

# *'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments*

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## *Abstract*

The idea of a treaty or treaties between Indigenous peoples and Australian governments has long been a subject of debate. One argument that often arises is the idea that such agreements are not achievable because they are inconsistent with Australian 'sovereignty'. This article explores whether sovereignty is indeed a roadblock to modern treaty-making. It analyses what the term means as well as uses of it in Australia by Indigenous peoples, governments and the courts and how it is applied in other nations. The article concludes, after analysing some common objections, that as a matter of public law the concept of sovereignty need not be an impediment to treaty-making in Australia.

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## 1. *Introduction*

‘We recognise that this land and its waters were settled  
as colonies without treaty or consent.’

Prime Minister John Howard, 11 May 2000<sup>1</sup>

‘A nation ... does not make a treaty with itself.’

Prime Minister John Howard, 29 May 2000<sup>2</sup>

The first statement by Prime Minister John Howard is a matter of fact. From that fact flows a sense of grievance, felt by many Indigenous people and shared by many other Australians, that ultimate political and legal authority — or ‘sovereignty’ — was never properly secured by the Crown over the Australian landmass. The second statement is an assertion. It suggests that it is impossible to use a treaty to remedy the way that the continent was settled and the Australian nation constructed. The difficulty, it has been argued, is that ‘implicit in the nature of a treaty is recognition of another sovereignty, a nation within Australia’.<sup>3</sup> Whether Indigenous people have the power and authority as a matter of law to negotiate and enter into such agreements lies at the heart of the contemporary treaty debate in Australia. This is a difficult question because the concept of sovereignty is elusive and there is no constitutional recognition of Indigenous people or their place within the Australian nation.<sup>4</sup> Using Australian and comparative public law principles, this paper explores whether ‘sovereignty’ is indeed a roadblock to a modern-day treaty or treaties<sup>5</sup> between Indigenous peoples and the wider Australian community.<sup>6</sup>

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1 John Howard, *Reconciliation Documents* (Media Release, 11 May 2000): <[www.pm.gov.au/news/media\\_releases/2000/reconciliation1105.htm](http://www.pm.gov.au/news/media_releases/2000/reconciliation1105.htm)> (23 December 2003). Howard responded to the Council for Aboriginal Reconciliation’s *Australian Declaration Towards Reconciliation* by saying there were several areas of disagreement which prevented the Government offering its full support for the document. ‘For the information of the public’ he attached a version of the document ‘to which the government would have given its full support’.

2 John Laws, *Interview with John Howard, Prime Minister of Australia* (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003). David Yarrow pointed out to the authors that Prime Minister Howard’s statement bears a striking similarity to an assertion made by former Canadian Prime Minister, Pierre Trudeau, at the time his newly elected government released its 1969 White Paper on Aboriginal policy: ‘We will recognise treaty rights. We will recognise forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn’t go on forever. It’s inconceivable, I think, that in a given society one section of the society have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves’: Peter Cumming & Neil Mickenberg (eds), *Native Rights in Canada* (2<sup>nd</sup> ed, 1972) at 331.

3 Robert French, ‘The Constitution and the People’ in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 60 at 78.

4 See George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38 *Osgoode Hall Law Journal* 643.

5 Australia is the only Commonwealth nation that does not have a treaty with its Indigenous peoples: *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: AusInfo 2000) 6.

We begin by examining the origins of the term 'sovereignty' and the various meanings it has acquired over past centuries. From this diversity of meanings, we identify key themes relevant to the current Australian debate about treaty-making. We explore how the concept of sovereignty has been used in Australia by Indigenous peoples, government and the courts. We then look at how it has been applied by governments, courts and Indigenous people in other comparable English-speaking countries where the relationship between Indigenous peoples and the settler state is an ongoing source of political and legal concern. Finally, we discuss sovereignty within the context of some public law and policy objections that have been made to negotiating a treaty settlement in Australia.

In this article, we find that debates about sovereignty are important — they deal with the most fundamental questions of legitimate power and authority — but they do not appear to be inherently unresolvable.<sup>7</sup> After examining the different meanings of the term and the different ways that Australia and other countries have wrestled with its dilemmas, we conclude that as a matter of public law the concept of sovereignty itself poses no roadblock to moving forward with a process of treaty-making. In discussing the possibility of modern treaty-making in Australia we take a broad view of what a 'treaty' or treaty-like agreement might be.<sup>8</sup> Essentially we apply the term to comprehensive agreements reached between Indigenous peoples and governments that have a political or governmental

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6 See also on sovereignty in this context, Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture Law and Colonisation* 13; William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002) 6: <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003); Marcia Langton, 'The Nations of Australia', Alfred Deakin Lecture, 21 June 2001: <[www.abc.net.au/rn/deakin/stories/s300007.htm](http://www.abc.net.au/rn/deakin/stories/s300007.htm)> (24 December 2003); Lisa Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate' (2002–2003) 20 *Arena Journal* 83. This article does not attempt to tackle the significance and status of treaties made between Indigenous peoples and governments under international law.

7 In discussing Neil MacCormick's recent book *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999) in the context of the ongoing controversy over national sovereignty within the European Union, Peter Oliver says that while a pluralistic notion of sovereignty sounds like a recipe for confusion 'the rush for certainty is not always warranted'. Later he says it is MacCormick's 'distinctive contribution to point out that this question, the sovereignty question, does not need a definitive answer'. Peter C Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *KCLJ* 137 at 171. See also the conclusion drawn by the Canadian Royal Commission on Aboriginal Peoples on the issue of sovereignty, text below at n124.

8 See the discussion of what the term 'treaty' might encompass in Sean Brennan, *Why 'Treaty' and Why This Project?*, Discussion Paper No. 1, Treaty Project, Gilbert + Tobin Centre of Public Law, January 2003: <<http://www.gtcentre.unsw.edu.au/publications.asp#Treaty%20Project%20Discussion%20Papers>> (30 June 2004). This Paper suggests that the idea of a treaty conveys certain ideas in terms of premise, process and outcome. The *premise* or starting point is acknowledgment, a mutual recognition of negotiating authority and also of the past exclusion of Indigenous people from the processes by which the Australian nation was constructed. The (default) *process* in a treaty relationship is that of negotiation as the primary way of doing business, ahead of litigation, legislation and administration, which have been more typical methods by which governments have dealt with Indigenous issues. The *outcomes* which treaty advocates have spoken of might be summarised as rights and opportunities.

character, that involve mutual recognition of the respective jurisdiction each side exercises in entering into the agreement and that have a binding legal effect.<sup>9</sup> Whether or not such a process is desirable, and what any treaty might contain, are separate questions of politics and policy not addressed in this article.

## 2. *The Uses of Sovereignty*

In references made to ‘sovereignty’, the same themes emerge again and again: the concept is important, but also elusive and very much dependent on its context.<sup>10</sup> As one study has recently suggested:

The uninterrupted quest for a so-called ‘proper’ or ‘adequate’ definition of ‘sovereignty’, in both its internal and international ramifications, bears witness to the unfading materiality of this word for human society.... However, far from being semantically crystallised, this word has in fact never stopped changing.<sup>11</sup>

Although he did not invent the concept, French lawyer, philosopher and writer Jean Bodin is widely seen as the ‘father’ of sovereignty. A recent investigation of his work suggests he propounded the concept to meet a particular purpose at a particular time. Sixteenth Century France was wracked by violence and war. With

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- 9 We note that in his landmark study as a Special Rapporteur for the UN’s Commission on Human Rights, Miguel Alfonso Martinez took a similarly broad approach to the characterisation of such agreements. At one point he referred to them as ‘formal and consensual bilateral juridical instruments’ (at [82]). More generally he said ‘the decision of the parties to a legal instrument to designate it as an “agreement” does not necessarily mean that its legal nature differs in any way from those formally denominated as “treaties”’ (at [40]) and that ‘one should avoid making oneself a prisoner of existing terminology’ (at [53]). He went on to say that ‘a narrow definition of ‘a treaty’ and ‘treaty-making’ would hinder or pre-empt any innovative thinking in the field. Yet it is precisely innovative thinking that is needed to solve the predicament in which many indigenous peoples find themselves at present’. Miguel Alfonso Martinez, ‘Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations’, Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999: <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>> (30 June 2004).
- 10 There is a wealth of literature discussing the discriminatory assumptions embedded in the conclusive presumption that Indigenous and non-state societies lacked sovereignty. This body of literature is not dealt with in the present article, but see, eg, Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990). Kent McNeil has also noted that sovereignty is ‘a European concept, arising out of the development of the nation-state. So care needs to be taken in applying the concept in other parts of the world, where societies were not necessarily organized on the nation-state model, and where an equivalent conception of sovereignty may not have existed in the minds of the people’. Kent McNeil, ‘Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims’ (2000) 39 *Journal of the West* 10 at 11.
- 11 Stéphane Beaulac, ‘The Social Power of Bodin’s ‘Sovereignty’ and International Law’ (2003) 4 *Melbourne Journal of International Law* 1 at 24–25. Marcia Langton has also dealt with this issue recently. She notes Stephen Krasner’s observation that ‘since Jean Bodin and Thomas Hobbes “first elaborated the notion sovereignty in the 16<sup>th</sup> and 17<sup>th</sup> centuries”, it has always been malleable in practice’. Marcia Langton, ‘Unsettling Sovereignties’ in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) 31.

authority collapsing, Bodin wanted to save the monarchy: 'The end he sought was the establishment of a coherent system of political organisation; the means he promoted to reach this objective was the concentration of supreme power in as few hands as possible'.<sup>12</sup> This was sovereignty in its original form: that is, legal and political authority constructed to be absolute and monolithic as a bulwark against social chaos. The idea of sovereignty has been applied many times since, again frequently with a political or rhetorical purpose in mind. Over centuries sovereignty has acquired multiple meanings, few of which now resemble Bodin's concept of a single omnipotent king at the top of a pyramid of power.

At its most general, sovereignty is about the power and authority to govern. On that much, at least, there is a rough consensus amongst those who seek to define the term. Beyond that, context becomes important and different interpretations emerge. This is true even according to a range of dictionaries and other authoritative reference works. The *Macquarie Dictionary*<sup>13</sup> defines 'sovereignty' as:

1. the quality or state of being sovereign
2. the status, dominion, power, or authority of a sovereign
3. supreme and independent power or authority in government as possessed or claimed by a state or community
4. a sovereign state, community, or political unit.

Other specialist dictionaries and reference books provide slightly different meanings. The *Butterworths Australian Legal Dictionary* states: 'Sovereignty is an attribute of statehood from which all political powers emanate.... However sovereignty is rarely absolute; it is generally limited by duties owed to the international community under international law'.<sup>14</sup> According to the *Constitutional Law Dictionary*: 'Sovereignty is the power by which a state makes and implements its laws, imposes taxes, and conducts its external relations.... The notion of sovereignty was countered or altered in some respects by the concept of popular sovereignty, which retains for the governed ultimate control in a political sense'.<sup>15</sup> The *Dictionary of International & Comparative Law* defines 'sovereignty' as: 'the ability of a state to act without external controls on the conduct of its affairs'.<sup>16</sup> In *A Dictionary of Modern Politics*, 'sovereignty' is defined as 'the right to own and control some area of the world ... [It] depends on the idea of independent rule by someone over somewhere ... [It] can, at the same time, be used inside one country. One can talk about the sovereignty of the people'.<sup>17</sup> A leading nineteenth century text on international law contained the following, more nuanced definition:

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12 Id at 22.

13 *Macquarie Dictionary* (3<sup>rd</sup> ed, 1997) at 2028.

14 *Butterworths Australian Legal Dictionary* (1997) at 1094.

