convincingly argues? The process of implementing the self-government rights of an Indigenous people could have the effect of returning to privileged groups their specificity and particularity. They could start to recognise themselves not as holding a specific view from a particular cultural, social – and political – position. This process is perhaps most prominent in New Zealand where substantial scholarship in the 1980s began to be devoted to the question of what it was to be Pakeha – as a direct result of the aggressive assertion of a confident, distinct, Maori identity.[19] Young does not develop her theory along lines that suggest the recognition of Aboriginal sovereignty, or rights as peoples, but this point emphasises the value of her ideas even when taken further than she may have intended. Real self-determination may be more easily brought about than the revolution Young envisages. Ross Poole argues that however problematic they will be to achieve in practice, 'land rights and self-government for Aborigines are less problematic than changes needed in the towns and cities' whereby Aboriginal difference is recognised in the meanings involved in day-to-day life.[20]

Young's identification of the relational character of difference is useful when it is recalled the future of 'settler societies' necessarily requires nurturing relationships between Indigenous and non-Indigenous peoples. The 'cultural revolution' in attitudes that Young calls for may well be facilitated by the negotiation of Aboriginal claims against the state, but it does not provide a strong enough argument on which to base such rights. Ultimately, Young's attempt to 'fit'

---

[19] For discussion of this period, see Michael King, *Being Pakeha now : reflections and recollections of a white native,* Penguin Books, Auckland, 1999.

[20] Ross Poole, 'National Identity, Multiculturalism and Aboriginal Rights: An Australian Perspective', in Jocelyne Couture, Kai Neilsen and Michael Seymour (eds.), *Rethinking Nationalism, Canadian Journal of Philosophy*, Supplementary, vol. 22, 1996, p.235.

Indigenous claims within a politics of difference misrecognises the basis of these rights as belonging to a group within the state, rather than a people against the state.

II. Will Kymlicka – protecting 'national minorities'

Liberal political philosopher Will Kymlicka has directly addressed the question of Indigenous rights in the context of the clash between the existence of 5000 ethnic groups, and about 200 states. He sees answering the question of how these two seemingly intractable elements fit together as 'the greatest challenge facing democracies today'.[21] He identifies a need for answers that are both morally defensible and politically viable, and develops a theory that can be used to strongly argue for Aboriginal rights along both these lines. However, his theory of minority rights can be questioned both for its over-reliance on a particular view of culture, as well as for its central categorisation of Indigenous peoples as 'national minorities'. It is this latter criticism that I wish to focus on, particularly as it contextualises the issue of Aboriginal status, as well as the direction in which it is likely to lead subsequent developments, which may tend more towards further 'domestication' of Indigenous status.[22]

Unlike Young, Kymlicka was particularly motivated to address the issue of indigenous peoples in developing his theory. His more recent attempt to formulate a liberal theory of minority rights, contained particularly in his *Multicultural Citizenship,* starts by deliberately departing from the post-war liberal approach to the question of ethnicity, which he

[21] Kymlicka, *op cit,* p.1.
[22] For discussion of this concept of the domestication of Aboriginal status, see Isabelle Schulte-Tenckhoff, 'Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties', *Review of Constitutional Studies,* no. 4, 1998, pp.239-289.

characterises as 'benign neglect'.[23] It has become increasingly clear, he argues, that conventional human rights mechanisms such as already exist are inadequate to protect the rights of minorities (which includes Indigenous minorities). However, he does not wish to abandon liberalism altogether, and thus retains its focus on the rights of individuals.[24] This immediately suggests the probability of tension in the creation of an individualistic theory developed to support the particular rights of a communally based society – a difference seen as irreconcilable by some.[25] It is significant to note that Kymlicka's inquiry aims to use liberal theory as a means of addressing the rights of Indigenous peoples *within* the state. This immediately situates his inquiry within certain parameters, which precludes a number of outcomes. For instance, his use of the 'minority' category perhaps prevents recognition of 'peoples' rights.

It is certainly collective rights that Kymlicka wished to defend, however. In doing so, he identifies three types of collective rights that may be appropriate for a specific minority:

- self-government rights (these are inherent, permanent rights);
- polyethnic rights (such as financial support and legal protection); and
- specific group rights (such as guaranteed seats in parliament, usually temporary, of the affirmative action type).

These collective rights comprise both what he describes as 'internal restrictions' (the right to limit the liberty of individual members); and 'external protections' (the right to limit the power of the dominant group). Arguments for collective rights may be:

---

[23] Kymlicka, *op cit,* pp. 3-4.
[24] He states it is legitimate, and even unavoidable that human rights should be concerned with individual equality, not cultural equality. *ibid,* p.6.
[25] For example, Geoffrey Brahm Levy suggested corporate cultural (group) rights are not amenable to a defence on the basis of individual autonomy. 'Equality, autonomy and cultural rights', *Political Theory,* vol. 25, no. 2, April 1997, p.238.

- equality based (rectifying a group's unfair disadvantage);
- history based (a historical claim to group rights based on prior sovereignty, a treaty etc.); and/or
- on the basis of the intrinsic value of cultural diversity.

Having outlined possible bases for minority rights, Kymlicka then critically differentiates between different types of minorities. For him, the importance of this step comes because the type of minority will determine the type of rights that should be accorded to a particular group. The fundamental distinction to be made is between

- national minorities: incorporated peoples who typically wish to maintain their distinctness, and demand some form of autonomy; and
- ethnic groups: immigrants, those who typically wish to integrate.

Indigenous peoples clearly fall into the category of 'national minorities'. This distinction between minorities who are primarily seeking autonomy and those more concerned with integration is fundamental to conceptualising the particular relationship of Indigenous peoples to the state. It has been criticised as an oversimplified distinction, ignoring the similarities between Aboriginal peoples who have not consented to join state structures, and immigrants subject to the same institutions not on the basis of their consent, but because they were forced to leave previous homelands.[26] However, given the framing of the question above, it is a distinction I believe is fundamental in understanding the nature of status. Immigrant minorities are not nations with homelands within the state, and while they often wish to assert their ethnic particularity, this generally occurs within the dominant institutions. National minorities

[26] Chandran Kukathas, 'Survey Article: Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship', *Journal of Political Philosophy*, vol. 4, no. 5, 1997, p.414.

seek recognition of their own institutions and processes. In a political sense, I regard 'Greek-Australians', for example, as fundamentally different to 'Aboriginal-Australians'. The question Kymlicka's categorisation poses, however, is whether the recognition of Indigenous peoples as 'national minorities', as opposed to, say, 'peoples' can do justice to the nature of their claims, or whether it ultimately serves to subsume them within the very structures from which they have historically sought freedom.

Critically for this discussion, Kymlicka does specify the distinct position of Indigenous peoples in 'settler states'. He criticises the claim of states such as the US, Australia and New Zealand that they are 'immigrant communities' as ignoring the rights of Aboriginal peoples.[27] Kymlicka aligns this criticism with a view that the inferiority of Indigenous peoples, their status as wards and subject races, has meant they have been regarded as incapable of nationhood. This view underpinned not only the development of modern states, but also the international legal system that grew up around them. Kymlicka correctly points out that this overt racism is fading, as indicated by moves such as the Draft Declaration on the Rights of Indigenous Peoples,[28] and gradual recognition of the inherent right to self-determination.[29] However, this blatant assertion of inferiority is often replaced only by a position that equates Indigenous peoples with any other minority, as another ethnic group, rather than a nation, or a people. Demand for particular Aboriginal rights can thus be denied not through a discredited appeal to racial superiority, but by regarding them as in conflict with hard-won and deeply-held commitments to equality – at least when it is narrowly defined as the need to treat people 'the same'.

---

[27] Kukathas, *op cit,* p.22.
[28] The Draft Declaration can be found at http://www.cwis.org/fwdp/drft9329.html
[29] Recognised in Australia from 1972 until 1998.

Here, importantly, Kymlicka is concerned to point out that bland appeals to 'equal treatment' often assume an equality that merely serves to perpetuate Aboriginal status as an underclass in their homeland, the land of their ancestors.[30] The type of equality that positions Aboriginal peoples (only) as 'the same as everybody else' is clearly the type of equality Kymlicka wishes to reject. Critically, he argues that through policies of genocide, expulsion, segregation, and assimilation, the consistent failure of governments has been to not recognise Aboriginal peoples 'as distinct peoples with cultures different from, but not inferior to their own'.[31] It is clear that this failure to recognise Aboriginal peoples as distinct peoples continues to differing degrees,[32] and recognition of this status by states has been, and continues to be central to Aboriginal demands since the 'settlement' of both Canada and Australia. The key question for Kymlicka's theory is whether his description of Indigenous peoples as 'national minorities' clearly demarcates them from (other) ethnic minorities (the concern of many Indigenous peoples), and if this is done in a manner which adequately addresses equality concerns (often held by those who would deny Aboriginal rights.)

It is here that the major problems emerge with Kymlicka's theory as it applies to Indigenous peoples. He wants to recognise Aboriginal peoples as 'peoples' – he is quite happy to use the term – yet he is not prepared to recognise the full political implications of this status.

---

[30] Homi Bhaba described the situation thus: 'there can be no mirage about a 'level playing field' until the soil is dug up and the whole terrain is rebuilt', in David Bennett (ed.), *Multicultural states: rethinking difference and identity,* Routledge, London, 1998, p.45.

[31] Kymlicka, *op cit,* p.22.

[32] Kymlicka singles out Canada as one of the few countries to recognise its status as both multinational, having particular responsibilities to (Indigenous) national minorities, and polyethnic, having different responsibilities to ethnic minorities (*ibid,* p.22). This notion of the 'multinational state' foresees the end of usefulness of the term 'nation-state'. Guyatri Spivak felt 'it seems obvious that the always precarious hyphen between nation and state is now rather more so.' Spivak, 'Teaching for the Times' in Jan Nederveen Pieterse and Bikhu Parekh (eds.), *The Decolonization of Imagination: Culture, Knowledge and Power,* Zed Books, London, 1995, p.177. Jon Stratton and Ian Eng went as far as to suggest 'the modern individual cannot identify with the state. Instead s/he identifies

Aboriginal peoples have the right to a distinct form of recognition that separates them from other minorities, yet they are not said to possess the inherent rights of other peoples, such as that of independent political action. Speculative, perhaps, but it appears that Kymlicka's unwillingness to pursue his differentiation to its logical conclusion is a factor of his desire to stay within the liberal tradition. Instead of recognising the collective rights of Aboriginal peoples as peoples, he is ultimately recognising the rights of Aboriginal individuals as members of an endangered (albeit particular) minority.

It is the power of Kymlicka's argument in not only addressing, but also *harnessing* equality-based arguments that Spaulding regards as a 'breakthrough in liberal thinking'.[33] For unlike Young, Kymlicka does not base his argument for differential Aboriginal rights on the need simply to respect difference, but on the need to uphold liberal notions of equality – specifically *cultural equality*. It is minority *cultures* that deserve to be protected, having the same right to exist as any other culture.

In discussing the concept of justice, Kymlicka – like Tully and Young (and others) – firmly dismisses the cultural neutrality of the state.[34] Kymlicka argues certain cultural identities are inevitably promoted, while others are disadvantaged.[35] Injustice occurs because the cultural

---

with the nation.' 'Multicultural Imagined Communities: Cultural Difference in the USA and Australia' in Bennett (ed.), *op cit,* p.139.

