

Sovereign DESIRES

Self-determination has been at the heart of Aboriginal aspirations. As a slogan, it echoes through the twentieth century. But Garth Nettheim argues that sovereignty is rarely defined, and often misunderstood.

The term 'sovereignty' has several technical legal meanings as well as a less specific general or political meaning. When aboriginal people in Australia, or elsewhere, assert their sovereignty they may be using the phrase in either a legal or a political sense or in a sense that represents some amalgam of the two. Communication becomes difficult if those attempting dialogue use words in different senses. The same sort of problems beset references to 'treaties' and discussions about the claim of indigenous peoples to 'self-determination'. These problems arise in debates about law and policy, at the national and the international levels.

Peoples have been encroaching on other peoples' territories for millenia but it is perhaps sufficient to go back only 500 years to the rise of the modern state, the beginnings of European colonial expansion—1992 marks the 500th anniversary of Columbus' 'discovery' of 'The New World'—and the birth of modern international law.

Themes emerged five centuries ago about the relationships between colonisers and indigenous peoples that continue

to resound today. Satisfactory resolution seems as elusive today as then.

The fundamental question is, inevitably, by what right a people from one land take over territories occupied by other peoples. In modern international law such conduct is clearly unlawful in terms of the United Nations Charter, Article 2(4), which states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

While this prohibition has been honoured more in the breach than in the observance, it is the basis for the UN Security Council's response to Iraq's takeover of Kuwait. However, in earlier centuries colonial expansion was a matter of "might is right", and any international disputation tended to revolve only around the question of which European power had the superior right to colonise a particular territory and its people. Nonetheless, questions of moral and legal entitlement were always present, even within the colonial power.

In a period of colonial expansion there is no shortage of people ready to find justifications. The sheer self-interest in the acquisition of territory and resources may be dressed



Graphic: 'Mortuary Ceremony', Johnny Bulun Bulun (detail)

up in references to the Christian mission of conversion. This will often be linked with a denigration of the existing inhabitants. Such a denigration of the colonised peoples may refer to their 'primitive' forms of land use compared to such 'advanced' practices as cultivation or forest clearance or mining. It may refer to 'barbaric' or simply non-Christian beliefs or practices. It is not only Christians who may denigrate those of other faiths and lifestyles, as can be seen in more recent non-European examples of imperial expansion in places such as Tibet, West Papua and East Timor.

The classic debate along these lines took place in 1550-1551. The Valladolid disputation was convened by King Charles V of Spain and the Council of the Indies in an attempt to resolve the continuing contention within Spain over the morality and legality of the wars of conquest against the Indians. The case for the colonialists was presented by Juan Gines de Sepulveda. The case for the Indianists was presented by Bartolomé de las Casas. Las Casas refuted Sepulveda's several justifications for conquest and insisted that the political and legal sovereignty and jurisdiction of the Indian nations had to be respected. He was not, of course, successful in averting the impact of Spanish colonialism, but his writings (and those of his contemporary, Francisco de Vitoria) represent a strand in thinking

in international law from that early period which is of continuing relevance in debates about sovereignty, self-determination and indigenous rights today. In particular, the colonialist device of denigrating the colonised was strongly repudiated.

Denigration may go even further. It may extend to denying the inhabitants the status of occupiers of the land. Hence the statements, common in European juristic writings of the 17th and 18th centuries, that peoples such as hunter-gatherers who neither till the soil nor live in settled villages, do not 'occupy' or 'possess' the land at all, but simply wander across it. However, the practice of European States, including Britain, during this period was to acknowledge the political status of indigenous peoples and to negotiate treaties to regulate their relationships with them.

Cook's instructions from the Admiralty were that he should obtain "the consent of the natives", if there be any, to establish "convenient stations". But discussions about Australia in the period between Cook's first voyage and the departure of the First Fleet proceeded to a large extent on the belief that Australia was literally uninhabited. Sir Joseph Banks' testimony to the House of Commons' Select Committee on Transportation surmised that there were thin populations on the eastern coastline but that the inte-

rior was quite empty. On the basis of this misinformation, and also on the basis of notions of cultural superiority, the English treated the land as terra nullius—land belonging to no one—and regarded themselves as entitled to take over the territory and to settle the land without regard to any rights of the prior inhabitants. The contrast with contemporaneous British policy in North America, New Zealand and elsewhere was quite marked.

Soon after settlement in Australia, it became quite clear that all parts of the country were in fact populated, and that particular peoples had very strong attachments to particular territories—sufficiently strong to induce them to engage in prolonged guerrilla warfare in their defence. By the 1830s the British Colonial Office deemed it appropriate to recognise prior Aboriginal rights, specifically in regard to the settlement of South Australia, but it proved too late in the day to alter the assumptions and practices of the colonies themselves.