15 Ralph Chandler (ed), *The Constitutional Law Dictionary* (1987) at 654.

16 *Dictionary of International and Comparative Law* (3<sup>rd</sup> ed, 2003).

17 David Robertson, *A Dictionary of Modern Politics* (1985) at 305.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public laws... but which may more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law,... but may more properly be termed international law.<sup>18</sup>

From such definitional diversity, four key themes emerge. The first is a distinction between *external* and *internal* sovereignty. Roughly, this parallels the difference between foreign affairs and domestic politics, between international law and constitutional law. External sovereignty is about who has the power on behalf of the nation to deal externally with other nation-states. Internal sovereignty looks at how and where power is distributed within territorial boundaries, such as through a federal system or according to the separation of powers between different arms of government. The second distinction is between definitions of sovereignty that focus on the power of *institutions*, and those that focus on the power of the *people*. A third distinction is closely related to the second. It contrasts the formal view of sovereignty, which emphasises *legal* authority,<sup>19</sup> from the more fluid *political* understanding of the term. Fourth, there has been an evolution in meaning away from the view of Bodin (and of Thomas Hobbes in his *Leviathan* which was first published in 1651) — that a sovereign has *absolute, monopolistic and irrevocable* power — to a more *qualified* understanding of the term. Under this modern ‘realist’ conception, sovereignty is divisible and capable of being shared or pooled across different entities or locations.<sup>20</sup> Aspects of each of these themes can be seen in the legal and rhetorical debates that surround the treaty-making process, and the idea of Indigenous sovereignty, in Australia and other like nations.

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18 Henry Wheaton, *Elements of International Law* (1878) at 28–29, quoted in *New South Wales v Commonwealth* (1975) 135 CLR 337 at 376 (McTiernan J).

19 Albert Dicey wrote a highly influential analysis of the English Constitution at the end of the 19<sup>th</sup> century and said that the ‘sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions’. He defined Parliamentary sovereignty by saying that under the English Constitution Parliament has ‘the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1962) at 39–40. For an interesting discussion of this traditional view of parliamentary sovereignty, Jeffrey Goldsworthy’s recent book which championed it and Neil MacCormick’s book which seeks to break from it in favour of a more ‘diffusionist’ perspective, see Peter C Oliver, ‘Sovereignty in the Twenty-First Century’ (2003) 14 *KCLJ* 137.

### 3. *Indigenous Sovereignty in Australia*

#### A. *Indigenous Uses of Sovereignty*

There has always been a range of views and voices on sovereignty within Aboriginal and Torres Strait Islander communities in Australia. The decision by the High Court in *Mabo v Queensland (No 2)*<sup>21</sup> to recognise land rights that derive from traditional law and custom has given additional impetus to this debate. We seek here to identify some recurrent themes in the diversity of Indigenous views expressed about the notion of sovereignty.

Indigenous people often say that they were sovereign before Australia was colonised, that their sovereignty was never extinguished and thus it remains intact today. This view is articulated, for example, by Michael Mansell:

Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the existence of Aboriginal sovereignty.<sup>22</sup>

The reason sovereignty is retained, on this argument, is that it was never validly extinguished. In the eyes of many Indigenous people, the explanation for absolute British control over the Australian landmass is deeply unconvincing. This causes them to question the validity and legitimacy of non-Indigenous sovereignty or legal authority. After examining the international law bases for the acquisition of new territory and assertion of sovereignty, Mick Dodson concluded that 'the foundations of the sovereignty of the Australian state remain a mystery'. Noting that *Mabo (No 2)* recognises the ongoing operation of traditional law and custom, Dodson said that the 'reconstruction of the settlement thesis by the High Court, in

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20 Referring to economic deregulation in New Zealand which saw 'much locally owned industry pass into foreign hands', Stephen Turner said that this experience, common to many other countries over the last two decades, has led to claims that full national sovereignty no longer exists, 'that no political body can fully control economic operations in the physical space over which it presides'. Stephen Turner, 'Sovereignty, or the Art of Being Native' (2002) 51 *Cultural Critique* 74 at 79. See also a recent statement by the Australian Foreign Minister Alexander Downer about overseas intervention by Australia. He told the National Press Club in an address on 26 June 2003: 'Sovereignty in our view is not absolute. Acting for the benefit of humanity is more important': <[http://www.foreignminister.gov.au/speeches/2003/030626\\_unstableworld.html](http://www.foreignminister.gov.au/speeches/2003/030626_unstableworld.html)> (30 June 2004). Later in responding to a question he said 'for people who think the only thing that matters is this 19<sup>th</sup> Century notion of sovereignties, the only thing that matters in international relations. – I always say, it's not the only thing that matters. It's important, but it's not the only thing that matters': <[http://www.dfat.gov.au/media/transcripts/2003/030626\\_qanda.html](http://www.dfat.gov.au/media/transcripts/2003/030626_qanda.html)> (30 June 2004).

21 (1992) 175 CLR 1.

22 Michael Mansell, *Aboriginal Provisional Government: Finding the Foundation For a Treaty With the Indigenous Peoples of Australia* (2002): <[www.faira.org.au/issues/apg05.html](http://www.faira.org.au/issues/apg05.html)> (23 December 2003). See Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (1996).

order to accommodate Native Title fundamentally undermines it. The sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky'.<sup>23</sup>

The thing designated as 'sovereignty' that many Indigenous people say they had and still retain is not an easy concept to grasp. It deals with authority at its most fundamental level. Irene Watson says:

We were 'sovereign' peoples, and we practised our sovereignty differently from European nation states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country.<sup>24</sup>

For others, sovereignty describes their capacity to make decisions across the range of political, social and economic life:

Sovereignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our indigenous political institutions.<sup>25</sup>

From these preliminary observations we can see that when Indigenous people adopt the word sovereignty to express their political claims it involves a deliberate choice.<sup>26</sup> The word is used to convey a sense of prior and fundamental authority, drawing attention to the widespread dissatisfaction with the orthodox explanation of British 'settlement'. For many, it is a verbal approximation of an innate sense of identity and of legal and political justice. It has structural as well as rhetorical resonance.

As we saw in the previous section of this article, however, sovereignty brings with it multiple implications. It is a loaded term precisely because it deals with ultimate authority and its use is often wedded to a strong rhetorical purpose. By using a concept borrowed from Western legal and political thought, Indigenous advocates run the risk of their opponents selecting the most politically damaging interpretation available, to invalidate all competing interpretations. All the nuance can be lost.

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23 Dodson, above n6 at 18.

24 Irene Watson, 'Aboriginal Laws and the Sovereignty of *Terra Nullius*' (2002) 1(2) *Borderlands e-journal* at [49]: <[www.borderlandsejournal.adelaide.edu.au/vol1no2\\_2002/watson\\_laws.html](http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html)> (31 May 2003).

25 National Aboriginal and Islander Health Organisation, *Sovereignty* (1983) <[www.kooriweb.org/foley/news/story8.html](http://www.kooriweb.org/foley/news/story8.html)> (23 December 2003) quoted in Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) at 100.

26 Dodson, above n6; William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002) at 6: <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003); Lisa Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate' (2002–2003) 20 *Arena Journal* 83.



When hearing assertions of Indigenous sovereignty, it is important to remember that non-Indigenous people freely use the word sovereignty in different ways to describe different versions of political authority.<sup>27</sup> For example, they may be referring to the external sovereignty of the nation-state to deal with other nation-states on an equal footing under international law. Or they may be pointing to the internal distribution of authority within the territorial boundaries of the nation-state. They may even be referring to the sovereignty of the people in a democracy to elect their government or change the Constitution by referendum.

Similarly, Indigenous people use the word sovereignty in different contexts to convey different ideas. Some use it to engage directly with the idea of external sovereignty, arguing for recognition as a separate and independent nation. In 1992, the Aboriginal Provisional Government proposed 'a model for the Aboriginal Nation — a nation exercising total jurisdiction over its communities to the exclusion of all others. A nation whose land base is at least all crown lands, so called. A nation able to raise its own economy and provide for its people'.<sup>28</sup> In *Treaty '88*, Kevin Gilbert also argued that Aboriginal people should sign a treaty as a fully sovereign nation.<sup>29</sup>

However, Larissa Behrendt has pointed out that for many

the recognition of sovereignty is a device by which other rights can be achieved. Rather than being the *aim* of political advocacy, it is a *starting point* for recognition of rights and inclusion in democratic processes. It is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing from which to separate from it.<sup>30</sup>

This internal perspective on sovereignty seems compatible with much of the current advocacy in Indigenous politics, using the language of 'governance' and 'jurisdiction' as exercised by Indigenous 'polities'.<sup>31</sup> Notions of internal sovereignty also correspond, for many, with the long-term political campaign

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27 See text accompanying nn10–20 above.

28 Aboriginal Provisional Government, *Intellectual Prisoners* (1992) Foundation for Aboriginal and Islander Research Action: <[www.faira.org.au/issues/apg01.html#prisoners](http://www.faira.org.au/issues/apg01.html#prisoners)> (23 December 2003).

29 Kevin Gilbert, 'Aboriginal Sovereignty: Justice, the Law and Land' (1998): <[www.aiatsis.gov.au/lbry/dig\\_prgm/treaty/t88/m0066865\\_a/m0066865\\_p1\\_a.rtf](http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/t88/m0066865_a/m0066865_p1_a.rtf)> (31 May 2003).

30 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) at 99.

31 See, for example, Marcia Langton & Lisa Palmer 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004). See also the papers given at the Indigenous Governance Conference, Canberra, 3–5 April 2002: <[www.reconciliationaustralia.org/graphics/info/publications/governance/speeches.html](http://www.reconciliationaustralia.org/graphics/info/publications/governance/speeches.html)> (23 December 2003), and at the Building Effective Indigenous Governance Conference, Jabiru, 4–7 November 2003: <[www.nt.gov.au/cdsca/indigenous\\_conference/web/html/papers.html](http://www.nt.gov.au/cdsca/indigenous_conference/web/html/papers.html)> (23 December 2003). See generally the Harvard Project on American Indian Economic Development Harvard Project: <[www.ksg.harvard.edu/hpaied/](http://www.ksg.harvard.edu/hpaied/)> (23 December 2003).

waged by Indigenous peoples and their supporters for self-determination, another term borrowed from international law and Western political thought.

Internationally, the *Draft United Nations Declaration on the Rights of Indigenous Peoples*<sup>32</sup> makes no reference to sovereignty, but Article 3 states that 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Writing soon after *Mabo (No 2)*, Noel Pearson said he was sceptical 'whether the concept of sovereignty as understood in international law is an appropriate expression' and instead favoured the use of 'self-determination':

a concept of sovereignty inhered in Aboriginal groups prior to European invasion insofar as people have concepts of having laws, land and institutions without interference from outside of their society. This must be a necessary implication of the decision in *Mabo* against *terra nullius*.... Recognition of this 'local indigenous sovereignty' could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded.<sup>33</sup>

Many Indigenous people also frame their claim to sovereignty in popular, rather than strictly institutional, terms. In this sense, sovereignty is seen as something inherent. It is the basic power in the hands of Indigenous people, as individuals and as groups, to determine their futures. As inherent sovereignty does not result from grant by the Australian Constitution or any other settler document or institution, it does not require recognition by a government or court in order to activate it. 'It is about exercising autonomy, both at an individual level and as a "people". On this view Indigenous people can assert sovereignty in their day-to-day actions: there is a personal aspect to sovereignty'.<sup>34</sup> That account echoes the 'Cape York view' of self-determination put forward by Richie Ah Mat:

self-determination is about practice, it is about actions, it is about what we do from day to day to make changes, it is about governance. It is about taking responsibility for our problems and for our opportunities: because nobody else will take responsibility for our families, our children, our people. We have to do it ourselves.<sup>35</sup>

If we understand talk of sovereignty and self-determination to be about nuance as well as deliberate rhetorical force, then we gain a different appreciation for the debate. Indigenous assertions of sovereignty assume their place in the ongoing framing and revision of the political settlement in Australia.<sup>36</sup> A range of

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32 UN doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56.