[33] Spaulding, *op cit,* p.46.

[34] They are certainly not alone on this point. Michael Walzer argues most liberal states '...take an interest in the cultural survival of the majority nation; they don't claim to be neutral with reference to the long history, literature, calendar or even the minor mores of the majority.' Walzer, 'Comment' in Taylor, *op cit,* p.100. Ross Poole (*op cit,*) also notes the political, legal affairs, rituals and procedures of states are 'imbued with a particular national culture...which gives priority to one language, one history, one people' (p.415). He suggests the idea of a culturally neutral state is a 'surprisingly widespread fantasy' (p.417).

[35] Kymlicka, *op cit,* p.107.

viability of the minority is undermined by everyday decisions of the majority.[36] The majority, whose culture is secure, does not face this problem. To alleviate this inequality, group rights (such as to land) reduce the vulnerability of, say, Indigenous individuals, giving them *the same* rights (to cultural, and thus personal, security) and opportunities as other people. Kymlicka argues that the burden on non-Indigenous people to observe these differential rights is acceptable, but the burden on Aboriginal people caused by their loss of culture is not.[37] It is important he argues, that this right to land be based on equality, not compensation. For Kymlicka, historical property rights fail to adequately explain a right to self-government. Under this *equality argument*, land is a necessary right to sustain viable self-government and prevent cultural disadvantage. However, this fails to recognise the particular relationship Aboriginal peoples have with the land, which suggests the right to *particular lands*, rather than territory as a derivative of an equal right to culture.

The major difference is that Kymlicka does not focus on the political implications of his designation of Aboriginal groups as 'distinct peoples'. He concentrates, rather, on its cultural component. It is here that in focussing on culture, Kymlicka's theory gets unnecessarily complicated in addressing Aboriginal rights and status.

At the heart of Kymlicka's argument for minority (for our purposes, Aboriginal) rights, is the relationship between *individual* freedom, and an individual's culture. For him, freedom 'is intimately linked with and dependent on culture'.[38] National minorities, such as Indigenous peoples, are distinguished from ethnic groups in that they possess 'genuinely distinct societal

[36] For example, with the native title regime in Australia. The suggestion is that the native title regime has emerged in its current form as much to protect non-Indigenous interests, as Aboriginal. See chapter 11.
[37] Kymlicka, *op cit*, p.108.
[38] *ibid*, p.75.

cultures'[39] that are highly resilient, while cultures of ethnic groups, not being 'societal cultures' will be reduced to ever-decreasing marginalisation.[40] It is this societal culture which provides the individual with choices (of the good life) and makes them meaningful to us.[41] Thus the exercise of meaningful choice for the individual requires this societal culture. Liberals can only support minority rights 'in so far as they are consistent with respect for the freedom and autonomy of individuals'.[42]

It is this equality-based argument – strengthened by but not solely based on appeals to historicism – that Kymlicka favours as the basis of Indigenous rights. Rights allocated are to compensate for morally arbitrary disadvantages, especially if in the words of John Rawls, they are 'profound and pervasive and present from birth',[43] as is seen to be the case with Indigenous peoples in the societies under consideration. Without these specific rights, Indigenous peoples don't have the same right to live and work in their culture that members of other cultures do. Once again, we are hovering dangerously close to elision of the identification of 'Aboriginality' with 'disadvantage' discussed in the previous section. Kymlicka's concentration on the practising of Aboriginal cultures in terms of 'morally arbitrary disadvantage' may serve to perpetuate the type of thinking which continues to see Aboriginality in terms of 'a lack'. This possibility remains, despite his repudiation of the inherently inferior status of Aboriginal peoples. It is also questionable as to how 'arbitrary' the disadvantaged position of Aboriginal cultures is. This characterisation deflects discussion

[39] Kymlicka, *op cit*, p.79.
[40] *ibid*, p.80.
[41] Similarly, Poole sees culture as one of the most significant determinants of our identity, providing the context for choice, rather than being an object of choice. Poole, *op cit*, p.411.
[42] Kymlicka, *ibid.*
[43] Cited in *ibid*, p.126.

away from the deliberate processes of colonisation that have denied Aboriginal rights, rather than making them the primary focus of inquiry.

Kymlicka's view of culture does seek to acknowledge its dynamic nature, explicitly recognising the character of a culture will change, while its existence is not in question.[44] Yet it remains questionable as to whether the concept is the best one to base an argument for Aboriginal rights – or whether his arguments provide sufficient explanation for the broad array of rights (to self-government, and independent political action) claimed by many Aboriginal peoples. It has thus been suggested that 'providing secure cultural context' is too narrow a base for powerful political claims.[45] Similarly, Chandran Kukathas has accused Kymlicka of virtually ignoring political aspects of group identity, suggesting '...group identity is a political (because a legal and institutional) construct rather than simply a cultural one – when it is cultural at all'.[46] These two criticisms are indeed powerful, when it is remembered the theory Kymlicka is developing is to be applied to peoples whose claims are *inherently political* in that they can often be most clearly understood as the claims of 'a people' against 'a state'. Kymlicka's theory of minority rights is essentially 'a theory of fairness *within* the liberal state'.[47] [emphasis added]. It is for this reason that Patrick Macklem is able to suggest Kymlicka's equality argument 'doesn't do justice' to the nature of Aboriginal claims, because his argument for self-government for Aboriginal peoples doesn't transcend state sovereignty.[48]

[44] Kymlicka, *op cit*, p.132.
[45] Katherine Fierlbeck, 'The ambivalent potential of cultural identity', *Canadian Journal of Political Science,* vol. 124, no. 1, March 1996, p.11.
[46] Kymlicka, *ibid,* p.414.
[47] *ibid.*
[48] Macklem cited in Spaulding, *op cit,* p.49.

Kymlicka himself has acknowledged the fact that his theory does not specifically address the 'prior' question of the make-up of a state.[49] In doing so, it must then begin by assuming the authority of the state over 'its' citizens.[50] Framing the question in this manner may not necessarily affect substantive outcomes for Indigenous peoples, in terms of the rights that are accorded them, as Kymlicka previously argued.[51] According to his theory, Indigenous peoples may exercise the (collective) substantive rights of self-government they claim due to the unequal distribution of the (individual) security of cultural membership. This gap between Indigenous demands and Kymlicka's individualistic paradigm is seen in the fact his equality argument does not allow the Indigenous collective any right of independent political action. Even when it is acknowledged that relatively few Indigenous people in Canada and Australia argue for a status wholly detached from the state, the point is that Kymlicka's theory *begins* from a position which assumes this to be the status quo. This assumption ignores or glosses over the political status of Aboriginal peoples *prior to* (and in some instances, despite) the imposition of the state. The fact that most Indigenous peoples see their peoples exercising jurisdiction within the boundaries of states can be viewed, as the Dene people suggested in 1975, as a strategic concession to contemporary realities, which include a massive power imbalance between Indigenous peoples and the state.[52] The injustice of this reality is thus compounded if the prior usurpation of political authority is not recognised, but simply taken as providing the factual starting point from which to develop a theory of indigenous rights. Such

---

[49] He states it is an 'underlying assumption' of the equality argument 'that the state must treat its citizens with equal respect. But there is the prior question of determining which citizens should be governed by which states.' Kymlicka, *op cit,* p.116.

[50] This is at least implicitly acknowledged by Kymlicka when discussing the question of a group who has not consented to state rule through a treaty or other means. Here, 'the question is not how should the state act fairly in governing its minorities, but what are the limits to the state's rights to govern them?' *ibid,* p.118.

[51] This was argued by Kymlicka in his *Liberalism, Community and Culture,* Clarendon Press, New York, 1989. For discussion of this point see Spaulding, *op cit.*

[52] In 1975 the 'Dene Declaration' recognised 'realities we are forced to submit to such as the existence of the state of Canada', but asserted their right of the Dene people to 'independence and self-determination within the country of Canada'. http://www.canadahistory.com/sections/documents/1975_dene_declaration.htm

a theory which seeks to distribute justice amongst the states' citizens cannot recognise that Aboriginal peoples are not 'the state's citizens' – or at least not in the same way as non-Aboriginal citizens who have consented to state control.

The major criticism of Kymlicka's theory as it applies to Indigenous peoples is its failure to significantly advance recognition of Indigenous peoples' particular claims to political authority beyond the level of previous theories. Whether or not it is said to exist in a given environment, a demand for the recognition of Aboriginal sovereignty, for example, cannot easily be discussed by Kymlicka's theory. Spaulding has creatively developed an argument that Kymlicka's historical argument for minority rights can in fact be used to support the right of independent political action, and thus, not necessarily displace Aboriginal sovereignty.[53] Yet, the question of Aboriginal political authority is clearly relegated by Kymlicka's focus on arguing for Aboriginal self-government on the basis of individual cultural deprivation – echoes of Young's focus on oppression. This formulation has a number of implications for the way in which discussion of Aboriginal-state relationships will proceed, and thus, following this, the nature of those relationships themselves.

Discussion of Kymlicka's theory of minority rights suggests the way these issues are framed is important not just in ensuring that Aboriginal peoples have access to the rights which they are due, but also in terms of the impact it will have on the non-Aboriginal population. In developing a liberal theory which supports Aboriginal rights to self-government, Kymlicka may have made the idea more palatable to those who would deny Aboriginal autonomy via a narrow definition of 'equality'. Yet his focus on 'cultural disadvantage' ultimately does little to disturb the bedrock of non-indigenous thought about Indigenous-state relationships.

Kymlicka shows that arguments for Aboriginal self-government can be made within – and in fact may be required by – the liberal tradition of states such as Canada and Australia. Yet, in relying on the equality of individuals rather than the equality of peoples, he leaves open the question of just how deeply he has been prepared to challenge his own political tradition, which he prefers only to reinterpret. The terrain explored by his theory is necessarily limited by its point of departure, which assumes the legitimacy of the liberal state. Although it has been suggested that Kymlicka's referral to Aboriginal peoples as 'national minorities' may perhaps be read as 'political communities',[54] it is not clear that he has abandoned the logic of minority status. It is too easy still, for conservatives, and others, to view 'Aboriginal Australians' in the same way as 'Greek-Australians'. This continues not only to potentially contain Aboriginal aspirations, but as a result, it also limits the imagination of any new relationship between Aboriginal and non-Aboriginal peoples. It is only by examining the roots of assumptions that have historically governed this relationship, that we can legitimately frame the question of Aboriginal peoples and the state. This concern is apparent in the approach of James Tully.