By the middle and later 19th century, European justifications for colonialism and the denigration of indigenous peoples were reaching their most extreme form. Even in the lands where treaties had been negotiated, the fortunes of the indigenous people were little better than in Australia. In the United States, Canada and New Zealand indigenous peoples argue that their pre-existing rights and their treaty rights have been ignored or eroded by the settler societies, and they continue to press claims in terms of sovereignty, self-determination and self-government.

Increasingly, governments in these several countries are beginning to acknowledge the proposition advanced four and a half centuries ago by Las Casas, that the relationship between colonising peoples and indigenous peoples has to be perceived in political-legal terms. There are, in addition, moves (also echoing Las Casas but currently resisted by national governments) towards treating the relationship as one to be defined by international law.

By the early part of the 20th century a Eurocentric conception had evolved which perceived international law as concerned almost exclusively with the mutual rights and obligations of States and their governments. The States themselves seldom coincided with peoples or nations but frequently divided them, or grouped various nations and peoples within their borders. How the governments of those States dealt with their own subject peoples was regarded, with few exceptions, as of no concern to international law.

Since the end of World War Two the scope of international law has dramatically broadened to incorporate a concept of human rights. The Charter of the United Nations, in Article 1, defines the purposes of the organisation as including not only the maintenance of international peace and security but also respect for equal rights and self-determination of peoples as conducive to friendly relations among nations and “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”. The subsequent development of international law on human rights has been through such instruments as the

Universal Declaration of Human Rights and a series of treaties, conventions and covenants ratified by the governments of many states.

These new international standards, together with the (still rudimentary) implementation procedures, have been of value in addressing some of the claims of indigenous peoples, but not all of them. In particular, international human rights law has proved inadequate to meet ‘group’ or ‘collective’ claims advanced by indigenous peoples in respect of culture, territory and autonomy, particularly the autonomy claims. The term ‘autonomy’ here refers to any sort of status under which a people have effective political control over the matters that concern them. The word ‘sovereignty’ is sometimes used in this popular sense.

Whatever popular meaning that the term ‘sovereignty’ may have had or may still have, it now has a quite technical meaning in international law as denoting

...the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law.¹

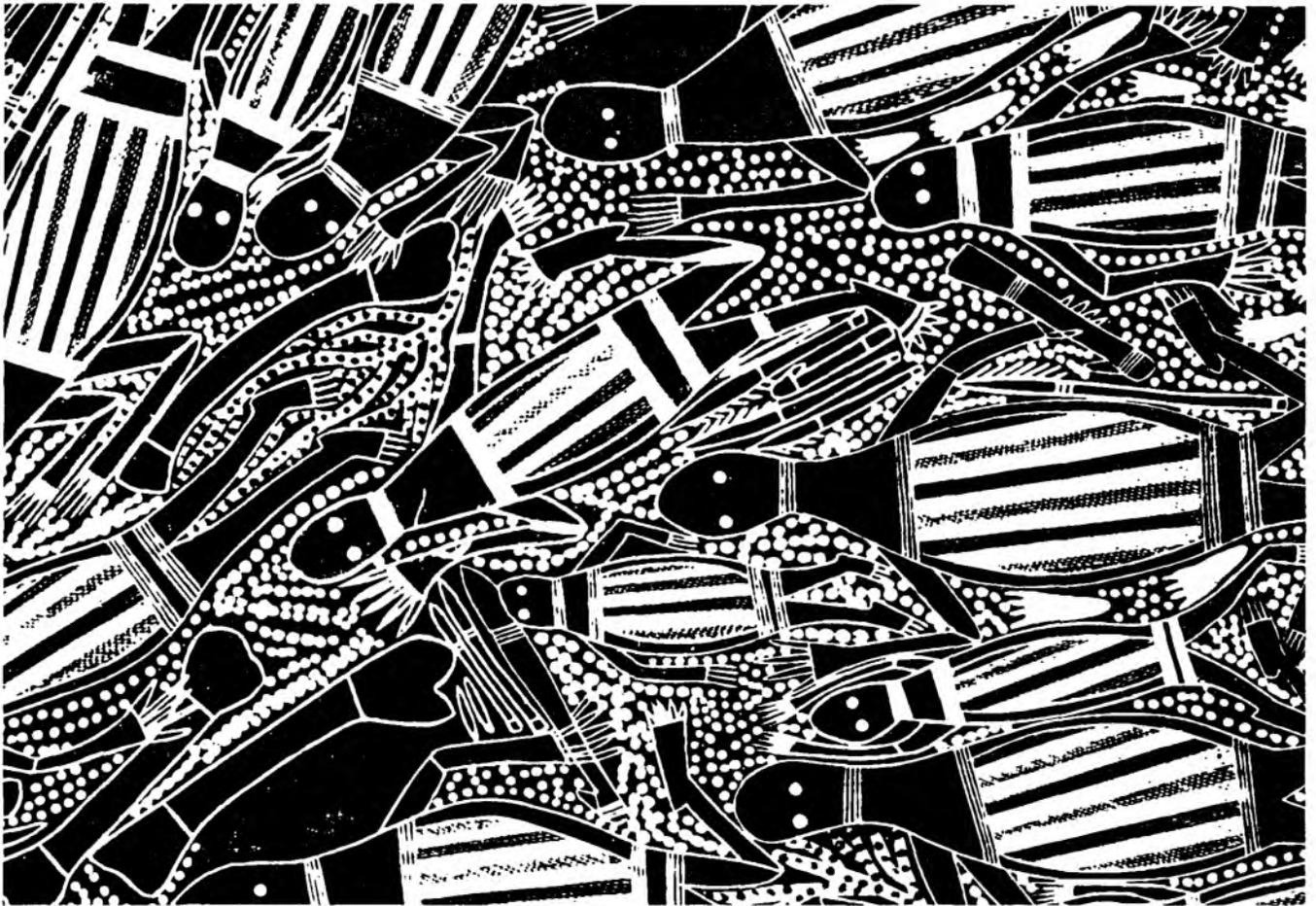
Within contemporary international relations the government of the Commonwealth of Australia is regarded as having sovereignty, in relation to other sovereign States. Can a rival or competing sovereignty in this specific legal sense be claimed on behalf of Australia’s indigenous peoples? Such a claim was argued in *Coe v Commonwealth* (1979) but the High Court held that such a proposition was not arguable. Justice Jacobs pointed out that such issues