33 Noel Pearson, 'Reconciliation: To Be or Not to Be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation?' (1993) 3(61) *ALB* 14 at 15.

34 Behrendt, above n30 at 101.

35 Richard Ah Mat, 'The Cape York View', paper presented at the Treaty Conference, Murdoch University, Perth, 27 June 2002: <[www.treaty.murdoch.edu.au/Conference%20Papers/ah%20mat%20speech.htm](http://www.treaty.murdoch.edu.au/Conference%20Papers/ah%20mat%20speech.htm)> (23 December 2003).

Indigenous views exist as the preceding paragraphs reveal. Some Indigenous people seek to challenge the Australian government's authority in the external sense of the word sovereignty. But it is equally important to recognise that many others adopt an internal perspective. These advocates seek to re-negotiate the place of Indigenous peoples within the Australian nation-state, based on their inherent rights and their identity as the first peoples of this continent. This vision of an Australia where, in practical terms, sovereignty is shared or 'pooled' is consistent with the way the concept has evolved in Western thought. Sovereignty can encompass the role of people as well as institutions, it has a political as well as a legal significance and it is far more common to have qualified power than the rule of an absolute and monolithic sovereign.

### ***B. The Commonwealth Government and Indigenous Sovereignty***

The Howard Government does not generally engage with the language of Indigenous sovereignty. However, its position on the use of treaties between Indigenous peoples and the wider Australian community is clear. The government is not willing to negotiate or to enter into such agreements. This position was stated during several interviews with Prime Minister Howard on 29 May 2000, the day after a quarter of a million people took part in the 'People's Walk for Reconciliation' across the Sydney Harbour Bridge (hundreds of thousands more people joined bridge walks and related events in cities and towns around Australia).<sup>37</sup>

Although the precise wording varied, the Prime Minister's position remained constant: a country does not negotiate a treaty with itself. For example, in his interview with John Laws, the Prime Minister said: 'I'll try and reach agreement but a nation, an undivided united nation does not make a treaty with itself'.<sup>38</sup> Similarly, in his interview with Alan Jones, he stated: 'I mean nations make treaties, not parts of nations with each other'.<sup>39</sup> And finally, in his interview on the 7:30 Report, Howard stated: 'Countries don't make treaties with themselves, they make treaties with other nations and the very notion of a treaty in this context conjures up the idea that we are two separate nations'.<sup>40</sup> Although the Prime Minister did not explicitly state that Indigenous people do not possess a form of

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36 As Langton & Palmer put it recently, 'Even if, as [Henry] Reynolds argues, there is a clear distinction to be made between the states and nations, or even if national sovereignty is an accretive and divisible bundle of things, the question remains: what of Aboriginal customary authority and forms of governance, and the modern-day adaptations of those traditions and customs in new political formations? How are they expressed and how do they mediate between the state and indigenous jurisdictions?' Langton & Palmer, above n31 at 36.

37 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra, 2000) at 60.

38 John Laws, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003).

39 Alan Jones, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003).

40 Transcript of the Prime Minister The Hon John Howard Interview with Tim Lester, 7.30 Report, 29 May 2000: <[www.pm.gov.au/news/interviews/2000/7302905.htm](http://www.pm.gov.au/news/interviews/2000/7302905.htm)> (19 December 2003).

sovereignty, his statements are consistent with an absolute view of sovereignty based upon its external aspect. By focussing only on this conception of sovereignty, Prime Minister Howard denies any other form of jurisdiction in the hands of Indigenous people that might authorise the negotiation of treaty-like instruments.

Rather than mentioning any form of Indigenous sovereignty, the Commonwealth Government prefers to speak of Indigenous people being 'equal' members of the Australian nation. For example, the *Executive Summary of the Commonwealth Government Response to the Final Report of the Council for Aboriginal Reconciliation*<sup>41</sup> speaks of 'a sincere desire to see Indigenous people not just treated as equals, but to experience equity in all facets of Australian life'. This would require recognition that Indigenous people, like all other Australians, share in whatever form of sovereignty is said to underpin the Australian nation. However, this approach does not necessarily recognise any other distinct form of authority continuing to inhere in Indigenous peoples as the first peoples of the nation.<sup>42</sup>

Despite its position that Indigenous people should be seen as 'equal' to non-Indigenous Australians, the Government does acknowledge the 'special' place of Indigenous people within Australian society. The *Executive Summary* states: 'As a nation, we recognise and celebrate Indigenous people's special place as the first Australians'.<sup>43</sup> Because of their 'special' status, the government does recognise the need for some consultation with Indigenous communities: 'if our policies are to have traction, they must be designed and delivered through genuine partnership of shared responsibility between all governments and Indigenous people'.<sup>44</sup> While the Government has indicated that one of its priorities is 'increasing opportunities for local and regional decision making by Indigenous people',<sup>45</sup> it has steered away from using terms such as sovereignty and self-determination, preferring terms such as 'self-management' and 'self-reliance'.<sup>46</sup> Recognising the 'special'

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41 *Executive Summary of the Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report — Reconciliation: Australia's Challenge* (September 2002) at 1.

42 Other governments have taken a different approach to Indigenous issues. On the State government level see for example Western Australia, *Statement of Commitment to a New and Just Relationship Between The Government of Western Australia and Aboriginal Western Australians* (10 October 2001): <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>> (4 June 2004) which, amongst other things includes the following statement: 'Aboriginal people have continuing rights and responsibilities as the first people of Western Australia, including traditional ownership and connection to land and waters. These rights should be respected and accommodated within the legal, political and economic system that has developed and evolved in Western Australia since 1829'. For a different approach at Federal level see for example the speech of then Prime Minister of Australia, Paul Keating, at Redfern Park in Sydney on 10 December 1992 in Paul Keating, 'Redfern Park Speech' (2001) 5(11) *JLB* 9, where he talked of ATSIC 'emerging from the vision of Indigenous self-determination and self-management'.

43 *Executive Summary*, above n41 at 1.

44 *Id* at 2.

45 *Ibid*.

46 *Ibid*.

status of Indigenous people apparently does not connote any retained or inherent power and authority. Most recently the Howard Government has announced its intention to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC) in the following terms:

[w]e believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure. We will not replace ATSIC with an alternative body. We will appoint a group of distinguished indigenous people to advise the Government on a purely advisory basis in relation to aboriginal affairs. Programmes will be mainstreamed, but arrangements will be established to ensure that there is a major policy role for the Minister for Indigenous Affairs.<sup>47</sup>

Herein lies a gulf between the Government and many of the most prominent voices within the Indigenous community.

### **C. *The High Court on Sovereignty***

The High Court has examined the concept of sovereignty in a number of public law contexts. Before moving to what the Court has said about Indigenous sovereignty, we look first at some of these other situations. One theme that emerges is the Court's own recognition that there are several different perspectives on the concept and that the context in which the issue arises is an important consideration.<sup>48</sup> For example, when the Australian States challenged the Commonwealth's assertion of sovereignty and sovereign rights over the sea, the seabed and the continental shelf in the *Seas and Submerged Lands Case*<sup>49</sup> in 1975, Jacobs J described sovereignty as 'a concept notoriously difficult of definition' and acknowledged the distinction that can be drawn between external and internal sovereignty.<sup>50</sup> 'External sovereignty' was seen as a power and right under international law to govern a part of the globe 'to the exclusion of nations or states or peoples occupying other parts of the globe'.<sup>51</sup> Looked at from the outside, external sovereignty is 'indivisible because foreign sovereigns are not concerned' with the way power is carved up within the borders of a nation-state.<sup>52</sup> Internally, on the other hand, the 'right to exercise those powers which constitute sovereignty may be divided vertically or horizontally ... within the State. There, although a sovereignty among nations may

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47 Transcript of the Prime Minister the Hon John Howard MP, Joint Press Conference With Senator Amanda Vanstone, Parliament House, Canberra, 15 April 2004: <<http://www.pm.gov.au/news/interviews/Interview795.html>> (24 June 2004). See Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Cth).

48 As Barwick CJ acknowledged, sovereignty 'is a word, the meaning of which may vary according to context' (*New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 364). More recently, Gleeson CJ, Gaudron, Gummow and Hayne JJ of the High Court said that sovereignty has long been recognised as 'a notoriously difficult concept which is applied in many, very different contexts' (*Yarmirr v Commonwealth* (2001) 208 CLR 1 at 52–53).

49 *Seas and Submerged Lands Case*, *ibid.*

50 *Id* at 479. His approach was quoted with approval in *Yarmirr*, above n48 at 53 by Gleeson CJ, Gaudron, Gummow and Hayne JJ.

51 *Seas and Submerged Lands Case*, above n48 at 479.

52 *Id* at 479–480.

thus be indivisible, the internal sovereignty may be divided under the form of government which exists'.<sup>53</sup> In other words, internal sovereignty in Australia is necessarily divided. The Constitution divides power between the Commonwealth government and the different States and territories<sup>54</sup> and separates the powers of the different organs of government — the executive, the parliament and the courts.

The High Court has recognised that within the Australian system of public law sovereignty is qualified and shared, rather than absolute, in other contexts as well. The Court has acknowledged that for much of the nation's history, Australia's external sovereignty was actually shared with the United Kingdom.<sup>55</sup> It is difficult even to pinpoint the precise time at which the Commonwealth fully attained its external sovereignty. This was captured in a quote from a recent High Court decision, with its deliberately imprecise compression of historical events: '*At or after federation, Australia came to take its place in international affairs and its links with the British Empire changed and dissolved.*'<sup>56</sup> [Emphasis added.]

In the Court's eyes, the claim to external sovereignty *offshore* is qualified by the public rights of navigation and fishing and the international right of innocent passage.<sup>57</sup> This non-Indigenous claim to sovereignty and sovereign rights over the territorial sea, seabed and beyond has also been evolutionary rather than static in character.<sup>58</sup> It has changed significantly and several times over the last few hundred years,<sup>59</sup> with the common law each time moving in step.<sup>60</sup> In the meantime, political and legal uncertainty has surrounded issues of offshore sovereignty. For example, for much of the twentieth century the States mistakenly asserted that they had some sovereign or proprietary rights in the territorial sea.<sup>61</sup>

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53 *Id* at 480.

54 *Id* at 385 (Gibbs J), 444 (Stephen J). In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 67 Brennan J, with Mason CJ and McHugh J agreeing, said that the 'sovereign powers' to grant interests in land, reserve it for particular purposes and extinguish native title, are vested in the State of Queensland.

55 For example, *Seas and Submerged Lands Case*, above n48 at 408 (Gibbs J), 443 (Stephen J), 469 (Mason J). Federal Court judge Robert French has said recently that we 'should not underestimate how large and for how long the imperial connection loomed in Australian constitutional jurisprudence': French, above n3 at 72. Brad Morse writes in a similar vein of his own country: 'Canada was formally confirmed as a semi-independent country in 1867, with Great Britain retaining ultimate control over all foreign affairs until the *Statute of Westminster 1931* and over amendments to Canada's Constitution until 1982.' Bradford W Morse, 'Indigenous-Settler Treaty Making in Canada' in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) at 59.