III. James Tully – 'contemporary constitutionalism'

What most distinguishes Tully from Young and Kymlicka is his intention to reimagine the trajectory of the modern liberal state. Sharing the criticisms of other opponents of 'blind

---

[53] Spaulding, *op cit.*

[54] This argument is developed by Spaulding, who suggests Kymlicka's arguments for self-government and nationhood have much more in common with Aboriginal leaders than statist assumptions of minority status. Spaulding, *ibid*, p.38 and *passim*.

liberalism', Tully seeks to revisit those developments in Western thought that have brought us to the current impasse. In doing so, the apparently stable, concrete, even 'inevitable' positions of today emerge as the result of deliberate actions and decisions – or at least with respect to Indigenous peoples, an identifiable (colonising) rationale. It is perhaps Tully's greatest contribution to the project of reimagining Indigenous-state relations that his investigations pursue not only the goal of decolonisation, but in doing so, he adopts what has been referred to as the *tone* of political philosophy in a post-colonial voice.[55]

Tully views the modern constitutional arrangement between Indigenous peoples and the state as a distortion of the just recognition of Aboriginal peoples. He argues that modern constitutionalism has developed through specifically and artificially acting to exclude Aboriginal peoples. This immediately particularises the 'different' treatment of Indigenous peoples. Whereas Young's 'difference' approach, and Kymlicka's classification of 'national minorities' sought justifications for differential treatment, Tully's approach is suggestive of the need for equal consideration of the rights of Indigenous peoples. To reverse the unjust position of the present day, we do not need necessarily to reject the political tools and arrangements laid down as the basis of Western political thought and practice. He does not propose to completely abandon the liberal individualist model. What is required, he argues, is rather a reassessment of this tradition, whereby the rights of Indigenous peoples are given the *same* status as other peoples. When the development of international political processes are re-examined on the basis of including rather than excluding Indigenous societies, today's Aboriginal peoples emerge with the same rights and responsibilities in the international arena as other peoples, that is, rights to exist as distinct, self-determining entities. Fundamentally,

[55] David Owen, 'Political Philosophy in a post-imperial voice: James Tully and the politics of cultural recognition', *Economy and Society* vol. 28, no. 4, November 1999.

Tully is not arguing for extra or special rights, but for Aboriginal peoples to be allowed the same rights as others. This may well require differential treatment, but only in so far as this contributes to equality. A new form of accommodation, what he calls contemporary constitutionalism, emerges as a just dialogue between peoples based on the keystones of *mutual recognition, consent* and *continuity.*

Crucial to Tully's model of inclusion is the creation of a dialogue of accommodation. This is only possible after the act of mutual recognition between parties, on the basis of equality. Tully's hypothesis relies heavily on a cultural definition of 'Aboriginal difference' – Indigenous and non-Indigenous peoples are seen as distinctly different cultural rather than racial groups. The dialogue that takes place between different groups is thus an 'intercultural dialogue', in which 'culturally distinct ways of speaking and acting are mutually recognized'.[56] Critical is the structure of the dialogue itself, the first thing to be negotiated. He argues, 'only a dialogue in which different ways of participating in the dialogue are mutually recognized would be just'.[57] Difference does feature in Tully's formulation, not as a primary organising principle, but *after* the act of mutual recognition has taken place. Given the massive power discrepancies that often exist between Indigenous peoples and the state, achieving this act of mutual recognition will be problematic, to say the least. There is great appeal in relegating the variable of 'cultural difference', with all its possibilities for misunderstanding, to a 'second order of business', though this too seems difficult to achieve in practice. However, the 'treaty relationship' may be a means of addressing both these issues, as has been seen in the past.[58]

---

[56] James Tully, *Strange Multiplicity: constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995, p.29.
[57] *ibid.*
[58] This relationship will be fully explored in Chapter 8.

Though Tully, like Kymlicka, places a strong emphasis on 'cultural recognition', his rendering of 'culture' differs from Kymlicka, with implications for our understanding of Aboriginal-state relationships. For instance, Tully is concerned to engage with the political implications of the assertion of cultural difference. He goes as far as to identify culture as an 'irreducible and constitutive aspect of politics'.[59] On these grounds, culture is given a certain priority with respect to a just form of constitutional association, and since association needs consent, consent requires this to take place in one's own voice.[60] This subtle conceptualisation argues strongly for cultural recognition as a first step in engaging Indigenous claims. However, it does not require (predominantly political) calls for a treaty or recognition of sovereignty to be reduced *only* to demands for cultural recognition.

As with Kymlicka, Tully's focus on 'culture' necessitates an articulation of his vision of just what the term might mean. He is concerned to repudiate the 'billiard ball' view of culture. This sees cultures as discrete, bounded entities clashing with each other but not mixing. They are in competition for survival, rather than contributing to each other. Tully argues that cultures are essentially 'overlapping, interactive and internally negotiated.'[61] They are constantly evolving in response to internal dynamics as well as external pressures, and, recalling Young, there is no reliable line of demarcation between what is to count as 'internal' or 'external'. Given this picture, Tully suggests an 'aspectival view', where cultural horizons, rather than being fixed, change as one moves about. The experience of otherness then, is internal to one's identity,[62] rather than one's culture providing that identity in the form of a

[59] Tully, *op cit,* p.5.
[60] *ibid.*
[61] *ibid,* p.10.
[62] *ibid,* p.13.

seamless background against which one determined where one stood. This latter characterisation – of culture providing our fixed background – sounds very reminiscent of Kymlicka's view of culture, which is rendered somewhat static and unreal by Tully's 'rich' conception.[63]

Tully's fluid description of culture situates us always and already on common ground from which we can observe our differences, rather than positioning us in different places from which we must attempt to build some common ground. This has obvious advantages in terms of negotiating new Indigenous-State relationships, but may overstate the degree of shared perspective, particularly as it applies to many non-Indigenous people. They have little knowledge, and perhaps even less motivation to take in what are still to a large extent 'alternative' cultural horizons. As with Young's notion of relational difference, Tully's conception of culture here may be suggestive of a relatively 'weak' Indigenous cultural outlook, which may in fact come into regular conflict with dominant societal values. While such a description of 'culture clash' cannot tell the whole of the story, the continued worth of the concept can be gauged by contemporary attempts by Aboriginal people to maintain particular ceremonies and traditions which are, in a very real sense, seen as being under threat. One advantage of Tully's conception is that is moves us away from Kymlicka's use of cultural deprivation as the basis for differential group rights. This can serve to maintain and amplify what may be strategic, or apparent rather than fixed or essential differences. The advantage of Tully's approach becomes further apparent when it is used in the negotiation of an intercultural dialogue between peoples. It is here, in his location of both Aboriginal and non-

[63] Michael Milde, 'Critical notice: James Tully Strange multiplicity: Constitutionalism in an age of diversity', *Canadian Journal of Philosophy,* vol. 28, no. 1, March 1998, p.122.

Aboriginal peoples on 'common ground', that Tully's cultural paradigm literally reflects the reality of settler states where (at least) two peoples share one state.

In stressing the need for dialogue, he focuses specifically on language. If the struggle for Aboriginal rights is a struggle to change people's thinking, it is also not just intended to get people to talk, but to change the *way* they talk. This is suggestive of a complete overhaul of the terms of debate, which remain loaded in favour of those who constructed the language – the colonisers. Far from presupposing the adequacy or neutrality of our public political language then, Tully regards it as a central topic of investigation.[64] This is important, he argues, as the language of modern constitutionalism, unquestioned and reinforced through centuries of practice, has been one of the primary elements in the exclusion of Aboriginal peoples. Thus, the narrow use of terms such as 'sovereignty', 'self-determination' and 'peoples' has been accepted by the political traditions of liberalism, communitarianism and nationalism alike. Any theory that seeks justice for Aboriginal peoples without questioning the basis of these traditions runs the risk of perpetuating injustice, rather than contributing to the project of decolonisation. This raises the very real question of whether Indigenous demands can ever really be successful when framed in the language of the conqueror.[65]

Some resolution is possible when it is remembered that the language dominant groups have used to maintain power has increasingly also been the language of anti-imperial struggles. As Jeremy Webber points out, there is a practical need for a common political language of

---

[64] Owen, *op cit*, p.528.

[65] Alfred, for example, suggests 'The state's power, including such European concepts as... "sovereignty", must be eradicated from politics in Native communities.' *op cit*, p.xiv. Cf. William Jonas 'Native Title and the Treaty Dialogue', Speech delivered by Dr William Jonas, AM at a seminar hosted by the Aboriginal and Torres Strait Islander Social Justice Commissioner and the International Law Association, 10 September 2002. Jonas argues that it is not sovereignty *per se* that is inappropriate for Aboriginal peoples, but the particular Western form of it that has come to dominate discussion. http://www.hreoc.gov.au/speeches/social_justice/treaty.html

debate.[66] When Aboriginal claims to sovereignty and self-determination are critically adjudicated on the basis of inclusivity rather than exclusion, rights to Indigenous sovereignty and self-determination emerge as just, according to Tully. This approach is favoured as it facilitates self-analysis of the dominant. By contrast, it has been suggested that as some sort of conciliatory act Aboriginal groups present themselves as a 'political community' rather than a people,[67] or that 'rights' are viewed as a strategic rather than a legally substantive concept.[68] Yet this may serve to merely undermine the legitimacy of calls for Aboriginal rights and/or self-determination, and amount ultimately to a misrecognition of Aboriginal status.

---

[66] Jeremy Webber, *Reimagining Canada: language, culture, community, and the Canadian constitution*, McGill-Queen's University Press, Kingston, 1994. Homi Bhaba suggests this will still be in liberal terms, as liberalism still claims the moral high ground in national debates, and 'any valorisation of minority identities must engage with its terms.' Cited in Bennett, *op cit.* As is discussed below, 'engagement' need not necessarily mean wholesale adoption.

[67] Webber, *ibid.*

[68] Bruce Morito, 'Aboriginal Right: A Concilliatory Concept', *Journal of Applied Philosophy*, vol. 13, no. 2, 1996, p.123. Morito's argument that there is no equivalent of 'right' in many Aboriginal languages, and that there is conceptual difficulty between positions of 'land is self; development is damage' reproduces concrete distinctions which appear to be less and less reflective of Indigenous realities. Indigenous groups are increasingly looking to (harmonious, sustainable) development of land as a way of securing an ongoing, viable economic base. The author seems disturbed by 'particular uses' of terms such as 'sovereignty' and 'justice', but renegotiation of these terms allowing recognition of other than traditional liberal principles appears increasingly necessary. Morito suggests that if Aboriginal difference is substantive, 'Aboriginal claims cannot be adequately articulated within the European based legal tradition.' (p.126) However it is not clear why Indigenous claims can't contribute to a reformulation of that system, especially when such a shift toward accommodation of difference has also been suggested by feminist and post-modernist critiques of the liberal tradition. It has been suggested for example, that novel and innovative definitions of sovereignty have always potentially resided in the previously perceived monolithic theory of sovereignty. (Peter Oliver, 'Constitutional Independence and Questions of Sovereignty and Diversity', paper given at ACSANZ Conference, Macquarie University, 1998) Webber (*op cit,* p.265) rejects the idea of sovereignty as the basis for Aboriginal rights, arguing that debates over complete sovereignty or partial extinguishment merely serve to confuse the issue. He feels this misleadingly places the source of Aboriginal autonomy in seventeenth and eighteenth century international law, whereas the source of rights actually comes more from the relationship between peoples, a result of 'adaptation and mutual accommodation' (*ibid*). However it could be argued that international law is merely an instrument that recognises these Aboriginal rights, rather than creates them. If the development of Aboriginal rights today is, as Webber argues, an attempt to recapture the 'respect for autonomy developed in earlier arrangements', what if there were few or any such arrangements in a particular context? Colin Tatz suggests along similar lines that the development of contemporary Aboriginal rights mirrors this 'respect factor' developed in the earliest engagements. ('The art of respect', *Spirit and Place*, Museum of Contemporary Art, Sydney, 1997, p.111) If this continues though to be the basis for Aboriginal rights, groups such as Australian Aboriginal peoples will continue to have little on which to build, due to the lack of historical accommodation. This suggests the need for a broader base for 'Aboriginal rights', the detail of which will continue to be negotiated on a case-by-case, contextual basis. The 'respect factor' as Tatz calls it may have dictated the degree to which Aboriginal rights were recognised in the past, but it would be unjust for it to do so in the future.