...are not matters of municipal [ie, national] law but of the law of nations [ie, international law] and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.

Can such a claim be argued in the International Court of Justice? The problem here is that to be entitled to argue a case in that court you have, generally speaking, to be a State. Hence, a classic “Catch 22”: the only forum that may adjudicate whether you are a sovereign State requires, before it even listens to you, that you be a sovereign State! There are slightly better prospects to argue a non-rival sovereignty or sovereignties within the overall sovereignty of the Commonwealth of Australia. Indeed, the notion is already familiar within our federal system in which the six states claim to be sovereign entities, subject to the Commonwealth Constitution.

United States law has long acknowledged a subordinate sovereignty in individual Indian nations in terms first articulated in the 1820s and 1830s by Chief Justice Marshall. They are subject to the authority of the United States government but they have a right of internal self-government and a degree of sovereign immunity, especially with regard to matters arising on Indian lands.

In New Zealand, Maori argue that the proper interpretation of the 2nd Article of the Treaty of Waitangi, 1840,



Graphic: 'Mortuary Ceremony', Johnny Bulun Bulun (detail)

preserves internal sovereignty or self-government to the Maori. In Australia a similar proposition has most frequently taken the form of claims for a degree of immunity from the jurisdiction of settler courts. Such claims have been asserted since the early years of European settlement. While some courts were ready to accept such arguments (eg, Willis J in *Bonjon*) the view that has generally prevailed has been that of the Full Supreme Court of New South Wales in *R v Murrell* (1836), followed in *R v Wedge* (1976), that Aboriginal people were fully subject to the introduced legal system. But the issue continues to be raised.

The word 'treaty' is another term that once had a quite general meaning which included any sort of agreement. In modern times, however, these other usages have come to be regarded as obsolete and the term is confined to formal agreement between two or more independent States. It could be argued that the act of a colonising government in concluding a treaty with an indigenous nation represents an acknowledgment of the independent status of such indigenous nation, of its legal capacity to enter into such an agreement and, hence, of its sovereignty. Many of the earlier North American treaties, for example, took the form of treaties for peace and friendship, for alliance, or for trade, and clearly acknowledged not only the capacity of the indigenous nation to enter the treaty but also the continuation thereafter of that independent nation status.

However, the treaties characteristic of the 19th and 20th centuries made provision for non-indigenous land settle-

ment and for governmental rights of the colonising power. If the act of entering such a treaty was an exercise of sovereign power, was the effect of the treaty to relinquish sovereignty? The critical fact is that such treaties have fallen to be interpreted by the courts of the settler society, and the clear trend has been to deny such treaties any international status whatsoever, ie. one party to the agreement has used its institutions to restrict the original meaning, as understood by the indigenous nation. This has been the pattern in the United States, in Canada, and in New Zealand. In Australia, where treaties have been conspicuously absent, modern proposals to negotiate some sort of instrument of reconciliation have tended to avoid any use of the word 'treaty' (though Prime Minister Hawke has not hesitated, on occasion, to use the term).

Self-determination is a relatively modern concept in international law, though only in the sense that it connotes the right to recover political autonomy; conceptually, it is clearly linked with much older principles that peoples ought not to be deprived of such autonomy.