56 *Yarmirr*, above n48 at 58 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

57 *Id* at 56 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

58 *Id* at 103 (McHugh J): 'The sovereignty that the coastal state exercises over the territorial sea is also subject to the developing international law. As international law changes, so does the content of the sovereignty of the coastal state over its territorial sea.'

59 Including as recently as 1994 in Australia, as reflected by the ratification of the United Nations Convention on the Law of the Sea, which entered into force in Australia on 16 November 1994: 1994 Australia Treaty Series No 31; 21 ILM 1261.

60 See *Seas and Submerged Lands Case*, above n48 at 494 (Jacobs J) and *Yarmirr*, above n48 at 53–60 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

Despite the confusion, Australians continued to control the offshore territory and exploit its resources.

Members of the High Court have also developed the idea of popular sovereignty. The Australian Constitution is set out in s 9 of the *Commonwealth of Australia Constitution Act* 1900, an Act of the British Parliament. When enacted, the source of the Constitution's status as higher law was thought to derive from the British Parliament and not from the Australian people. In other words, the instrument was effective because of its enactment in the United Kingdom, not because of its acceptance by the Australian people at the referendums held between 1898 and 1900.<sup>62</sup> Over time, understandings of the Australian Constitution have changed, in part because of the evolution of Australian independence.<sup>63</sup>

Today, many see the Constitution as deriving its efficacy and legitimacy from the Australian people. The idea of popular sovereignty is supported by s 128 of the Constitution, which provides for amendment of the Constitution by the Australian people voting at a referendum initiated by the federal Parliament.<sup>64</sup>

In *Bisticic v Rokov*<sup>65</sup> Murphy J stated that: 'The original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people.'<sup>66</sup> His approach anticipated later judicial opinion, and the idea of popular sovereignty has since gained wider acceptance among the judges of the High Court. Mason CJ, for example, stated in *Australian Capital Television Pty Ltd v Commonwealth*<sup>67</sup> that the *Australia Act* 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'. Similarly, Deane J argued in *Theophanous v Herald & Weekly Times Ltd*<sup>68</sup> that the present legitimacy of the Constitution 'lies exclusively in the original adoption (by referendums) and subsequent maintenance (by acquiescence) of its provisions by the people'.<sup>69</sup> Or, as McHugh J stated in *McGinty v Western Australia*,<sup>70</sup> 'Since the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical

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61 *Yarmirr*, above n48 at 56–57 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

62 Owen Dixon, 'The Law and the Constitution' (1935) 51 *LQR* 590 at 597 ('It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.').

63 See the *Statute of Westminster 1931* (UK) (as applied in Australia by the *Statute of Westminster Adoption Act 1942* (Cth)) and the *Australia Acts* of 1986. See generally Geoff Lindell, 'Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Fed LR* 29.

64 Under s 128 constitutional change cannot be initiated by popular will as such a power rests exclusively with the Commonwealth Parliament. See *McGinty v Western Australia* (1996) 186 CLR 140 at 274–275 (Gummow J).

65 (1976) 135 CLR 552.

66 *Id* at 566.

67 (1992) 177 CLR 106 at 138.

68 (1994) 182 CLR 104.

69 *Id* at 171.

70 Above n64 at 230.

difficulties, the political and legal sovereignty of Australia now resides in the people of Australia.’

The consequences of recognising that ultimate sovereignty in Australia lies with the people has yet to be explored by the High Court. For example, does the concept mean that popular sovereignty has co-existed alongside British sovereignty as different but, together, effective sources of ultimate authority?<sup>71</sup> It might be that the advent of judicial recognition of popular sovereignty is a largely symbolic development that has little effect on the Australian system of government or in the interpretation of the Constitution. After all, the idea of popular sovereignty merely grants legal recognition to what is in any event the political reality.

The High Court’s development of the concept of popular sovereignty does have implications for the related idea of Indigenous sovereignty. According to popular sovereignty Indigenous peoples, collectively and individually, are part of the constituting force of the Australian nation. The legitimacy of the nation’s sovereignty depends upon Indigenous people’s acceptance of the Constitution, as much as it does the acceptance by non-Indigenous people: ‘the Australian Aborigines were, at least as a matter of legal theory, included among the people who, ‘relying on the blessing of Almighty God’, agreed to unite in an indissoluble Commonwealth of Australia’.<sup>72</sup> But can popular sovereignty be plausibly argued as the basis to the Constitution without belatedly providing some means for securing that legitimisation from Indigenous peoples, as first peoples with legal systems and property rights which preceded the British assertion of sovereignty?<sup>73</sup> Perhaps this particular form of sovereignty — the concept of popular sovereignty — can also be seen as pluralistic rather than monolithic and indivisible.

This concept of popular sovereignty is relevant for another reason. Section 128 of the Constitution illustrates that Australia’s constitutional future rests in the hands of its people and their federal parliamentarians. It is possible to alter the Constitution by the process set out in s 128 to bring about a treaty, or even more profound changes to our public law system. Such changes might include the aspirations of Australia’s Indigenous peoples and might reflect and recognise their own expressions of sovereignty or inherent authority. Of course, this does not mean that such reform is easy to achieve.<sup>74</sup>

The High Court has also addressed the issue of Indigenous sovereignty more directly. In *Coe v Commonwealth*,<sup>75</sup> the appellants applied for leave to amend their statement of claim to assert that the Aboriginal people were a sovereign nation,

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71 French, above n3 at 73 relying on the proposition to that effect made by Professor Leslie Zines.

72 *Mabo v Queensland (No 2)*, above n54 at 106 (Deane and Gaudron JJ) invoking words from the preamble to the *Commonwealth of Australia Constitution Act 1900* (Cth).

73 Indigenous people appear to have played no meaningful role in the drafting of the Australian Constitution (Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia* (1994) at 6). This was reflected in s127 of the Constitution, which provided prior to its removal in 1967: ‘In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted’.



that Britain had wrongly asserted sovereignty over Australia and that Australia was acquired by conquest, not settlement. In response, Gibbs J found:

it is not possible to say ... that the aboriginal people of Australia are organized as a 'distinct political society separated from others,' or that they have been uniformly treated as a state ... They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.<sup>76</sup>

He further stated that 'there is no aboriginal nation, if by that expression is meant a people organized as a separate state or exercising any degree of sovereignty'.<sup>77</sup> In any event, Gibbs J held that the legal premise under which Australia was colonised is not justiciable because '[i]t is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest'.<sup>78</sup> Jacobs J agreed that 'disputing the validity of the Crown's proclamations of sovereignty and sovereign possession ... are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged'.<sup>79</sup> However (jointly dissenting with Murphy J on this point), he thought that the part of the statement of claim dealing with inherent rights to land was not based on a denial of Crown sovereignty and should be permitted to proceed. In the result, the Court by statutory majority<sup>80</sup> would not permit exploration beyond conceptions of the absolute sovereignty which it said rested with the Crown.<sup>81</sup>

Thirteen years later, in *Mabo v Queensland (No 2)*,<sup>82</sup> the High Court confirmed that the British acquisition of sovereignty could not be contested in domestic

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74 Of the 44 referendum proposals put to the Australian people over more than a century, only eight have been passed. For the results of the referendums, see Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) at 1303–1308. For the relevance of this history to the Australian treaty process, see George Williams, 'The Treaty Debate, Bills of Rights and the Republic: Strategies and Lessons for Reform' (2002) *5 Balayi: Culture, Law and Colonialism* 10.

75 *Coe v Commonwealth* (1979) 24 ALR 118.

76 *Id* at 129.

77 *Id* at 131.

78 *Id* at 129.

79 *Id* at 132.

80 The four member Court split 2:2 on the outcome. Applying s 23 of the *Judiciary Act 1903* (Cth), the decision of Mason J at first instance to dismiss the appellant's application for leave to amend his statement of claim was affirmed.

81 In *Coe v Commonwealth*, above n75 at 128–129, Gibbs J (with whom Aickin J agreed) noted that, in oral argument, the appellants argued for a subsidiary form of sovereignty based on American jurisprudence by asking the Court to recognise the Aboriginal people of Australia as a 'domestic dependent nation'. He rejected this, insisting that the circumstances were different in Australia and that Aboriginal people had 'no legislative, executive or judicial organs by which sovereignty might be exercised'.

82 Above n54.

courts. Several judges expressed reservations about Australia being characterised as ‘settled’ rather than conquered in light of historical facts.<sup>83</sup> However, despite exposing the fiction that underpins the settlement doctrine — ‘the hypothesis that there was no local law already in existence’<sup>84</sup> when the British arrived — the court left intact that theory for how Britain acquired authority over the Australian continent.<sup>85</sup> Therefore, the common law became the law of the new colony, adjusted as necessary for local circumstances.

In *Mabo (No 2)*, the majority did acknowledge some important propositions. They held that the courts do have jurisdiction to determine the *consequences* of the acquisition of sovereignty.<sup>86</sup> Secondly, the majority held that Crown sovereignty over a territory does not necessarily mean full Crown ownership of that territory.<sup>87</sup> Across the continent of Australia, the land rights of Indigenous peoples under their traditional systems of law survived the acquisition of British sovereignty. The Crown did, however, acquire a degree of sovereign power over land, specifically the right to create private interests in the land and extinguish them. This was expressed as the Crown’s ‘radical title’ to the land.<sup>88</sup> Finally, the Court said this recognition of existing Indigenous land rights ‘left room for the continued operation of some local laws or customs among the native people’.<sup>89</sup>

Although the Court in *Mabo (No 2)* said Crown sovereignty could not be challenged domestically (and the plaintiffs did not seek to do so), some important references were made to the notion of Indigenous sovereignty. For example, Brennan J noted a Select Committee report to the House of Commons in 1837 that the state of Australian Aborigines was ‘so entirely destitute... of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded’.<sup>90</sup> He also referred a number of times to the ‘change

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83 Id at 33, 38–39 (Brennan J, with Mason CJ & McHugh J agreeing), 78 (Deane and Gaudron JJ).

84 Id at 36 (Brennan J, with Mason CJ & McHugh J agreeing).

85 Gerry Simpson is one of several commentators who have questioned the logic of this juxtaposition: ‘The logic employed in *Western Sahara* [an International Court of Justice decision on *terra nullius*] permitted the High Court to declare that Australia was not *terra nullius* at the time of settlement, but thereby obliged the Court to reject that Australia had been occupied. In the absence of either a treaty (cession) or a determination that Australia was *terra nullius* (occupation), the only method of acquisition was conquest. The Court refused to consider this possibility and instead produced a new method of acquisition combining the symbolism of one (occupation) with the consequences of another (conquest).’ Gerry Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19 *MULR* 195 at 208.

86 *Mabo*, above n54 at 32 (Brennan J, with Mason CJ & McHugh J agreeing).

87 Id at 51 (Brennan J, with Mason CJ and McHugh J agreeing) referring to the ‘fallacy of equating sovereignty and beneficial ownership of land’.

88 Id at 48 (Brennan J, with Mason CJ and McHugh J agreeing). ‘The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*. To adopt the words of Brennan J in *Mabo (No 2)*, it explains *how* “[n]ative title to land survived the Crown’s acquisition of sovereignty” over a particular part of Australia.’ See *Yarmirr*, above n48 at 51 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

89 *Mabo*, above n54 at 79 (Deane and Gaudron JJ).

90 Id at 40.

in sovereignty'<sup>91</sup> that came with British colonisation, with the obvious implication that Indigenous sovereignty operated at least prior to 1788. Implication became express statement when Brennan J referred to 'fictions ... that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown'.<sup>92</sup>

Deane and Gaudron JJ described what others have referred to as Indigenous polities:

Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession. ...