In the spirit of dialogue that appears necessary in any just reappraisal of relationships, Aboriginal claims to, say, some form of sovereignty, would not be rejected outright because they conflict with accepted ideas of (absolute, indivisible) sovereignty. Rather, Tully's analysis suggests the creation of a space which allows for the renegotiation of such terms. It has been argued along these lines that international law should facilitate accommodation, rather than constrain parties to traditional concepts of sovereignty and statehood.[69] When the concept is reinterpreted in non-absolutist terms, state sovereignty and Aboriginal sovereignty may co-exist, rather than be mutually exclusive, broadening possible outcomes in an arena such as native title negotiations. This possibility has been facilitated by the shift away from viewing the question of the status of Indigenous peoples as an internal or domestic matter to an international one, which only really came about from the early 1970s. S. James Anaya has detailed the development of a number of international customary legal norms which now serve to protect Indigenous peoples,[70] a process Russel Barsh has described as the movement of Aboriginal peoples from 'objects' to 'subjects' of international law.[71] Tully's dialogic approach is particularly suited to addressing the position of Indigenous peoples as it allows, and even encourages, discussion of issues such as sovereignty in an open, non-absolutist, non-confrontational way.[72]

In analysing modern constitutionalism, Tully sees its focus on individualism, as well as its eurocentric biases as central to the exclusion of Aboriginal peoples. He argues that the

---

[69] Catherine Brèolmann and Marjoleine Zieck, 'Indigenous peoples', in Brèolmann (et al.), *Peoples and minorities in international law*, Martinus Nijhoff, Dordrecht, 1993, p.338.
[70] S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996.
[71] R.L. Barsh,'Indigenous Peoples in the 1990s: From Object to Subject of International Law?', *Harvard Human Rights Journal*, vol. 7, no. 2, 1994.
[72] The example of sovereignty is particularly apposite here as it has been perhaps the greatest point of contention in the relationship between Indigenous peoples in the state. On the one hand, Indigenous peoples have consistently asserted the fact of their historic, continuing and inalienable sovereignty. On the other hand, states (or their judicial arms) have refused to engage in discussion of the question – either through avoidance (see *Mabo*

existence of Aboriginal groups was for political philosophers a problem to be overcome, just as Indigenous individuals were for European settlers on the ground.[73] Tully thus speaks directly to the colonial experience. The importance of this approach is that it is in substantial agreement with Indigenous demands that historical injustices be addressed, as well as pointing to a possible mechanism of 'decolonising' Western theory by analysing its beginnings. In discussing the justificatory arguments of colonialism, Michael Dodson identified a 'strange inversion of deductive reasoning', whereby the desired outcome (displacement of resident populations, settlement of new territories) creates the facts (legitimate European sovereignty).[74] In order to facilitate colonial expansion, Aboriginal people were immediately situated as being in a state of nature, as opposed to the European state of civilisation. Despite Indigenous claims to nationhood and sovereignty, their law was seen as ad-hoc, their use of land did not indicate a sense of property, and thus any idea of Indigenous sovereignty was dismissed due to the lack of European style institutions on which it could be based. As Tully describes it, a narrative of invasion and usurpation was conveniently replaced by one of benign progress and modern constitutionalism,[75] one that continues to inform public opinion.

Tully points out that this view of the need for homogeneity was never completely dominant, and never completely accurate. Recognition of Indigenous peoples did take place through mechanisms such as treaties, and even in places like Australia which was settled on the myth

---

v Queensland [No 2] (1992) 175 CLR), or simple assertion of Crown sovereignty (see *Delgamuukw v British Columbia*, (1988) 1 CNLR 14 (SCC)).

[73] Bikhu Parekh also argues the new phase of colonialism led to new philosophical defences produced by liberals such as John Stuart Mill, where individuals had moral claims, but Indigenous groups had no political claims to self-determination etc. Parekh, 'Liberalism and Colonialism: A Critique of Locke and Mill' in Pieterse and Parekh (eds.), *op cit*, p.92.

[74] Michael Dodson, 'Towards the exercise of indigenous rights: policy, power and self-determination', *Race and Class*, vol. 35, no. 4, 1994, p.70.

[75] Tully, *op cit*, p.78. It is interesting here to investigate to what degree the narrative of invasion and genocide is being successfully reasserted by Indigenous peoples as well as others in these societies – and opposed, perhaps most vigorously in those areas with the greatest reliance on resource industries, such as British Columbia. Tully's

of *terra nullius*, the continued presence of Aboriginal people and their refusal to be assimilated denied the reality of one Australian culture[76] despite rhetoric to the contrary. However, the resilience of this idea is indicated by the fact that recurring appeals to an homogenous national culture only officially ceased in Australia in the last three decades, and in fact continue to be a significant feature in Australian (and other settler societies') political discourse.

In retrieving the now hidden constitutional conventions of mutual recognition, consent and continuity evident in Indigenous-settler encounters, Tully looks to what he calls 'agents of justice', such as US Chief Justice John Marshall. Developments in the United States in the 1830s, where Marshall recognized the sovereignty of the Cherokee people as well as their right to self-government, indicated how recognition of Aboriginal peoples may have been possible elsewhere. Marshall found America was already inhabited by 'a distinct people divided into separate nations', with their own institutions and laws. For Tully, this is the first step necessary for the emergence of contemporary constitutionalism – in this case, the *mutual recognition* of both parties as independent and self-governing nations.[77] Critically, Crown negotiators listened to how Indigenous peoples presented themselves. Similar processes were undertaken in Canada in the signing of treaties, while the same imperative to recognise Indigenous inhabitants was lacking in Australia. In recognizing but not overly exoticising Aboriginal difference, Marshall was doing no more than applying to Indian nations the same standard that European nations applied to each other.

---

point begs further questions such as which societies and non-Indigenous groups within societies seem most resistant to the overturning of triumphant colonial histories which appear increasingly unjust and even inaccurate.

[76] This recognition of the reality of difference was encapsulated by the *Mabo* decision in Australia in 1992.

[77] Charles Taylor, in *The Politics of Recognition, op cit*, argues that due recognition is not simply a courtesy, but 'a vital human need' with a profound impact on the formation of identity. (p.26.) Non-recognition is seen by Taylor as a form of oppression, in that it can project an inferior or demeaning image of another which can distort identity to the extent that the image is internalised. (p.36).

Once recognised, Indigenous sovereignty could only be gained through *consent* (of the first nations) due to 'the most fundamental constitutional convention' – *quod omnes tangit* – what touches all should be agreed by all. This allows for the continuity of independent nationhood, unless explicit consent is given to amend this situation. The identity of equal and sovereign nations exhibits *continuity*, and is affirmed by treaties and mutual agreements. This allows for the relationship expressed in different Indigenous narratives, here referring specifically to a ceremonial Iroquois two row wampum belt:

> These two rows will symbolise two paths or vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs, and their ways. The other, a ship, will be for the white people and their laws, their customs, their ways. We shall travel together, side by side, but in our own boat. Neither of us will try to steer the others vessel.[78]

Tully argues that this recognition of diversity and difference is infinitely preferable to the search for universal principles or norms, because *there are no shared implicit norms.*[79] This assumption would appear to prevent the possibility of reconciliation between different groups. Mutual understanding is possible, however, because in diverse societies an intercultural dialogue is always taking place. Understanding between groups will come through practical dialogue. Webber argues that the act of conversing on issues such as national identity can in fact lead to a shared perspective.[80] This suggests that those societies with the longest history or deepest experience of meaningful, practical dialogue would today be furthest along the path to mutual understanding – an hypothesis that at first glance appears to be borne out in Australia and Canada. Here Tully distances his view from that of Young by disagreeing with her that

---

[78] Cited in Tully, *op cit.*

[79] *ibid,* p.127. Steven C. Rockefeller puts the opposing view that 'Our universal identity as human beings is our primary identity and is more fundamental than any particular identity...' (Rockefeller, 'Comment' in Taylor, *op cit,* p.88) This position has the dangerous side effect of homogenising minority cultures which may not wish to identify primarily as 'human', but as the product of a particular, distinct history.

[80] Webber, *op cit,* p.88.

this dialogue must necessarily lead to a monological universal view.[81] In Tully's view, this will be impossible as the dialogue must be dynamic, constantly shifting and adjusting. Arriving at a norm that is concrete, perfect or transcendent is neither possible nor desirable. The goal, if you like, is not to find a concrete outcome (such as 'Reconciliation') but to engage in the ongoing process of dialogue. Different parties must not necessarily share ideas of a desired result, but rather a 'commitment to a particular public debate through time'.[82] Political philosopher Seyla Benhabib similarly prefers the *idea* of an ongoing conversation between groups, rather than the *ideal* of consensus.[83]

Importantly, this accords with Indigenous world views which see agreements in terms of an endless linking chain, rather than as foundational, binding and universalistic. Hence in New Zealand, negotiations take account of 'the spirit' of the Treaty of Waitangi, rather than its strict letter. Tully sees developments such as this as indicating the revival of an Aboriginal legal system that has been hidden behind modern constitutionalism. European law can exist – not above Indigenous law, but as continuous with it.[84] Thus, as a result of Aboriginal protest, we have seen the early 1970s bring treaty negotiations, recognition of native title and the increased legitimacy of oral versions of historic treaties in Canada. These events were mirrored in New Zealand in the 1980s and Australia in the 1990s. This has led Fleras and Elliot to call for a new discipline of the comparative politics of Aboriginal nations. This would

---

[81] Tully, *op cit*, p.135.
[82] Webber, *ibid*, p.223.
[83] Seyla Benhabib, 'Toward a deliberative model of democratic legitimacy', in Benhabib (ed.), *Democracy and Difference: contesting the boundaries of the political*, Princeton University Press, Princeton N.J., 1996, p.68. In New Zealand, the Waitangi Tribunal can be seen as both a product of this conversation, as well as reinforcing it. Mason Durie argues it has not been content to remain 'within Western concepts', but has interpreted concepts of fairness, justice and ownership 'from a Maori perspective.' For him the result has been that all new Zealanders have a greater understanding of their (shared) history. (Durie, *Te mana, te kåawanatanga : the politics of Måaori self-determination*, Oxford University Press, Auckland, 1998, p.186.)
[84] These sentiments were expressed in the comprehensive report of the Australian Law Reform Commission, *The Recognition of Customary Aboriginal Laws*, Report No. 31, 1986. See http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/alrc/custlaw_summary/

be an examination of the period Tully describes as the 'post-imperial dawn'.[85] For him, this requires critical reflection from both the Aboriginal and non-Aboriginal viewpoint. It is a position perhaps difficult to attain, but which will be partly defining of the postcolonial period.