The right of self-determination finds expression in the Charter of the United Nations and in the two International Covenants that developed the Universal Declaration of Human Rights into treaty form: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Both Covenants have an identical Article 1 which commences:

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

This was the primary basis, especially after 1960, for the massive process of decolonisation, presided over by the UN's Decolonisation Committee, whereby former European colonies in Asia, Africa and elsewhere progressively achieved independence as sovereign States. But one major category of colonised people who have not enjoyed the benefits of decolonisation are those indigenous peoples subordinated within the borders of independent States. United Nations practice has been to confine the right to self-determination to people in the 'classic' colonial context of governance from a distant European power. Anything beyond that is perceived as a potential threat to the territorial integrity of established States.

That threat has been overstated because, in the heyday of Third World decolonisation, 'self-determination' came to be regarded as virtually synonymous with 'independence'. But 'self-determination' is a process; it does not necessarily indicate one particular outcome of that process, independence. It contemplates the right of a "people" to make a free choice about their political-legal relationship with a State. A variety of relationships may be possible which meet the legitimate needs of the indigenous people ranging from full integration, at one end of the spectrum, to full independence, at the other. The latter may be politically unachievable in many cases, and certainly faces major political difficulties in Australia. But a variety of other forms of autonomy may be achievable within the overall sovereignty of the State. It is quite likely that the future will see some creative development of the concept of self-determination in a way that may serve to meet the aspirations of many indigenous peoples.

In many States where indigenous peoples have been colonised, the settler society has attempted to deal with them in a variety of ways. Extermination has been tried, and the more modern techniques of destruction of habitat or relocation have similar consequences. Assimilation has often been pursued, generally without success. Governments have frequently treated the problems of marginalised indigenous peoples as problems of welfare, to be dealt with by funds and programs and bureaucrats—also usually without success. The application of human rights standards, nationally and internationally, has produced some benefits, but problems persist in the relationship between the indigenous people and the settler society. National governments are beginning to acknowledge that the issues have to be addressed in fundamental terms that go to the legal and political basis of that relationship.

This became evident in Canada in the 1982 "constitutionalisation" of aboriginal and treaty rights and in the subsequent attempt, through a series of First Ministers' Conferences, to define an aboriginal right of self-government. It emerged in New Zealand with the statutory underpinning, since 1975, of the Treaty of Waitangi and the establishment of the Waitangi Tribunal as a forum for hearing Maori claims. It has even been evident in Australia in discussion about a treaty or *makarrata* or instrument of

reconciliation and in some of the rhetoric about the new Aboriginal and Torres Strait Islander Commission (ATSIC). All these governments, however, continue to view the relationship as one which is to be defined as a matter of national law so as to leave the peoples ultimately at the mercy of national governments.

Indigenous peoples are arguing strongly that their relationship to the enveloping State should be treated as a matter of international law. The principal forum in which such claims are being developed is the United Nations Working Group on Indigenous Populations which, since its establishment in 1982, has opened its deliberations to indigenous peoples from around the world. The working group is in the process of drafting a Universal Declaration on Indigenous Rights. The current draft contains a number of strong statements about the right of indigenous peoples to self-determination even if within the context of a non-indigenous State. Indigenous claims of this nature are unlikely to be completely palatable to States, but it is quite feasible that international law may well develop to the point where there are reasonably firm standards to meet indigenous aspirations, together with some form of international monitoring of State conduct.

For some indigenous peoples such developments will be insufficient. They will continue to seek full decolonisation and recognition of their independent nationhood. The people of East Timor, for example, have shown their persistence in resisting the recent substitution of a new Indonesian colonisation for an ancient and retreating Portuguese colonialism. The Six Nation Iroquois Confederacy in North America has continually asserted its international sovereign status.

For Australia's indigenous peoples, the Torres Strait Islanders may have a stronger chance of achieving independence through existing decolonisation arrangements (which are, arguably, too restrictive), being geographically separate from Australia and having been subject to relatively minor non-Islander settlement. For mainland Aboriginal peoples, however, achievement of a complete, independent sovereignty faces considerable political and procedural problems. But some measure of sovereignty in a popular sense, some degree of self-determination and self-government, is not only feasible, it is essential for the recovery of Aboriginal communities from the impact of two centuries of continuing colonisation.

It will take a major act of creative statesmanship for Australian governments to sit down with representatives of the indigenous peoples in an attempt to negotiate a redefinition of the political and legal basis of the relationship. But without such an attempt the relationship will continue to cause grave difficulties for the Aboriginal and Torres Strait Islander peoples and, indeed, to Australian society as a whole.

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1. *Encyclopaedia of Public International Law*, Vol 10 (North Holland, Amsterdam, 1987), 297 at 408.