Indeed, as a generalization, it is true to say that, where they existed, those established entitlements of the Australian Aboriginal tribes or clans in relation to traditional lands were no less clear, substantial and strong than were the interests of the Indian tribes and bands of North America, at least in relation to those parts of their traditional hunting grounds which remained uncultivated.<sup>93</sup>

*Mabo (No 2)* left the 'settlement' theory for the acquisition of Crown sovereignty undisturbed. But traditional law and custom — an additional source of law in Australia that does not derive from the Crown — was newly recognised as a coherent system, governing the inherent rights and interests of Indigenous people who are also citizens of the Commonwealth of Australia. Native title adjudication henceforth would become an 'examination of the way in which two radically different social and legal systems intersect'.<sup>94</sup>

In 1993, the plaintiffs in *Coe v Commonwealth (No 2)* launched a post-Mabo assertion of Indigenous sovereignty in the High Court. They argued that the Wiradjuri people are a sovereign nation in the external sense and, in the alternative, that they enjoy a subsidiary or internal form of sovereignty as a 'domestic

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91 Id at 57, 59, 63 (Brennan J, with Mason CJ & McHugh J agreeing). See also the reference to 'the change in sovereignty at settlement' by Gleeson CJ, Gaudron, Gummow & Hayne JJ in *Ward v Western Australia* (2002) 191 ALR 1 at 55 and below n210.

92 *Mabo*, above n54 at 58 (Brennan J, with Mason CJ & McHugh J agreeing).

93 Id at 99–100 (Deane and Gaudron JJ). For similar judicial observations in relation to 'sea country', see *Yarmirr*, above n48 at 142 (Kirby J). See also the dissenting judgment of Gaudron and Kirby JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 569.

94 *Yarmirr*, id at 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please'.<sup>95</sup> Mason CJ, who had struck out the earlier Wiradjuri sovereignty claim at first instance in the 1979 case of *Coe v Commonwealth*, again gave the argument short shrift. Sitting as a single judge, he acknowledged that the legal assumption of terra nullius (the notion of land belonging to no one) had been displaced in 1992 by the recognition of ongoing Indigenous rights to land, stating 'what was said in *Coe* must be read subject to *Mabo (No 2)*'.<sup>96</sup> Nonetheless, he went on:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo (No 2)* denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country. *Mabo (No 2)* recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown.<sup>97</sup>

He repeated similar arguments when a defendant to criminal charges in *Walker v New South Wales*<sup>98</sup> argued that the Crown's legal authority over Aboriginal people was heavily qualified:

There is nothing in the recent decision in *Mabo v Queensland (No 2)* to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent. Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, *Mabo (No 2)* rejected that suggestion....

English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo (No 2)* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.

In the 2001 decision of *Commonwealth v Yarmirr*,<sup>99</sup> a native title claim to the sea prompted different musings on the wider implications of native title recognition. McHugh J re-asserted the orthodox legal position when he said that the 'Aboriginal and Torres Strait Island peoples do not have any residual sovereignty over the territory of Australia or its territorial sea'.<sup>100</sup> In his separate

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95 *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110 at 113.

96 *Id* at 114.

97 *Id* at 115.

98 (1994) 182 CLR 45 at 48, 50.

99 Above n48 at 99.

judgment, Kirby J reflected on the proclamations and flag-planting activities of British officials, stating the 'very claims to sovereignty in the Crown, made respectively by Captains Cook and Phillip, over the land mass of a huge continent, had a similar metaphorical quality [to the native title claimants' assertion of exclusive rights over 'sea country'], excluding all other claims to sovereignty.'<sup>101</sup> These assertions of Crown sovereignty 'had undoubted legal consequences which our courts uphold'<sup>102</sup> he said. In passing, however, he noted that unlike English law, Australia's legal system has to 'adjust the universal conception of a single legal sovereignty to a new legal idea affording special recognition to the legal claims of indigenous peoples both because their claims relate to rights and interests that preceded settlement and because their recognition is essential to reverse previously uncompensated dispossession.'<sup>103</sup>

Most recently, in *Members of the Yorta Yorta Aboriginal Community v Victoria*,<sup>104</sup> the High Court again explored the consequences of Britain's assertion of sovereignty over the Australian continent for Indigenous legal systems and societies, and its own understandings of those legal systems and societies. The joint judgment of Gleeson CJ, Gummow and Hayne JJ acknowledged that native title rights and interests 'owed their origin to a normative system other than the legal system of the new sovereign power ... the body of norms or normative system that existed before sovereignty'.<sup>105</sup> They said that it 'is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener'.<sup>106</sup> They analysed the advent of the British as a 'change in sovereignty',<sup>107</sup> implicitly acknowledging the existence of a prior Indigenous sovereignty. They also noted the potential for cross-cultural differences in the concept of sovereignty: 'A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful.'<sup>108</sup>

For our purposes their most significant statement in *Yorta Yorta* concerned the ongoing operation of Indigenous legal systems after the acquisition of British sovereignty:

Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of

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100 Ibid.

101 Id at 136.

102 Ibid.

103 Id at 133.

104 Above n93.

105 Id at 550.

106 Id at 551.

107 Id at 550, 555.

108 Id at 551.

the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.<sup>109</sup>

The joint judgment recognised there may be some alterations and development in traditional law and custom after 1788, but insisted ‘what the assertion of sovereignty by the British Crown necessarily entailed was that *there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty*. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible.’ [Emphasis added.]<sup>110</sup> They reached this holding despite also requiring that an Indigenous legal system must have ‘a continuous existence and vitality’<sup>111</sup> since the assertion of British sovereignty, to give rise to the rights in land and waters recognised as ‘native title’. These three High Court judges seem to have determined that Indigenous sovereignty does not continue to exist in Australia. However, given their recognition that sovereignty is a fluid concept dependent on context, that (implicitly) Indigenous people were sovereign prior to colonisation, and that Indigenous legal systems continue to operate, it is arguable that their position on Indigenous sovereignty is contradictory at best.

This section has attempted to show the spectrum of approaches to Indigenous sovereignty in Australia. Within Indigenous communities, sovereignty has been invoked in different ways. However, a common theme seems to be that Indigenous people seek to re-negotiate their place within the Australian nation-state based on their inherent rights and their identity as the first peoples of this continent. While the Federal Government does not generally engage the language of Indigenous sovereignty, it does recognise the need to share responsibility with Indigenous people in the policy areas affecting them. High Court jurisprudence on Indigenous sovereignty does not seem to get us any closer to bridging the gap between the different approaches to Indigenous sovereignty. To provide greater context to these debates regarding sovereignty, we now turn to Canadian, American and New Zealand approaches to Indigenous sovereignty.

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109 Id at 552.

110 Ibid.

111 Id at 553.

#### 4. *Comparative Approaches to Indigenous Sovereignty*

##### A. *Canada*

In Canada, debate amongst Aboriginal people over the concept of 'sovereignty' takes place within a broader political and intellectual context, including developments over the last 35 years in Aboriginal rights, title to land, treaty rights and self-government.<sup>112</sup> Again we see a diversity of voices and some striking similarities to the range of views we briefly depicted earlier in relation to Australia's Indigenous peoples.

Taiaiake Alfred, for example, surveys recent history and concludes that in Canada 'more than any other country, indigenous peoples have sought to transcend the colonial myths and restore the original relationships'.<sup>113</sup> He acknowledges that sovereignty has its rhetorical advantages,<sup>114</sup> but is wary of restrictive interpretations of what it means. Alfred insists that, at least in its statist Western conception, it obscures the expression of 'indigenous concepts of political relations — rooted in notions of freedom, respect and autonomy'.<sup>115</sup> He says that the:

challenge for indigenous peoples in building appropriate post-colonial governing systems is to disconnect the notion of sovereignty from its western, legal roots and to transform it. It is all too often taken for granted that what indigenous peoples are seeking in recognition of their nationhood is at its core the same as that which countries like Canada and the United States possess now...Until 'sovereignty' as a concept shifts from the dominant 'state sovereignty' construct and comes to reflect more of the sense embodied in western notions such as personal sovereignty or popular sovereignty, it will remain problematic if integrated within indigenous political struggles.<sup>116</sup>

Dale Turner notes that many Aboriginal peoples 'have viewed the Eurocentric legal-political discourse' around sovereignty with scepticism,<sup>117</sup> although he urges Aboriginal intellectuals to engage with the discourse, quoting Native American author Robert Allen Warrior who said 'the struggle for sovereignty is not a struggle to be free from the influence of anything outside ourselves, but a

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112 The release of the Trudeau Government's White Paper on Aboriginal policy in 1969 is widely regarded as a catalyst for high profile Aboriginal initiatives in the courts and in the political sphere.

113 Taiaiake Alfred, *From Sovereignty to Freedom. Toward an Indigenous Political Discourse 2000*: <<http://www.taiaiake.com/pdf/sfp.pdf>> (29 June 2004).

114 'Using the sovereignty paradigm, indigenous people have made significant legal and political gains toward reconstructing the autonomous aspects of their individual, collective and social identities.' Id at 8.

115 Id at 1.

116 Id at 11–12.

117 Dale A Turner, *'This is not a Peace Pipe': Towards An Understanding of Aboriginal Sovereignty* (D Phil Thesis, McGill University, 1997) at 189: <<http://www.collections.canada.ca/thesescanada/>> (30 June 2004).

process of asserting the power we possess as communities and individuals to make decisions that affect our lives'.<sup>118</sup>

The Royal Commission on Aboriginal Peoples, which reported to the Canadian government in November 1996, heard from many Aboriginal people on the issue of sovereignty. 'Sovereignty is difficult to define because it is intangible, it cannot be seen or touched. It is very much inherent, an awesome power, a strong feeling or the belief of a people. What can be seen, however, is the exercise of Aboriginal powers' said one First Nation leader.<sup>119</sup> Another said that as 'an inherent human quality, sovereignty finds its natural expression in the principle of self-determination. Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action.'<sup>120</sup> The Royal Commission itself said that there was a spiritual quality to many Indigenous submissions it received on the concept:

Sovereignty, in the words of one brief, is 'the original freedom conferred to our people by the Creator rather than a temporal power.' As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the interconnectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking.<sup>121</sup>

But the Royal Commission report noted a material basis to sovereignty claims as well:

While Aboriginal sovereignty is inherent, it also has an historical basis in the extensive diplomatic relations between Aboriginal peoples and European powers from the early period of contact onward. In the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign peoples capable of conducting international relations.<sup>122</sup>

It found that 'while Aboriginal people use a variety of terms to describe their fundamental rights, they are unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples. This right entitles them to determine their own governmental arrangements and the character of their relations with other people in Canada.'<sup>123</sup>

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118 Robert Warrior, *Tribal Secrets: Recovering Indian Intellectual Traditions* (1993) at 124; cited in id at 190.

119 Roger Jones, Councillor and Elder of the Shawanaga First Nation, quoted in *Report of the Royal Commission on Aboriginal Peoples*: <[http://www.ainc-inac.gc.ca/ch/rcap/sg/ch3a\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/ch3a_e.pdf)> Volume 2 — Restructuring the Relationship, Part 1, Chapter 3, Section 1.1 (29 June 2004).

120 René Tenasco, Councillor of the Kitigan Zibi Anishinabeg Council, quoted in *ibid*.

121 *Ibid*.

122 *Ibid*.



In the end the Royal Commission, while respecting different views on sovereignty, was sceptical that agreement on its meaning could be reached and was inclined to set it to one side when resolving the practical issues of co-existence:

In extensive presentations to the Commission, treaty nation leaders said their nations were sovereign at the time of contact and continue to be so. Such positions are often perceived as a threat to Canada as we know it. The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations.