Tully's model is critically one of distributive justice *between* nations, rather than one *within* the nation. His analysis allows for, is indeed based on, affirmation of the distinct status of Indigenous peoples, and thus accords strongly with Indigenous sentiment. This Aboriginal status is asserted within a model that enables recognition of the continuity of Aboriginal sovereignty, even if it, like state sovereignty, is limited and to be negotiated through an ongoing intercultural dialogue. Here, the reality of an ongoing relationship is not only recognised by Tully's formulation, it is required by it.

IV. Conclusion

I have evaluated three different approaches of political philosophers who address questions around the accommodation of diversity. Specifically, I have focussed on how their particular formulations relate to the status of Indigenous peoples in today's states. I suggested the key political fact in Canada and Australia is the need for a people-to-people relationship to be developed. This will be between Indigenous peoples who have been resident often for many millennia, and other peoples who came more recently, but have since become dominant – politically, numerically, and in other ways. It is assumed in this characterisation that these groups each have a claim on the territory that cannot be resolved by one or the other 'going home' – for the nature of this particular dilemma is that more than one people call a space

[85] Tully, *op cit*, p.137.

home, yet the political and other arrangements that dominate reflect the will and traditions of only one people. It has been argued, though, that framing the issues in this manner appropriately focuses attention on the nature of relationships (past, present and future) necessitated by the combined forces of history and proximity.

Given this formulation, some approaches appear more appropriate to be applied here. The task before these societies may now be to move away from a focus on approaches that stress the differences among peoples who are attempting to share a single space. This focus on difference came about as an understandable reaction to previous philosophies which sought to deny recognition of these alternative ways in societies that saw uniformity as a necessity. The injustice of such denials seemed to necessitate the valorisation of diversity for its own sake. However, this approach can lead to the misrecognition of the contemporary rights of Aboriginal peoples by insisting they refer to practices deemed sufficiently 'different' to (and by) the European arbiter. Here, we may be witnessing what has been described as 'the intricate interplay of exclusion at the very moment of inclusion.'[86]

Kymlicka's development of a liberal argument for Aboriginal self-government based on the notion of equality is something of a breakthrough here. It does much to allay the fears held by those who see such group recognition in terms of loss – for their own group, the foundational philosophies of the state, and even themselves as an individual.[87] However, there remains in Kymlicka's argument something of the tone identified in much English philosophy by David Owen, that is '...the presumption of the sovereign authority of the political philosopher to

[86] Lisa Wilder, 'Local Futures? From Denunciation to Revalorisation of the Indigenous Other', in Gunter Teubner (ed.), *Global Law Without a State*, Dartmouth Publishing Co, Aldershot, p. 242.
[87] For example, those people who regard recognition of a distinct Aboriginal identity somehow fragmenting or

determine the nature and bounds of the reasonable.'[88] Like a court invoking the Act of State doctrine to protect state sovereignty, he appears unwilling or unable to question the fundamentals of a theory which, in a sense, determines his existence.

All three theorists point out that Indigenous people do not wish to abandon their difference, but embrace it. All three point to the cracks that are emerging in the temple of homogeneity, the preferred place of worship for the unitary state. Tully reminds us, however, that this temple was itself built on the prior recognition of diversity. It is the 'tone' of his argument as much as anything that appears most appropriate to framing the consideration of Aboriginal rights, and the (re)negotiation of relationships with(in) the state. If attempts to rethink relationships between Aboriginal peoples and the state are about arriving at a post-colonial society, it will be necessary that the theoretical vehicle that propels us in that direction is itself reflective of this new approach.

The risk with other approaches is to preclude possibilities which lie unexplored as to the potentialities within. Following Tully suggests the critical need to re-examine where we have been if we are to fully explore and understand where we might go. In truly reconfiguring unjust relationships between Aboriginal and non-Aboriginal peoples, we must be prepared in the dialogue that follows to relinquish – or at least renegotiate – even those notions dearest to us. This is not to abandon concepts of state, sovereignty and self-determination, but to reassess them in light of a just dialogue, rather than blindly maintain notions that may be predicated on the maintenance of an unjust, stifling, closed society. Tully suggests that, 'the injustice of cultural imperialism occurs at the beginning, in the authoritative language used to discuss the

---

fracturing their own. This may include Prime Minister Howard. See chapter 6.

[88] Owen, *op cit*, p.546.

claims in question'.[89] To respond justly to the claims of Indigenous people, requires questioning the often unexamined conventions 'inherited from the imperial age'.[90] It is critical then, to look at the beginnings of Australian society – a society composed of two distinct peoples whose relationship has largely been determined by a colonial dynamic. Even before this, my next chapter briefly traces the beginnings of some of the 'discourses of domination' in order to better uncover their emergence in more recent times.

[89] Tully, *op cit,* p.34.
[90] *ibid,* p.39.

Chapter 3

'One Right Way': Developing the Discourses of Domination

I. Beginnings
II. Pope Innocent IV
III. Francisco de Vitoria
IV. John Locke
V. The rise of positivist law
VI. Conclusion

Questions surrounding Aboriginal status have exercised European minds for more than half a millennium. To many, the issue may seem to be one of only recent prominence, yet determining the position of Indigenous peoples with respect to newcomers has been at issue as long as colonialism itself. When Europeans arrived in what is now referred to as Australia, they brought with them the outcomes of these inquiries as part of their intellectual and cultural baggage. Current debates often implicitly assume that they are addressing a question for the first time, or they begin from a position which already takes certain assumptions – often with regard to the contemporary position of Aboriginal peoples – as fact, rather than the site of contestation.

Yet even such flawed debates are often lacking in Australia. While questions of international law, the nature of national sovereignty and the rights of Indigenous peoples were topics of legal interest and public policy in Canada and New Zealand for centuries, in Australia they remained 'esoteric matters' largely until the late 1970s.[1] As late as 1983, Dr H.C. 'Nugget' Coombs pointed to the 'negligible' research on the Aboriginal land question and British sovereignty, particularly 'the circumstances in which, and the processes by which, Aborigines became subjects of the British Crown, if they in fact did so.'[2] Along similar lines, Henry Reynolds noted the 'remarkable reluctance' of the legal profession to admit the role of law in Aboriginal dispossession.[3]

This lack of attention to these questions could hardly be explained by the suggestion they are unimportant. On the contrary, it can be seen that the many issues and dilemmas that revolve around questions of Aboriginal status touch upon aspects as diverse and central as the foundations of the state, national identity, and the legitimacy of current political arrangements. How are we to understand what W.E.H Stanner referred to as 'the great Australian silence'?[4] In seeking to explore this question, it is necessary to examine what it is we were, or are, trying to forget – the historical processes of colonisation founded in other times and places, then imported to and developed in Australia. In particular, I wish to uncover the role played by what Native American theorist Robert Williams termed the 'discourses of conquest'[5] which

---

[1] Tim Rowse, *Obliged to be Difficult: Nugget Coomb's legacy in Indigenous affairs,* Cambridge University Press, Cambridge, 2000, p.193.
[2] Coombs, cited in Rowse, *ibid,* p.194.
[3] Henry Reynolds, *The Law of the Land,* Penguin, Ringwood, 1992, p.1.
[4] W.E.H. Stanner, *After the Dreaming: Black and white Australians - an anthropologist's view,* Australian Broadcasting Commission, Sydney, 1969, p.7.
[5] See Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest.* Oxford University Press, New York, 1990.

underpinned colonisation. In order to emphasise the ongoing role of these discourses in Australia, I call them the 'discourses of domination'.

Following Tully, a critical first step in redefining current relationships is to trace the development of these discourses of domination to lay bare beliefs that may still underpin policy and practice. The course of 'race relations' in this country has never been determined without reference to prior historical experience. With this in mind, it is important to know how questions of Indigenous status were determined in the centuries prior to the 'founding' of Australia. We need to better understand whether, and how, the discourses of domination planted in other times and places came to germinate and flourish here. The aim is to develop what John Raulston Saul referred to as the 'long view' rather than the 'little close ups of modern analysis'.[6]

This examination of the historical position of Indigenous peoples in Western political thought must be brief.[7] My aim is not to provide an exhaustive review of historical developments, but rather to contextualise subsequent discussion of the contemporary status of Indigenous peoples in Australia. The point is not simply that important European political, legal and social theories were employed to deny the rights of Aboriginal peoples as peoples. The project of colonisation accelerated at the same time as these theories were being formulated for the first time. Thus the theories specifically developed in such a way as to deny the rights of Indigenous peoples. It is possible to view a related process whereby the identity of emerging states, and the European peoples who came to embody them, was similarly determined in part

[6] John Raulston Saul, *Reflections of a Siamese Twin: Canada at the end of the Twentieth Century*, Penguin Books, Toronto, 1997, p.91.
[7] For a full treatment of this field with particular reference to the North American context, see Williams, *op cit.*

by the continuous presence of Indigenous peoples. Rather than see it merely as a process of exploitation of one people by another, colonialism is more usefully viewed as a two-way process affecting the constitution of both peoples.

I begin by addressing three key contributors to the discourses that shaped encounters between Aboriginal and non-Aboriginal peoples. In looking at the writing of Pope Innocent IV, Francisco de Vitoria, and John Locke, I analyse some of the critical debates that influenced the way European thinking came to dominate and define these relationships. Such an approach does not wish to privilege the historic over the contemporary (which remains the primary focus of this thesis), but rather to establish the links between the two – between past thinking and current policy. While the continued legacy of colonialism in terms of its production of Aboriginal deprivation and dependence has been well examined, the powerful assumptions that underpinned and, in fact, necessitated such dispossession are less explored. It would be callous, and unacceptable, to understate the extent and continued effects of what a number of scholars and at least one state body of investigation have described as genocide.[8] However, just as important will be to address the nature of the thinking that made – and makes – this project of domination possible. Fundamentally, this refers to misrecognition of the status of Aboriginal peoples as peoples with the inherent rights of all peoples.

[8] On Australia, see Colin Tatz, *Genocide in Australia.* Canberra, Aboriginal Studies Press, Canberra, 1999. On North America see Ward Churchill, *A little matter of genocide : holocaust and denial in the Americas, 1492 to the present,* City Lights Books, San Francisco, 1997. In 1997 a body set up by the Labor government of Paul Keating found Australia's policy of removing Aboriginal children over much of the twentieth century to

I. Beginnings

The powerful notion of unity in the European tradition is manifest not only in its methods, but in the desire to explain its own beginnings. European thought sought not only to assert the notion of unity over others, but to explain its own beginnings in terms of a single, traceable source. This is suggested in Virgil's *Aeneid,* the founding myth of the formation of the Roman Empire by the Trojans.[9] Not only did it account for the arts and sciences as emanating from a single, long destroyed source, but it defined civilisation itself – as settled agriculture and cities. Thus was established the hierarchy that for centuries would serve to define relationships between Europeans and 'others'. Noteworthy is both the centrality of this distinction, as well as the suggestion of the European view as universal. The 'civilised' (those of the cities, or 'civitas') were *naturally* held to be above those who otherwise were 'savages' (from 'silvestris', the woods).[10]

Robert A. Williams suggests that by the time of the colonisation of North America in the sixteenth century, Europeans had already established a 'systematically elaborated legal discourse on colonisation'.[11] By virtue of this discourse, Indigenous peoples could rightfully be conquered, their lands confiscated, and Europeans could lawfully assert their own version

---

constitute genocide. See HREOC, *Bringing them Home: The Report of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families,* HREOC, Sydney, 1997.