The Commission concludes that any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.<sup>124</sup>

Moving from Indigenous perspectives to official ones, we must begin by noting that Canada, like Australia, possesses a written Constitution that was originally enacted by the United Kingdom Parliament.<sup>125</sup> Many of its legal traditions, including a Westminster system of government, also derive from that historical connection. However, unlike the Australian Constitution, the 1982 amendments to the Canadian Constitution provide some protection for the interests of Indigenous peoples.<sup>126</sup> Section 35(1) of the *Constitution Act 1982* states that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. The Aboriginal people of Canada are defined in s 35(2) to include the 'Indian, Inuit, and Métis peoples of Canada'.

The *Federal Policy Guide: Aboriginal Self-Government*<sup>127</sup> recognises the right of self-government as a protected right under s35 of the Constitution:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

However, the Federal Policy states that this right does not confer sovereignty upon Aboriginal peoples in the external, international law sense. The Government

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123 Ibid.

124 *Report of the Royal Commission on Aboriginal Peoples*: <[http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2_e.pdf)> Volume 2 — Restructuring the Relationship, Part 1, Chapter 2, Section 1.3 (29 June 2004).

125 The original *British North America Act 1867* (Imp) was re-enacted as the *Constitution Act 1867*. It sits alongside the *Constitution Act 1982*, which includes in s35 protection of the rights of Canada's aboriginal peoples.

126 The Royal Proclamation of 1763 provided an earlier legal basis for recognition of Aboriginal people and their rights, with its acknowledgment of Indian 'Nations' and their lands.

127 <[www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html)> 4: (1 July 2003).

does not recognise the existence of independent Aboriginal nation-states. Instead, Aboriginal people remain subject to Canadian laws, although Aboriginal and Canadian laws will co-exist.<sup>128</sup> This idea of the overarching sovereignty of the state, within which it is possible to recognise Aboriginal self-government, is reflected most powerfully in the Nisga'a Final Agreement of 1998. The first modern treaty in British Columbia recognised the legislative, executive and judicial power of the Nisga'a Nation and the responsibility of the Nisga'a Lisims Government for intergovernmental relations with the provincial and federal governments. An interesting comparison can be found in the creation in 1999 of the new self-governing Territory of Nunavut, where 85% of the population is Inuit, but a public model of government rather than exclusively Indigenous self-government was adopted by agreement.<sup>129</sup>

As stated in the Federal Policy, the Government's preference is to negotiate rather than litigate self-government issues. Treaties were entered into from when the British arrived in North America, and since the 1970s Canada has had a modern-day treaty process for resolving issues of land, resources, service delivery and self-government.<sup>130</sup> *Gathering Strength — Canada's Aboriginal Action Plan*, the 1998 response to the Royal Commission on Aboriginal Peoples by the Canadian Government, acknowledged the starting place for such negotiations as recognition by government of its role in past injustices. For example, the document states:

The Government of Canada acknowledges the role it played in the development and administration of [residential] schools ... To those of you who suffered this tragedy at residential schools, we are deeply sorry ... The Government of Canada recognizes that policies that sought to assimilate Aboriginal people ... were not the way to build a strong country.<sup>131</sup>

Matters subject to negotiation include adoption and child welfare, education, health, social services, policing, natural resources management and housing.

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128 *Id* at 8.

129 The commitment to establish the territory of Nunavut was part of the Nunavut Land Claim Agreement signed in 1993. This 'public model of governance rather than an Inuit-exclusive government structure...does not benefit from protection under section 35' of the Canadian Constitution. John J Borrows and Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (2<sup>nd</sup> ed, 2003) at 710.

130 Brad Morse has written that while 'Canada went through a period of slumber in the mid-20<sup>th</sup> Century in which it thought that treaties were only of historic interest with no place in the modern world, First Nations used the courts, the media and the political process to remind everyone of the fallacy of those presumptions...[E]xisting Indian-Crown treaties are very much part of 21<sup>st</sup> Century Canada with their numbers growing and their scope expanding through dozens and dozens of negotiation tables in all parts of our country.' Bradford W Morse, 'Treaty Relationships, Fiduciary Obligations and Crown Negotiators', paper presented at the Ottawa Bar Association's Annual Institute of 2003, February 2003 at 7. For an overview of what he says are the four distinct eras of treaty-making in Canada, see Morse, above n55 at 53–64.

131 Indian and Northern Affairs Canada, *Gathering Strength — Canada's Aboriginal Action Plan*: <[www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html)> 3 (1 July 2003).

In 2002, the Federal Government introduced Bill C-7, the proposed *First Nations Governance Act*, as part of its policy on self-government. Among other things, the Bill would have created new governance structures for First Nations. The Government identified several goals of the new Bill: to strengthen the relationship between First Nations governments and their citizens; to give First Nations people a stronger voice in the way their communities are run; to make it easier for First Nations governments to respond to the needs of their citizens; to provide tools of good governance that can be adapted to individual bands' customs and traditions; to make it easier for First Nations to move towards self-government by building capacity; to reduce the power of the Minister and the Federal Government over First Nations communities; and to support First Nations in building stronger, healthier communities.<sup>132</sup>

Despite the claim that Bill C-7 would be a bridge to self-government,<sup>133</sup> many Aboriginal groups argued that the Bill infringed the inherent right to self-government. According to the Assembly of First Nations (AFN), which identifies as the national representative organisation for over 630 First Nations communities in Canada:

The Government of Canada has spent tens of millions of dollars on its First Nations Governance Act ... process, a process that will not build one more house or stop one more suicide, nor will it assist First Nations in realizing their long-standing goal of creating healthy, viable and self-governing communities based on the recognition of Aboriginal and Treaty rights. In fact, by ... dictating how First Nations must administer to the business of their communities, it infringes on Aboriginal rights as recognized in section 35 of Canada's *Constitution Act*, 1982.<sup>134</sup>

On 21 January 2004, the newly appointed Minister of Indian Affairs and Northern Development, the Honourable Andy Mitchell, announced he would not reinstate the Bill back to Parliament. The Minister indicated a desire to 'work with First Nations leaders and others on effective and practical ways to apply the principles of good governance into First Nations communities.'<sup>135</sup> AFN

132 Minister of Indian Affairs and Northern Development, *A Guide to Understanding Bill C-7, the First Nations Governance Act* (July 2003): <[www.fng-gpn.gc.ca/PDF\\_files/crarevju\\_e.pdf](http://www.fng-gpn.gc.ca/PDF_files/crarevju_e.pdf)> 3: (17 December 2003). According to Robert Nault, then Minister of Indian Affairs and Northern Development: 'The objectives of this new legislation are to put in place provisions that reflect current realities, that would serve as an interim step towards self-government and put the power on reserves back where it belongs — in the hands of the people' ('Statement by Robert D Nault Minister of Indian Affairs and Northern Development' 19 March 2003: <[www.fng-gpn.gc.ca/NR\\_FctFctnM19\\_e.html](http://www.fng-gpn.gc.ca/NR_FctFctnM19_e.html)> (2 July 2003)).

133 Robert D Nault, Minister of Indian Affairs and Northern Development, *News Release Proposed First Nations Governance Act Moves Forward* 28 May 2003: <[www.ainc-inac.gc.ca/nr/prs/m-a2003/2-02324\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/m-a2003/2-02324_e.html)> (12 June 2003).

134 Assembly of First Nations, *The Assembly of First Nations' Position on Bill C-7: The First Nations Governance Act*: <[www.afn.ca/Legislation%20Info/The%20Assembly%20of%20First%20Nations%E2%80%99%20Position%20on%20Bill%20C-7.htm](http://www.afn.ca/Legislation%20Info/The%20Assembly%20of%20First%20Nations%E2%80%99%20Position%20on%20Bill%20C-7.htm)> (12 June 2003).

135 <[http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02462\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02462_e.html)> (16 February 2004).

recognised some positive aspects to the government's legislative agenda. However, they remain concerned about the future of Aboriginal governance as the Minister indicated an intention to proceed with Bill C-19, the proposed *Fiscal and Statistical Management Act*. This Bill has been rejected by AFN because 'A legislative package without options and without the opportunity for a full national dialogue make this legislation unsupportable for the majority of First Nations and the AFN.'<sup>136</sup> At the time of writing the Liberal Party led by incumbent Prime Minister Paul Martin continues in power after national elections, but as a minority government. The implications of this for Aboriginal governance are unclear.

The courts in Canada have been called upon to interpret the legal significance of both historical and modern treaties with Aboriginal peoples. They have treated them as *sui generis* agreements, and have adopted reconciliation as an interpretive theme. For example, the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverley McLachlin, recently told an Australian audience that 'Canadian jurisprudence on Aboriginal rights has emphasised the twin tasks of recognition and reconciliation. The goal of reconciliation requires us to abandon an all-or-nothing perspective, and to seek principled compromises based on a shared will to live together in a modern, multicultural society.' A key concern of Canadian jurisprudence in this area, she said, is 'the idea of reconciling Crown sovereignty with the history of prior occupation by indigenous peoples.'<sup>137</sup>

The Canadian courts have also examined Aboriginal peoples' right to self-government. While the Supreme Court of Canada is yet to make a final determination whether this right falls under s 35(1) of the Constitution, it has begun to develop a legal framework for the right. In 1990 the Supreme Court said that in early colonial dealings Britain and France recognised Aboriginal peoples as independent nations.<sup>138</sup> It refrained, however, from clarifying the effect of European colonisation on their status under the common law. In 1996 in *R v Pamajewon*,<sup>139</sup> the Court assumed, without deciding, that if s 35 includes the right

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136 Statement by National Chief Fontaine: <[http://www.afn.ca/Assembly\\_of\\_First\\_Nations.htm](http://www.afn.ca/Assembly_of_First_Nations.htm)> (16 February 2004).

137 The Rt Hon Beverley McLachlin, 'Reconciling Sovereignty: Canada and Australia's Dialogue on Aboriginal Rights' delivered at the High Court Centenary Conference, Canberra, 10 October 2003 at 2.

138 *R v Sioui* [1990] 1 SCR 1025. Kent McNeil has noted that in *Simon v The Queen* [1985] 2 SCR 387 at 404 the Court denied international status to Indian treaties but that in the *Sioui* decision it did say 'that, until 1760 at least when the treaty in question was made with the Hurons of Lorette, Britain and France maintained relations with the Indian nations "very close to those maintained between sovereign nations." Nonetheless, the Supreme Court in *Sioui* did not question that the British Crown's sovereignty over that part of Canada was derived from the French, regardless of Indian treaties.' Kent McNeil, 'The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments' (1994) 7 *Western Legal History* 113 at 115 n7. McNeil points out that many Indigenous people have found no difficulty seeing these treaties as 'entailing peer relations between equal sovereigns' (at 115). See, for example, Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences' (1989-1990) *Canadian Human Rights Yearbook* 3 at 36: 'There is no compelling reason, according to international law, not to view treaties between Aboriginal peoples and the Crown as treaties between sovereigns, that is, as *international* treaties.'

to self-government, the *Van der Peet* test applies to determine that right. In *R v Van der Peet*,<sup>140</sup> the Court held that 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.<sup>141</sup> In 1997, the Court again briefly discussed the question of self-government in *Delgamuukw v British Columbia*,<sup>142</sup> but sent the issue back for re-consideration due to errors made by the judge during the trial. Despite the limited nature of the findings in *Delgamuukw v British Columbia* and *R v Pamajewon*, Patrick Macklem has argued that these cases suggest that:

the Constitution of Canada recognizes and affirms an inherent Aboriginal right of self-government — specifically, a right to make laws in relation to customs, practices and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title.<sup>143</sup>

Macklem's conclusion is supported by the British Columbia Supreme Court's 2000 decision in *Campbell v British Columbia (Attorney General)*.<sup>144</sup> In that case, the Court was asked to review the constitutional validity of self-government provisions in the Nisga'a Final Agreement, a modern treaty signed in 1998 by the Nisga'a people, the British Columbia government and the Federal government. The Court held that self-government is a constitutionally protected right under s 35, stating that 'the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those groups were eliminated'.<sup>145</sup> The Court also found that 'after the assertion of sovereignty by the British Crown ... the right of aboriginal people to govern themselves was diminished, it was not extinguished',<sup>146</sup> and that 'a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867'.<sup>147</sup>

In *Campbell*, the Court did not view the right of self-government as an absolute right. The Court made it clear that the right exists today within a framework of the Crown's sovereignty, including the Canadian Constitution. Within that framework, the Nisga'a government's legislative power and authority is limited to specific

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139 *R v Jones (sub nom R v Pamajewon)* [1996] 2 SCR 821 at [24].

140 [1996] 2 SCR 507 at [46] quoted in *R v Jones*, id at [25].

141 The Court in *R v Jones* (id at [27]) provided additional guidance by stating that 'Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right'.

142 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

143 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001) 174. Compare *Mitchell v MNR* [2001] 1 SCR 911 (Major and Binnie JJ).

144 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

145 Id at [124].

146 Id at [179].

147 Id at [81].

areas. Moreover: 'In circumstances where exercise of an aboriginal right to self-government is inconsistent with the overall good of the polity, Parliament may intervene subject only to its ability to justify such interference in a manner consistent with the honour of the Crown'.<sup>148</sup>

By developing this public law framework, the British Columbia Supreme Court indicated at least some judicial acceptance of the place of Indigenous self-government within the Canadian nation. The Court worked from the notion that, although the British Crown successfully asserted sovereignty, this does not exclude self-government by the Aboriginal peoples of Canada. Thus, the treaty between the Nisga'a, the provincial government and the federal government confirmed that power and authority resides in the Nisga'a people, even though there was no recognition by the Court of a new and independent Nisga'a nation-state.

### **B. United States of America**

At different times over almost two centuries, federal governments and the United States Supreme Court have in turn eroded and re-asserted the importance of tribal sovereignty. According to the Bureau of Indian Affairs in President George W Bush's current Administration, there are '562 federally recognized American Indian Tribes and Alaska Native villages in the United States. Each possesses inherent governmental authority deriving from its original sovereignty'.<sup>149</sup> Treaties with Indian (Native American) nations were commonplace in American history both before and after independence from the British.<sup>150</sup> The often brutal treatment of Indian nations and the repeated violation of treaty provisions that occurred across the country are well documented, but nonetheless the United States has a long history of Indian tribes maintaining a significant level of power and authority over their own communities. Like Canada, the United States has given some effect to Indigenous peoples' right to self-government. However, the United States has also gone further, at least in its use of language, in expressly recognising the sovereignty of the Indian tribes. For example, the Department of the Interior's *Fiscal Year 1996 Interior Accountability Report* states:

Indian self-determination is the cornerstone of the Federal relationship with sovereign tribal governments. Self-determination contracts, grants, cooperative agreements and self-governance compact agreements between the Federal government and Indian tribes and tribal organizations allow the tribes, rather than Federal employees, to operate the Federal programs.<sup>151</sup>

148 Id at [121]. See John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1999) 37 *Osgoode Hall LJ* 537 at 574.

149 Department of Interior, *Fiscal Year 2003 Annual Report on Performance and Accountability* (2003) at 43: <[http://www.doi.gov/pfm/par2003/par03\\_mda\\_goal5.pdf](http://www.doi.gov/pfm/par2003/par03_mda_goal5.pdf)> (29 June 2004).

150 On the difference between the North American and Australian approaches see Morse, above n55 at 50–51: 'One of the critical historical, political and legal elements that distinguishes the North American experience from that of Australia is that there was a recognition from the early points of contact that pre-existing societies were completely sovereign'.

More recently, the Bureau of Indian Affairs released its *Government-to-Government Consultation Policy*<sup>152</sup> pursuant to President Bill Clinton's Executive Order 13175 on 'Consultation and Coordination With Indian Tribal Governments'.<sup>153</sup> That Policy confirms the commitment to dealing with Indian tribes on a government-to-government basis. It recognises that this government-to-government 'relationship is not new, but has strong roots that took hold with the very earliest contact between the American Indians and the first European settlers'.<sup>154</sup> One of the Policy's guiding principles is that the government 'recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination'.<sup>155</sup> The Policy also requires government to consult Indian tribes before taking any actions that have 'substantial direct effects on one or more Indian tribes',<sup>156</sup> demonstrating the considerable political and bureaucratic recognition of Indigenous sovereignty and self-government in the United States.<sup>157</sup>

Analysts who focus on social and economic development on Native American lands, such as the influential Harvard Project on American Indian Economic Development, say that tribal self-rule or 'sovereignty' is a critical ingredient to successful development of that kind, and that sovereignty has legal, political and cultural dimensions. Kalt and Singer, for example, say of their study on the law and economics of Indian self-rule:

What emerges is a picture in which tribes do exercise substantial, albeit limited, sovereignty. This sovereignty is not a set of 'special' rights. Rather, its roots lie in the fact that Indian nations pre-exist the United States and their sovereignty has been diminished but not terminated. Tribal sovereignty is recognized and protected by the US Constitution, legal precedent, and treaties, as well as applicable principles of human rights.

Tribal sovereignty is not just a legal fact; it is the life-blood of Indian nations. This is obviously true in the political sense: Without self-rule, tribes do not exist as distinct political entities within the US federal system. Moreover, economically and culturally, sovereignty is a key lever that provides American Indian

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151 Department of Interior, *Fiscal Year 1996 Interior Accountability Report* at 50: <[www.doi.gov/pfm/acct96/entire.pdf](http://www.doi.gov/pfm/acct96/entire.pdf)> (8 July 2003). See also Department of Interior, *Fiscal Year 2003 Annual Report on Performance and Accountability* (2003) at 43, 200: <<http://www.doi.gov/pfm/par2003>> (29 June 2004).

152 Bureau of Indian Affairs, *Government-to-Government Consultation Policy*: <[www.doi.gov/oait/docs/g2gpolicy.htm](http://www.doi.gov/oait/docs/g2gpolicy.htm)> (8 July 2003).

153 Federal Register, Volume 65, Number 218, 9 November 2000.

154 Bureau of Indian Affairs, *Government-to-Government Consultation Policy* at 1: <[www.doi.gov/oait/docs/g2gpolicy.htm](http://www.doi.gov/oait/docs/g2gpolicy.htm)> (8 July 2003).

155 Id at 3.

156 Id at 2. Another indication of the Federal Government's support of Indian sovereignty is the Office of Self-Governance, which administers Tribal Self-Governance in relation to Bureau of Indian Affairs programs. See Office of Self-Governance, <[www.doi.gov/oait/osgwww](http://www.doi.gov/oait/osgwww)> (8 July 2003).

157 See Joseph William Singer, 'Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty' (2003) 37 *New Eng LR* 641 at 648.

communities with institutions and practices that can protect and promote their citizens' interests and wellbeing. Without that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run.<sup>158</sup>

The United States Supreme Court has recognised Indigenous sovereignty since a trilogy of cases in the early 1800s.<sup>159</sup> In *Johnson v M'Intosh*<sup>160</sup> in 1823, Marshall CJ acknowledged that Indigenous people were sovereign prior to the assertion of British sovereignty. Marshall CJ held that the British assertion of sovereignty diminished the Indian tribes' sovereignty, in part because their power to alienate their land was limited to purchases by the British Crown.<sup>161</sup> However, the British assertion of sovereignty did not extinguish Indian sovereignty because the tribes 'were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion'.<sup>162</sup> In *Cherokee Nation v Georgia*<sup>163</sup> in 1831, Marshall CJ found that the signing of treaties was a clear recognition of the Cherokee's statehood.<sup>164</sup> Since in certain respects the Indian tribes were dependent upon the federal government, he also stated that 'they may, more correctly, perhaps, be denominated domestic dependent nations'.<sup>165</sup> In a third decision in 1832, *Worcester v Georgia*,<sup>166</sup> Marshall CJ strongly reiterated that prior to contact the Indian tribes were sovereign nations. He stated: 'America ... was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws'.<sup>167</sup> Looking to international law, he found that 'the settled doctrine of the law of nations is that a ... weak State, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State'.<sup>168</sup>

Chief Justice Marshall's position on Indigenous sovereignty has been followed in subsequent decisions of the United States Supreme Court, even those which have otherwise eroded the constitutional position of Native American peoples. In 1886 in *United States v Kagama*,<sup>169</sup> Miller J recognised that the Indian tribes were dependent upon the United States: 'From their very weakness and helplessness, so

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158 Joseph P Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (2003): <<http://www.ksg.harvard.edu/hpaied/docs/Kalt-Singer%20Final%2001-04.pdf>> (29 June 2004).

159 The Rehnquist Court has, however, been extensively criticised by Federal Indian scholars for its interpretative emasculation of Indian sovereignty. See Robert N Clinton, 'There is no Federal Supremacy Clause for Indian Tribes' (2002) 34 *Ariz St LJ* 113.

160 *Johnson v M'Intosh*, 21 US 543 (1823).

161 *Id* at 586.

162 *Id* at 574.

163 *The Cherokee Nation v Georgia*, 30 US 1 (1831).

164 *Id* at 16.

165 *Id* at 17.

166 *Worcester v Georgia*, 31 US 515 (1832).

167 *Id* at 542–543.

168 *Id* at 560–561.

169 *United States v Kagama* 118 US 375 (1886).



largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection'.<sup>170</sup> However, he still found that the Indian tribes 'were, and always have been, regarded as ... a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided'.<sup>171</sup>

In 1978 in *United States v Wheeler*,<sup>172</sup> writing for the Court, Stewart J outlined the regulatory powers of Indigenous people and accepted that 'The powers of Indian tribes are in general, "inherent powers of a limited sovereignty which has never been extinguished"'.<sup>173</sup> He specified that, unless limited by a treaty or statute, the Indian tribes have the power 'to determine tribe membership ... to regulate domestic relations among tribe members ... and to prescribe rules for the inheritance of property'.<sup>174</sup> However, he did treat Indian sovereignty as diminished through '[t]heir incorporation within the territory of the United States, and their acceptance of its protection ... By specific treaty provisions they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others'.<sup>175</sup> Hence, the sovereignty of Indian tribes exists at 'the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers'.<sup>176</sup> Despite the vulnerability of Indian sovereignty to extinguishment, Stewart J found that Indian sovereignty is an inherent right: 'That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power ... [T]ribal self-government is a matter of retained sovereignty rather than congressional grant'.<sup>177</sup> During the past quarter century the Rehnquist Court has 'created a number of new federal common law limitations on tribal sovereignty',<sup>178</sup> but the concept itself remains part of the American legal landscape.

In summary, even though the Indian tribes have no specific constitutional protection of their right to self-government,<sup>179</sup> there are similarities between the Canadian and American positions. While the power and authority of Indigenous people in both countries are not identical, governments and courts in the two nations recognise Indigenous peoples' right to self-government. Significantly, both nations recognise this right as an inherent right not extinguished by the assertion of British sovereignty.

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170 Id at 384.

171 Id at 381–382.

172 *United States v Wheeler* 435 US 313 (1978).

173 Id at 322.

174 Ibid.

175 Id at 323.

176 Ibid.

177 Id at 328.

178 Catherine T Struve, 'Tribal Immunity and Tribal Courts' (2004) 36 *Ariz St LJ* 137 at 146. See also Singer, above n157.