[9] Virgil, *The Aeneid,* translated by John Dryden, edited by Robert Fitzgerald, Macmillan, New York, 1965.

[10] Richard Waswo, 'The Formation of Natural Law to Justify Colonialism, 1539-1689', *New Literary History,* vol. 27, no. 4, 1996, p.743. This distinction between the 'civilised' and 'uncivilised' world has proved remarkably resilient, emerging most recently in the context of the Unites States led so-called 'war against terrorism'. Addressing both houses of Congress on September 21, 2001, following the September 11 attacks on the US, President Bush said: 'This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilisation's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. The civilised world is rallying to America's side.' See full text of Bush's speech at http://news.bbc.co.uk/1/hi/world/americas/1555641.stm

[11] Williams, *op cit,* p.14.

of a universally binding natural law.[12] Yet even in the often ruthless application of this law, it is possible to discern the constant need to justify the use of power and right on one side, and its denial on the other. Thus, examining the history of law as it was developed and (not) applied to Indigenous peoples reveals the status of these peoples was rarely easily resolved.

The doctrine of unity in Virgil's founding myth runs through the discourse that justified the subjugation of Indigenous peoples. Initially, it was manifest in the idea of the Church as a universal Christian commonwealth, by which all people were united and hierarchically directed by God's representative, the Pope.[13] The Pauline allegory of the Church as the mystical body of Christ, with all its different constituent parts, established the church's mandate to exercise authority over all peoples.[14] To unity was added hierarchy through the notion that the places appointed to each limb of the mythical body would be ordered. As Paul said, 'within our community, God has appointed, in the first place apostles, in the second place prophets, thirdly teachers'.[15]

The exercise of power (or sovereignty, or governance) by those, such as Aboriginal peoples, who failed to recognise their allotted place within such an assumed cosmic order, constituted a problem that needed to be resolved both philosophically as well as physically. Whose power was real, and whose merely imagined? This could be dealt with at the extreme by the complete denial of rights to Aboriginal people, which was the influential approach of Alanus Anglicus, a British cleric of the Middle Ages. He argued simply that no earthly ruler's power was legitimate unless he believed in the true God, and received his power directly from the

[12] Williams, *op cit.*
[13] *ibid,* p.15.
[14] *ibid.*
[15] Pauline Text cited in Williams, *ibid.*

church.[16] Those who ruled before the birth of Christ ruled only in *de facto* manner, and upon Christ's birth, all authority belonged to Him. Alanus is an extreme – but by no means isolated – example of the powerful Christian ideology that would deny the legitimacy of Aboriginal governance, and extend the European will to empire over the globe. This Divinely inspired unity was described thus by German historian, Otto von Giercke:

> Throughout the whole of the Middle Ages there reigned, almost without condition or qualification, the notion that the Oneness and Universality of the Church must manifest itself in a unity of law, constitution and supreme government, and also the notion that by rights the whole of Mankind belongs to the Ecclesiastical Society that is thus constituted.[17]

Three prominent thinkers who helped entrench what Tully referred to as the 'empire of uniformity'[18] were Pope Innocent IV, Francisco de Vitoria, and John Locke. It is possible to observe striking similarities in their arguments, despite the radical differences in terms of when and where they were to be applied.

II. Innocent IV

Innocent IV, a former law lecturer at the famed University of Bologna, was Pope from 1243 to 1254. He was perhaps the first great medieval legal theorist to address the issues raised by the contact of European and non-European peoples. Williams suggests it was he who would define the essential terms of the debate as Europe moved from the Middle Ages into the age of

---

[16] Williams, *ibid,* 40. It is interesting to note that many Australian and Canadian statues stated that Indigenous people had no standing in courts of law because they had no belief in God or in a Superior being. Their evidence was, accordingly, discounted. See John McCorquodale, *Aborigines and the Law: a digest,* Aboriginal Studies Press, Canberra, 1987.

[17] Cited in Williams, *ibid,* p.17.

[18] James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge University Press, Cambridge, 1995. For discussion of this concept see chapter 3.

Discovery and Conquest.[19] In the course of the Middle Ages, the absolute power of the church came to be questioned by those who sought to justify an autonomous secular authority, based on a humanised vision of 'natural law' inspired by classical theorists such as Aristotle and Cicero.[20] Expounded by lay Roman law scholars, the vision was of a society discoverable by human reason, rather than papal decree. Innocent sought to salvage church rule by developing a synthesis of emergent humanist discourse with the Church's hierocratic tradition. Given the focus below on the development and adaptation of colonial discourse, of interest here is the way Innocent sought to neutralise and assimilate a potentially damaging alternative view of 'truth', ultimately creating a more dominant discourse with which to regulate 'others' – such as Aboriginal peoples.

Innocent's speculations on 'infidel' rights and status may be his most enduring contribution to Western thought.[21] He set out to determine whether non-Christian peoples could possess natural law rights to hold property and rule themselves, or whether they could be justly dispossessed on the basis of their non-belief.[22] Effectively, he asked 'were they human, and thus holders of the same rights, and subject to the same responsibilities as other people?' In answering this question, he attempted a synthesis between the absolutist positions of Alanus (who completely denied non-believers any rights to rule), and the Aristotelian recognition of natural law rights of self-government. Thus, he argued that theoretically at least, infidels and heathens possessed the same natural law rights as Christians to elect their own leaders and exercise *dominium* ('lordship') over their own property. These rights were, however, qualified by the Pope's universalised Petrine mandate to 'care for all the sheep in the Lord's flock',

[19] Williams, *op cit*, p.44.
[20] *ibid*, p.42.
[21] *ibid*, p.44.
[22] *ibid*, p.45.

which gave him at least an *indirect* right of intervention in the affairs of all the Church's subjects, actual and potential.[23] While pagan (or, for our particular purposes, Indigenous[24]) peoples may appear to govern themselves, ultimate authority resided in the Pope who 'has jurisdiction over all men and power over them in law but not in fact'.[25] Intervention was then limited to breaches of the natural law, which included the worship of idols, for 'it is natural for man to worship the one and only God...[Every] rational creature...[was] made for the worship of God.'[26] 'Natural law' was thus eurocentric, Christian law.

Innocent's argument illustrates both the motivation and methodology of subsequent discourses that sought 'legitimate' ways to deny the rights of Indigenous peoples. The existence of these 'other' peoples was quickly constructed in terms of a problem to be overcome – intellectually as well as on the ground. Physical destruction was necessary to occupy territory and exploit the resources indigenes possessed, but the philosophical bases for these 'just wars' also had to be found. Despite the long-time existence of these self-governing peoples following their own non-Christian beliefs, Innocent simply asserted that the immanent unity and hierarchy of the world was revealed by Divine Reason.[27] This perfect rationality could not be understood by human beings, and thus needed mediation through the church and its agents. Those who failed to recognise God's plan as revealed by the Pope were obviously in error as 'There is only one right way of life for mankind...'[28]

---

[23] Williams, *op cit*, p.45.
[24] For many of the 'non-believers' the discourses of domination were directed against, I will substitute the term we use today to describe such peoples, that is 'Indigenous'. While not all 'pagan', 'infidel', or 'savage' peoples were Indigenous, all those we regard today as Indigenous were seen as 'savage', 'barbarian' etc.
[25] Innocent cited in Williams, *ibid.*
[26] Innocent cited in *ibid,* p.46.
[27] *ibid.*
[28] Innocent cited in *ibid.*

It is this simple assertion – of the rightness (indeed, the righteousness) of European ways described as universal that justified (in fact necessitated) the destruction of those who opposed this divinely mandated mission. The destruction of Aboriginal peoples was easily defended, because as Innocent stated, 'they are in error, and we are on a righteous path'.[29] In this influential articulation, Innocent had provided a new legal discourse of domination, based on the central, orienting myth that the Christian European version of reason and truth entailed norms obligatory for all peoples.[30] The description of European norms as universal would prove a useful strategic element of subsequent colonial discourses, including the development of a broadly binding 'law of nations'.

III. Francisco de Vitoria

An influential thinker in this emerging discipline of international law was Dominican scholar, Francisco de Vitoria, who lived from 1480 to 1546. Colonialism was the central theme of his two lectures, described as the founding texts of international law.[31] They were delivered in 1532, when the Pope had divided the 'New World' between Spain and Portugal. Anghie points out that international law did not precede the encounter between the Spanish and the Indians, and could thus not effortlessly resolve it. Rather, it was actually created out of the unique issues that arose in the encounter between Indigenous and European peoples.[32] The central question was not how to establish order among sovereign states (the conventional view of

[29] Williams, *op cit*, p.47.
[30] *ibid*, pp.49-50.
[31] These can be translated as 'On the Indians Lately Discovered' and 'On the Law of War Made by the Spaniards on the Barbarians.' Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', *Social and Legal Studies*, vol. 5, no. 3, p.321.
[32] *ibid*, p.322. The fact that these questions are still frequently asked illustrates the tenuous nature of any 'resolution' to the questions that was simply asserted by the dominant people.

international law), but referred to a prior set of more fundamental questions, which included: Who are states? Who is sovereign? What are the powers of the sovereign? How are the respective rights of the coloniser and the colonised to be decided?[33]

Vitoria developed three arguments whose conclusions would later form the unquestioned basis of many subsequent theorists. Briefly, these were that:

1. the (Indigenous) inhabitants of the Americas possessed natural legal rights; therefore,
2. the Pope's grant to Spain of title to the Americas was 'baseless', and could not affect the inherent rights of the Indian inhabitants; but
3. transgressions of the universal Law of Nations by Indigenes might serve to justify conquest in the Americas.[34]

Perhaps Vitoria's most enduring contribution to subsequent jurisprudence is his suggestion that Aboriginal peoples inherently possessed legal equality. It is likely that his conclusions were influenced by the fact that he had observed Indigenous societies himself, rather than relying on second-hand, sensationalised accounts of the savages, and conceded the presence of recognisable families, communities, and even governance. Thus, despite popular views to the contrary, he saw Aboriginal peoples as possessing reason, as well as their own versions of many European institutions.[35] As such, they were guaranteed formal equality under natural law. Consequently, he refused to blindly accept the convenient legal fiction of 'discovery' used to justify Spanish title to much of the 'New World' (and later used to legitimate the

[33] Williams, *op cit,* p.50.
[34] *ibid,* p.97.
[35] Anghie, *op cit,* p.325.

colonisation of Australia). Vitoria said of the 'discovery doctrine', 'by itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us'.[36]

Due to their possession of reason, Vitoria had determined the trappings of natural law applied to the Indians. However, formal equality (of the individual) would not equate with substantive equality (of the collective). Vitoria moved away from a relativist approach toward a 'superordinate, universalist and Eurocentric position' which acted to deny Indigenes the rights that had briefly been accorded.[37] Thus, despite the fact that its sources were all Western and thoroughly Christo-Eurocentric in their normative orientation,[38] Aboriginal peoples were bound by the Law of Nations because it simply reflected natural law principles that were 'the consensus of the greater part of the world'.[39] The first duty of such a law was that of 'natural society and fellowship', whereby Aboriginal peoples had to accept Europeans in their midst. The second of Vitoria's duties foreshadowed subsequent liberal arguments of Locke and others, in requiring the Indigenous people to allow civilised nations 'free and open commerce' in their territories. Indigenous laws which contravened these 'truths' were simply void. Furthermore, the right to conquer was justified if requests to travel, settle and carry out trade were refused by Indians. Such activities were regarded as binding nations to one another, with refusal to participate contrary to the self-interest shared by all, and thus, irrational. Contravening the 'self-evident', rational law of nations that bound both coloniser and colonised could justifiably be punished. Thus, a 'war' of colonisation became a 'just war', and

---

[36] Franciso de Vitoria, *Francisci de Victoria De Indis et De ivre belli relectiones*, edited by Ernest Nys, The Carnegie Institution of Washington, Washington, 1917, p.139.
[37] Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (de)composition of law' in Diane Kirkby and Catherine Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire,* Manchester University Press, Manchester, 2001, p.11.
[38] Williams, *op cit,* p.101.
[39] Vitoria, *op cit,* p.153.

with the Indians deemed incapable of agreeing to a just peace, it would be in Vitoria's words, 'perpetual'.[40] Vitoria's argument was able, paradoxically, to justify the atrocities of colonialism by an appeal to 'sociability'.[41] Williams notes both the Crowns of Europe and her merchants would have found much to admire in Vitoria's secular Law of Nations.[42]

In ultimately providing a useful justification for the project of colonisation, Vitoria played upon a tension between Aboriginal inclusion and exclusion that has endured even to the present. In this instance, recognition of a universal humanity facilitated denial of a specific culture. Having been initially included in the universality of man ('they are the same as us'), Aboriginal people were then excluded from civilised society as distinct and deficient ('they are different to us'). Fitzpatrick notes the important consequence of this two-step process of exclusion. By not rejecting Aboriginal peoples outright as animalistic and beyond the reach of natural law, Vitoria's observation of similarity in religion, law and government, when combined with the deficiencies of the Indians in such things, imported a call for the Indian to change and become like the European.[43] Shared humanity held out the possibility of change, but the abhorrence of custom meant this would take time, and patient tutelage. Here, of course, are the intellectual underpinnings of more recent policies of assimilation, whereby Indigenous peoples would be treated, in Vitoria's own words, as if 'infants'[44]. But it also points to the creation of an ambiguous Indigenous status that would prove remarkably enduring – the Indian had to be 'schizophrenic', at once part of the universal humanity, yet excluded from it.[45]

---

[40] Vitoria, *op cit,* p.153.
[41] Waswo, *op cit,* p.745.
[42] Williams, *op cit,* p.103.
[43] Fitzpatrick, *op cit,* p.11.
[44] Vitoria, *ibid,* p.161.
[45] Anghie, *op cit.*

The beginnings of the international legal discourse to which Vitoria contributed internalised this pivotal relationship between 'sameness' and 'difference'. For the self-regulating Law of Nations to work, civilised nations had to be the same (as each other), and savage peoples had to be the same (as each other), thus maintaining the system's key distinction. The emerging international law was not so much about relations between sovereign states or peoples as is often assumed. It was actually concerned with 'the colonial domination of people burdened with radical difference.'[46] Aboriginal peoples encountered in the process of colonisation thus played a vital role in the emergent *jus gentium*, the law of all peoples, but also in the formation of national identities. In the absence of any positive, observable, predictable criteria by which to determine 'the people', or 'nation', this began to be resolved negatively via the critical distinction of 'civilised' and 'savage'.[47] As evidenced by simply viewing their societies (or more often, popular, sensationalised accounts of them[48]), the Indigenes are seen to lack sovereignty, Christianity, and civilisation – characteristics which, again, self-evidently and contrastingly, inhere in European nations.[49] Distinct national identity is taken on via the assertion of a sovereignty produced in opposition to the non-sovereign Aboriginal. The emerging international community of sovereign nations then generates consensus-forming international law through the coherence gained in the common rejection of the 'savage'.[50] Continuity is suggested by Waswo, who argues that

> The natural law theorists to follow are all quite as well meaning and pious as Vitoria, but what they are theorizing and justifying is the continued territorial expansion of Europe around the world. And they are doing so by assuming the categories in our founding story, that comfortable division between the civilised and the savage.[51]

---

[46] Fitzpatrick, *op cit,* p.12.
[47] See note 12 and surrounding text.
[48] See Olive Dickason, *The Myth of the Savage and the beginnings of French colonialism in the Americas,* University of Alberta Press, Alberta, 1983.
[49] Fitzpatrick, *op cit,* p.12.
[50] Fitzpatrick, *ibid.*
[51] *ibid.*

It can be argued that Vitoria at least framed the Indigenous *problematique* in a rational way for the first time. For him, the issue of encountering Aboriginal peoples was not, as many in Europe had argued, to be determined automatically between sovereign states. This initial assumption avoided the dilemmas created by recognising Aboriginal humanity, by reducing Indigenous status to that of mere objects to be handed from sovereign to sovereign. Vitoria recognised the novel question raised by the encounter of Aboriginal peoples and Europeans was the problem of order among societies belonging to different cultural systems.[52] Instructive for us, who continue to grapple with essentially the same issue today, is the approach he then took to resolve the issue. Tragically, perhaps, for the subjects of his discourse, Vitoria focussed on the issue of *cultural difference* rather than the project of establishing *order amongst different societies*. In doing so, he judged the different cultural practices of each people, and assessed them in terms of 'universal' (that is, Western) law.[53] By the logic of Vitoria's Law of Nations, Indigenous groups then became the victims of justified wars of colonisation because of their cultural difference, which meant they inevitably failed to comply with apparently 'universal' standards. According to the Law of Nations, Indigenous people were 'free', but this European discourse rigidly defined the limits of that freedom, effectively preserving Innocent's vision of 'one right way' for mankind into the age of Discovery. In providing Western legal discourse with its first secularly oriented, systematised elaboration of the superior rights of civilised peoples, it is not surprising Vitoria's arguments are said to have had a profound effect on the West's conception of Aboriginal rights and status.[54]

---

[52] Anghie, *op cit,* p.331.
[53] *ibid.*
[54] Williams, *op cit,* p.107.

IV. John Locke

Long before liberal philosopher John Locke's seminal work, *Two Treatises,*[55] was published in 1690, the English were developing their own discourses to justify the colonial project. As early as 1577, competition with Spain contributed to the drawing up of plans for an expedition aimed at discovering 'Terra Australis incognita' in the Pacific.[56] Increasingly in this Elizabethan age, colonial discourse fused the proselytising duties of the English with an eye for potential economic gain. As Sir Francis Bacon stated:

> It cannot be affirmed if we speak ingeniously that it was the propagation of the Christian faith that was the [motive]...of the discovery, entry, and plantation of the New World; but gold, silver and temporal profit and glory.[57]

Yet, even in this mercantilist age, the work of previous colonisers would underpin justifications for expansion. For example, Englishman George Peckham's *A True Reporte* was perhaps the Elisabethan era's most systematised justification of American colonisation. It borrowed so heavily from Vitoria that Williams suggests through the *Reporte*, the Spaniard's key notion that Aborigines were bound by the European's normative conception of natural law was smuggled into English colonial discourse.[58] A few decades after landing in America, it was already a 'grounding theme' of this colonial discourse that as perpetual violators of this law, Indians could be dispossessed of their lands by a race of cultivators 'destined to plant the seeds of a superior civilisation in the New World'.[59] Locke developed this 'common sense' on

---

[55] See particularly John Locke, *The Second Treatise on Government: an essay concerning the true original extent and end of civil government [1690]* Blackwell, Oxford, 1956; and Locke, *Two treatises of government,* ed. Peter Laslett. Cambridge, Cambridge University Press. 1991. See also C.B. McPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke,* Clarendon, Oxford, 1962.
[56] Williams, *ibid,* p.154.
[57] Cited in Williams, *op cit,* p.185.
[58] *ibid,* pp.164-169.
[59] *ibid,* p.221.

Aboriginal land to the point where his exclusionary concept of property became a finely honed instrument of empire.

Locke reflected, articulated and deepened the prevailing liberal discourse on colonialism, and has been regarded as providing English colonialism with its 'most articulate and influential philosophical defence' less than a century before the 'settlement' of Australia.[60] He was certainly not a disinterested observer of the colonial process, having not only a philosophical but also financial interest in the colonisation of America. His biographer, Maurice Cranston, noted Locke's 'zeal for commercial imperialism'.[61] Thinly disguised variations of Locke's description of Aboriginal society reappear again and again, yet James Tully has shown in detail how Locke's central arguments justifying colonialism fundamentally misrecognise the status Aboriginal peoples, particularly with regard to their system of property, and their political organisation.[62]

Locke began by situating Aboriginal peoples in a pre-political state of nature. This assumed that the savage present was our own past, and 'in the beginning all the world was America'.[63] At the stage of development they represent, Aboriginal peoples lack an established system of property or government, and have only a subsistence economy. While they have *individual* personal sovereignty, at this early stage there is neither nationhood nor territorial jurisdiction, with government being *ad hoc*. By contrast, Europeans live in sovereign nations or 'political

---

[60] Bikhu Parekh 'Liberalism and Colonialism: A Critique of Locke and Mill' in Jan Nederveen Pieterse and Bikhu Parekh (eds.), *The Decolonisation of Imagination: Culture, Knowledge and Power,* Zed Books, London, 1995, p.82.
[61] *ibid,* p.83.
[62] James Tully, 'Aboriginal property and Western Theory: Recovering a Middle Ground', in *Property Rights,* special edition of *Social Philosophy and Policy,* Jeffrey Paul, Ellen Frankel Paul and Fred Miller, (eds.), Cambridge University Press, New York, 1994, p.158.
[63] Cited in Williams, *op cit,* p.247.

societies', with all the institutional expressions of their civilised level of development.[64] Tully argues that such a 'stages view' of development tends to form the basis of much political theory today,[65] and, it may be added, much political discourse.[66]

Second, Locke suggests Aboriginal peoples have property only in the product of their labour, not their territory, to which they have not added their labour. They are 'inhabitants' of land, rather than 'occupiers'. Critically for the colonial project, *anyone* is free to appropriate this 'common' land without the consent of others, as long as there is 'enough and as good' left in common for others.[67] Here title is defined as 'labour', and labour is defined in European terms as 'Pasturage, Tilling or Planting'; all else is 'wast'.[68] Aboriginal peoples, as hunters and gatherers, are thus conveniently situated as having no rights to the land on which they exercised jurisdiction for thousands of years which may be acquired without recourse to one of the most prominent norms of the European political tradition – consent. Not only that, but should they resist European efforts to cultivate the land, as suggested by Vitoria, it is Indigenous peoples, not European usurpers, who are in violation of 'natural law', and can thus be 'destroyed', like 'savage beasts'.[69]

The third set of arguments justified appropriation on the grounds that Aboriginal peoples were better off as a result of the establishment of European principles of land regulation. European

---

[64] Tully, *Strange Multiplicity,* p.72.
[65] Tully, 'Aboriginal Property', p.159.
[66] Immediately following the Sydney Olympics, Australian Minister for Reconciliation, Philip Ruddock, suggested to the *Le Monde* newspaper that Aboriginal people remained disadvantaged primarily because they came into contact with 'developed civilisations' later than other Indigenous peoples. Supporting the Minister, National Party MP Ian Causley suggested Aboriginal people were 'not inclined to education.' See 'Australian minister sparks race row', 5 October 2000. See http://news.bbc.co.uk/1/hi/world/asia-pacific/957544.stm
[67] Tully, 'Aboriginal Property', p.159.
[68] Cited in Waswo, *op cit,* p.20.
[69] Cited in Tully, *ibid,* p.160.

economics were superior in that they used the land more effectively; they produced a greater quantity of conveniences; and finally, they created greater opportunities for work by expanding the division of labour.[70] By such a calculation, a day labourer in England is one hundred times better off than an Indian King with a huge yet uncultivated territory.[71] This economic argument would be incredibly influential in justifying the 'planting' of European constitutional systems of private property and commerce around the world, and then legitimating the coercive assimilation of Aboriginal peoples.[72]

Finally, Locke established a 'broad and influential picture' of the historical development of property and government.[73] Here government is defined in terms of the institutions of early European state-formation, effectively excluding Aboriginal peoples from holding sovereignty. While Locke recognised the rule of chiefs, it is based on consent of the people, rather than delegated and institutionalised through a legislature. The 'few controversies' over property meant Aboriginal peoples had 'no need of many laws to decide them'.[74] Aboriginal groups lack sovereignty because the right to declare war remains with the people, it is not delegated to the executive. This confined Aboriginal groups within a state of nature, preventing their development to 'political communities'.[75] As such, they can easily be characterised as a group of wandering individuals who warrant no collective recognition whatsoever. Parekh importantly notes that Locke offered Aboriginal people some *moral* protection, but no *political* protection. Aborigines were entitled to individual equality, but not as an organised society. This distinction between 'an egalitarian interpersonal morality' and an 'inegalitarian

[70] Tully, 'Aboriginal Property', p.160.
[71] *ibid*, p.161.
[72] Tully, *Strange Multiplicity*,p.75.
[73] Tully, 'Aboriginal Property', p.161.
[74] Locke, *Two Treatises*, p.107.
[75] *ibid*, p.162.

political and international morality' is critical to Locke's thought, and becomes a central part of the liberal tradition.[76]

Misrecognition of Aboriginal society flows not from the 'impeccable' [77] reasoning of Locke's arguments, but from the presuppositions which constrain the arguments. First, man was governed by reason, therefore by their unreasonable behaviour, Aboriginal people were defective. Locke effectively assumed (after Innocent), there was only one worthy way of life. Culturally specific (English) categories were used to determine this way, so as with this tradition, land had to be owned – and unambiguously demarcated – to be property. Finally, Locke assumed, humanity could be understood as a status or rank, to which rights as well as duties attached.[78] Critically, from this period on, Locke's conclusions – and therefore the assumptions that underpinned them - provided the starting point for subsequent political and social theories that followed him. Thus the destruction of Aboriginal societies is no longer something to be explained or justified – it is simply inevitable. The key assumption of European superiority provided the basis for the vast majority of accounts of Indigenous societies, setting a trajectory of thought which continues today. Thus, for example, original contract theories assume the inevitability of European style institutions, intellectually concreting over the societies whose institutions of governance differed from them and predated them.

[76] Parekh, *op cit,* p.92.
[77] *ibid.*
[78] Parekh, *op cit,* pp.89-92.

V. The rise of positive law

The period in which Australia was 'founded' has obviously influenced the course of Indigenous-state relations. It coincided with the decline of natural law which at least offered Aboriginal peoples some protection, and the rise of positivist thinking which effectively delivered them into the hands of settler societies. This meant the gradual recognition of (citizens) rights held by Aboriginal individuals which are delegated by the state, but no recognition of inherent (Aboriginal) rights whose source is Indigenous society itself.

Swiss jurist Emeric de Vattel was a pivotal figure in the development towards positivism. His *The Law of Nations*, was completed thirty years before the First Fleet arrived in Sydney, and in it, Vattel echoed Locke's agricultural justification of colonialism:

> The cultivation of the soil is an obligation imposed upon man by nature. Every nation is therefore 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...When the nations of Europe come upon the lands which the[se] savages [inhabit]...they may lawfully take possession and establish colonies in them.[79]

Vattel retained a good deal of naturalistic thinking, yet his writing stressed the position of the sovereign to such an extent that doubts were raised as to the power of international law to bind the sovereign.[80] To Vattel, separate, independent nations comprised a 'natural society' akin to the primitive state of nature 'among men in general'. The problem which confronted Vattel was, as always, how to distinguish the international society of civilised nations from its 'savage' counterpart.[81] For this, he turned to the issue of territory. With the advent of

---

[79] Vattel cited in Tully, *Strange Multiplicity*, p.79.
[80] Anghie, *op cit*, p.12.
[81] Fitzpatrick, *op cit*, p.14.

nationalism, the nation became 'actually' identified with its distinct territory and a people gainfully attached to it. [82] This, of course, applied only to the 'civilised territoriality' of Europeans, as opposed to the 'uncertain occupancy' of Aboriginal peoples. As Locke had shown, the Aboriginal interest in land was intrinsically inferior, his argument ultimately relying on the same 'secondary' exclusion as Vitoria. From the point of view of international law, the question of justifying colonial acquisition was usurped by the undeniable fact of Aboriginal dispossession. As Vattel suggested, Indigenous occupiers 'had never inhabited a territory to an extent sufficient to preclude newcomers'; therefore this law regarded their land as 'unoccupied and amenable to the acquisition of sovereignty'.[83] Fitzpatrick suggests to this day, and *in the same way,* territory remains the ground of sovereign completeness.[84]

While the late eighteenth century saw a combination of natural and positivist laws, by the beginning of the nineteenth century the 'science' of international law as the conduct of states had won out. Further, it was 'simply and massively' asserted that the practice of European states was decisive and could create international law – only *European* law counted as law.[85] The development of legal theory was no longer intended to establish a 'natural' hierarchy of rights between peoples. Such a distinction between 'civilised' and 'uncivilised' had become so implicit as to be a central organising principle in itself. The arguments and reasoning which produced this distinction became firmly unquestioned, to the point where any model of legal organisation that did not reflect this distinction (such as a truly egalitarian natural law) was, by definition, incoherent. Thus, prominent nineteenth century jurist John Westlake wrote:

> No theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce into his picture a difference between civilised and uncivilised

[82] Fitzpatrick, *op cit,* p.14.
[83] L.C. Green, 'Claims to Territory in colonial America', in L.C. Green and Olive Dickason (eds) *The Law of Nations and the New World,* University of Alberta Press, Alberta, 1989, p.75.
[84] Fitzpatrick, *ibid,* p.15.
[85] Anghie, *op cit,* p.24.

> man, because it is just in the presence or absence of certain institutions in their greater or lesser perfection, that the difference exists for the lawyer.[86]

This is the climate in which Aboriginal society would be (pre)judged by the Europeans who encountered their civilisation which had endured for tens of thousands of years. By 1788, the 'first settlers' had tried and tested the discourses of domination which they brought with them to Australia. Having successfully explained away the continuity of Indigenous laws and excluded non-European peoples from the realm of international law, Europeans could then attempt an 'accommodation' almost completely according to their own domestic rules, that is, largely ignoring any attempts at conciliation made previously by the naturalists such as Vitoria, but instead assimilating them 'on terms that completely subordinated and crippled non-European societies'.[87] While natural law proposed the existence of a set of transcendental principles that could be identified through the use of reason, positive law recognised only 'those rules that had been agreed upon by sovereign states, either explicitly or implicitly, as regulating relations between them'.[88] Whereas under natural law, the sovereign was bound by a system of laws which it administered, positivist law was itself the creation of such sovereigns. And as we have seen, sovereignty and indigeneity had by this period come to be regarded as mutually exclusive – an assumption which helped reinforce the continuity of the civilised-savage dichotomy. Discourses which ultimately relied on this key distinction would be central to the organisation of the new colony, as well as the state which grew out of it.

---

[86] Cited in Anghie, *op cit*, p.24.
[87] *ibid*, p.35.
[88] *ibid*, pp.11-12.

VI. Conclusion

James Tully has identified two 'hinge assumptions' which keep in place the current colonial relationship between Indigenous peoples and the state in places such as Canada and Australia. These are, firstly, the assumption that the exercise of exclusive jurisdiction is legitimate, and secondly that there is no viable alternative.[89] This chapter has cast doubt on the former assumption by suggesting that it relies on a number of 'discourses of domination', themselves based ultimately on a deliberately exclusionary and arbitrary distinction between 'civilised' Europeans and 'savage' Aboriginal peoples.

European peoples since the Middle Ages and even before have used various means to argue why the Aboriginal peoples they encountered should not be subject to the same respect and recognition of rights and land title given to other (European) peoples. Political philosophers and legal theorists facilitated the colonial project by initially recognising Aboriginal peoples as subject to a natural then international law, both of which were thoroughly eurocentric in their construction and outlook. Yet, even this initial recognition merely facilitated a secondary exclusion, whereby the 'uncivilised' were found wanting by this allegedly universal measure. Once excluded from the society of nations, Indigenous inhabitants were regarded as the preserve of states such as Australia which proceeded to define Aboriginal identity via tight legislative regimes of control. This effectively denied Aboriginal peoples the possibility of resolving a status that sought expression, at least partially, *against* the state, rather than through it.

---

[89] James Tully, 'The struggles of Indigenous peoples for and of freedom', in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political theory and the rights of Indigenous peoples,* Cambridge University Press, Cambridge, 2000.

Lest this appear too neat a picture, it must be remembered that ambiguity, contradiction and paradox continued to be as much a part of colonial discourses as the Aboriginal status they attempted to construct. The maintenance of a distinct Aboriginal identity would always prevent complete realisation of the colonial project. In a similar way, the refusal of Aboriginal people to follow the colonial script and abandon their law and culture in the face of a 'superior' European system has contributed to what Fitzpatrick described as the 'ambivalence of occidental self-constitution'.[90] Just as the development of European law and sovereignty in settler societies such as Canada and Australia was given substance by denying their existence in Aboriginal societies, so has settler identity been given shape through its expression in opposition to that of the Indigenous inhabitants.

This glimpse of the international and local forces surrounding the encounter between European and Aboriginal peoples suggests the colonial dynamic involves more than mere exploitation of one party by another, despite popular perceptions of Aboriginal passivity in the face of superior forces. The impacts of colonialism on Indigenous peoples are now well known and well documented. Yet it is often forgotten that European peoples in settler societies such as Australia have also had their identities shaped by these processes, though in less destructive ways. The following chapter investigates how the discourses of colonialism came to influence the construction of Australian political legitimacy, nation building and national identity. A key question is whether historic conceptions of an inferior Aboriginal status have endured in the first 180 years of 'settlement', or if there are signs of a paradigm shift in non-

[90] Fitzpatrick, *op cit*, p.19.

Indigenous perception. How prominent were the 'discourses of domination' in Australia's early history?