179 The United States Constitution is not, however, silent on the Indian tribes. Article 8, for example, confers power upon Congress, among other things, 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'.

### C. *New Zealand*

The New Zealand constitutional system has some important similarities as well as some significant differences from Australia. Originally a British colony, New Zealand has a Westminster system of parliamentary government in which most of the institutional ties to Britain were severed by 1986. However, unlike the federal systems with written constitutions in Australia, Canada and the United States, New Zealand is a unitary system and its constitution is largely unwritten. Its unicameral legislature enjoys considerably greater power because it is restrained neither by federalism nor by judicial enforcement of a constitutional text. This system also means that New Zealand can produce very strong executive governments, although the 1993 adoption of mixed-member proportional representation can now temper executive dominance.<sup>180</sup>

The legal relationship between the Crown and Indigenous people in New Zealand provides an interesting comparison with Australia. New Zealanders never laboured under the fiction of terra nullius. After some debate in the 1830s, the Colonial Office instructed the would-be first Governor of New Zealand to enter into a treaty with the Maori. The Treaty of Waitangi, signed by over 500 chiefs over an eight-month period from February to September 1840, deals with fundamental issues of government authority, property rights and the application of British law. Subsequently, New Zealand built a system of land titling based on the assumption of original Maori ownership, while the Australian system was premised on the non-existence of Indigenous rights to land.

Yet the contrast between the nations is not as stark as this difference might suggest. While New Zealand was never presumed to be terra nullius, early judicial thinking revealed the same cross-cultural inability to recognise a different but valid form of governance and society. In the 1879 decision in *Wi Parata v The Bishop of Wellington*,<sup>181</sup> Prendergast CJ found the Treaty of Waitangi to be a legal nullity because ‘no body politic existed capable of making a cession of sovereignty’. In official circles, that conclusion consigned the Treaty to near-irrelevance for almost a century. In addition, it was eleven years after the Australian High Court decision in *Mabo (No 2)* that New Zealand’s highest domestic court unequivocally affirmed the basic principle that jurisdiction and property rights are separate issues and that, at common law, customary property rights survived the Crown’s assertion of sovereignty.<sup>182</sup>

The Treaty of Waitangi warrants closer attention. There are two versions of the Treaty, one in English and one in Maori, both of which contain three sections. Both versions are official, recognised statements of the Treaty’s terms. A third version, which translates the Maori text back into English, is also treated with authority and

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180 See Matthew Palmer & Geoffrey Palmer, *Bridled Power: New Zealand’s Constitution and Government* (4th ed, 2004) 22-38.

181 (1877) 3 NZ Jur (NS) SC 72.

182 *Ngati Apa v Attorney-General (NZ)* (NZ Court of Appeal, Elias CJ, Gault P, Keith, Tipping and Anderson JJ, CA173/01, 19 June 2003).

is 'commonly used in the Courts'.<sup>183</sup> That third version illustrates how, from the time of its signing, different views have existed on what the Treaty says about sovereignty. The English version provides that Maori yielded to the Crown absolute sovereignty without reservation, with the Maori guaranteed undisturbed possession of their lands and estates, forests, fisheries and other properties (subject to the sole right of purchase by the Crown). On the other hand, the Maori text, translated back into English, grants the Crown the power of government (*kawanatanga*) in the context of Crown protection for the unqualified exercise of Maori chieftainship (*rangatiratanga*) over their lands, villages and all their treasures (subject to the Crown's sole right of purchase). Given this discrepancy, debates exist regarding whether the Maori chiefs handed over absolute sovereignty, agreed to share it, deliberately withheld it, or granted some lesser degree of authority while holding onto the power of self-government. This debate about what the treaty actually says appears likely to continue.<sup>184</sup>

New Zealand governments have tended not to refer directly to the sovereignty of Indigenous people. While the current Government of Prime Minister Helen Clark has stated its commitment to 'upholding and promoting the role of the Treaty in contemporary New Zealand',<sup>185</sup> the government uses the language of self-determination. Te Puni Kokiri (Ministry of Maori Development) is the branch of government with an exclusively Maori focus. Its current Strategic Plan states that 'in order to make self-determination a reality, cultural development must underpin all other forms of development .... This work concentrates on helping to build capacity of Maori groups and individuals in order for them to become economically and socially independent'.<sup>186</sup> Despite no mention of Maori sovereignty, the plan indicates the government's desire for Maori to have greater power and control over the matters that affect their lives. Maori lawyer and academic Claire Charters has said that the government's refusal to negotiate over

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183 Id at [139] (Keith and Anderson JJ).

184 Joe Williams, 'Not Ceded but Redistributed' in William Renwick (ed), *Sovereignty and Indigenous Rights. The Treaty of Waitangi in International Contexts* (1991) at 190. See also Claire Charters, 'Report on the Treaty of Waitangi 1840 Between Maori and the British Crown', Background Paper for Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, Geneva, 15–17 December 2003 at 6: <<http://www.unhchr.ch/indigenous/charters-BP15.doc>> (29 June 2004). Martinez notes that in Canada Indigenous parties to the so-called numbered treaties, officially regarded as 'land surrenders', insist rather that these agreements fall into the same category as earlier treaties of peace and friendship and 'that they did not cede either their territories or their original juridical status as sovereigns'. Miguel Alfonso Martinez, 'Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations', Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999 at [122]: <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>> (30 June 2004).

185 Te Puni Kokiri (Ministry of Maori Development), *Statement of Intent* (2003) at 15: <[www.tpk.govt.nz/publications/soi/eng\\_july03.pdf](http://www.tpk.govt.nz/publications/soi/eng_july03.pdf)> (23 December 2003).

186 Te Puni Kokiri (Ministry of Maori Development), *Strategic Plan 2001/02-2003/04* at 13: <[www.tpk.govt.nz/publications/docs/SP\\_2001-04eng.pdf](http://www.tpk.govt.nz/publications/docs/SP_2001-04eng.pdf)> (9 July 2003).

self-government in Treaty settlements has, however, diminished the political value of the process from the Maori point of view.<sup>187</sup>

The New Zealand courts have engaged more directly with the question of sovereignty. The orthodox perspective, based upon the notion of parliamentary sovereignty, was provided by Somers J in *New Zealand Maori Council v Attorney-General*.<sup>188</sup>

[T]he question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the 'full sovereignty of the Queen over the whole of the North Island' by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. ... The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.

In 1990 in *Kaihau v Inland Revenue Department*,<sup>189</sup> Hillyer J followed this approach in finding: 'In my view it is abundantly clear that the New Zealand Parliament has the right to enact legislation applying to all persons in New Zealand, whether they had ancestors who lived here in 1840 or whether they have only recently arrived in New Zealand'. Further debates on the legal and constitutional significance of the Treaty continue to occur. In 2003 in *Ngati Apa v Attorney-General (NZ)*,<sup>190</sup> several of the nation's most senior judges adopted the view that the Treaty of Waitangi was indeed about the 'cession of sovereignty'.<sup>191</sup>

The nineteenth century position that the Treaty is 'a simple nullity' seems less certain today. The orthodox view is that a treaty between peoples has no domestic legal effect without an express act of incorporation, usually by legislation.<sup>192</sup> However, Sir Robin Cooke (later Lord Cooke of Thorndon in the House of Lords) has called the Treaty of Waitangi 'simply the most important document in New Zealand's history'<sup>193</sup> and in 1987 hinted that it might have independent legal force in the courts after all. More recently, in an extra-judicial setting, the current Chief Justice, Dame Sian Elias left open the question of whether Parliament's power and Crown sovereignty in New Zealand were 'qualified by the Treaty'.<sup>194</sup>

There is also difference between Maori and non-Maori views on the effect of the Treaty of Waitangi. Joe Williams, now Chief Judge of the Maori Land Court, has said that if the Treaty 'is truly a founding document, and was truly entered into

187 Charters, above n184 at 14.

188 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 690.

189 *Kaihau v Inland Revenue Department* [1990] 3 NZLR 344 at 345–346.

190 *Ngati Apa v Attorney-General (NZ)*, above n182.

191 See Keith and Anderson JJ at [139]–[140] and Elias CJ at [15] who quoted, without contradiction, the characterisation of the Treaty as one of cession of sovereignty by the Anglo-American Claims Tribunal. See also the trial judge's adoption of a cession of sovereignty view, noted by Elias CJ at [7].

192 *Hoani Te HeuHeu Tukino v Aotea District Maori Land Board* [1941] AC 308.

193 Sir Robin Cooke, 'Introduction' (1990) 14 NZULR 1.

in good faith as between the parties, then the Treaty itself was — is — *the Law*. Either orthodox (English) views of the law must change to accommodate its existence or it really was just a trick to pacify savages.<sup>195</sup>

While these debates about its terms and legal status continue, the Treaty itself exerts a strong influence on New Zealand law in many concrete ways.<sup>196</sup> The Waitangi Tribunal was established by statute in 1975 and its jurisdiction was enhanced in the 1980s. It investigates Treaty breaches and makes recommendations to the government that then has the power to implement them or not. The government has established a process for resolving disputes over the Treaty of Waitangi by agreement, managed by its Office of Treaty Settlements. Such agreements are committed to a deed of settlement that is usually given legal effect by legislation. Statutes have been made expressly subject to Treaty principles.<sup>197</sup> Parliament instructs decision-makers to take the Treaty into account, and judges feel constrained by it in shaping the common law.<sup>198</sup>

The Treaty is not fully implemented by domestic legislation and, by comparison with Canada, it does not enjoy constitutional protection under New Zealand's largely unwritten Constitution. However, while the Treaty might occupy a 'legal shadowland', half outside the law and half inside the law,<sup>199</sup> its impact on legislation and administration is now so widespread that it is difficult to dispute that it has at least a 'quasi-constitutional' operation.<sup>200</sup>

Much like the legal assertions of the Australian High Court in *Coe (No 2)* and *Yorta Yorta*, discussed above, the Treaty of Waitangi (in English) supplies a 'working definition' of Crown sovereignty. For the moment, the New Zealand courts treat that definition as a sufficient basis upon which the apparatus of the state can operate, without looking too closely into how convincing the story is,

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194 The Rt Hon Dame Sian Elias GNZM, 'Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-Go-Round' (2003) 14(3) *PLR* 148 at 153. McHugh says that in 1995 the New Zealand Court of Appeal 'reaffirmed the orthodoxy that treaty rights, including those associated with the one concluded at Waitangi in 1840, required statutory incorporation and took effect only and subject to that manner of recognition'. Paul McHugh, 'What a Difference a Treaty Makes — The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15(2) *PLR* 87 at 91–92.

195 Williams, above n184 at 193.

196 See Charters, above n184 at 6.

197 According to McHugh, 'These statutes laid the platform for legal development into the new century. Indeed this activity was becoming so regular there was a suggestion at the time that the insertion of such clauses was becoming a constitutional convention. In any event, this statutory housing of "Treaty principles" facilitated their permeation into the institutional culture of public administration, as Government departments audited themselves for sensitivity and compliance.' McHugh, above n194 at 91.

198 Matthew Palmer, 'The Treaty of Waitangi in Legislation' [2001] *NZLJ* 207. McHugh said that 'Treaty principles motored legal development in New Zealand during the 1990s (the first half in particular) as claims negotiation and resolution dominated, and substantially dictated the direction of, Crown-Maori relations.' McHugh, above n194 at 92.

199 Palmer, *id* at 207.

200 *Ibid*.

while at the same time perhaps keeping the door open to evolving understandings of New Zealand constitutionalism. This approach explains how, in constitutional terms, the role of the Treaty has been more about shaping the relationship between Maori and the Crown, or providing a framework for the ongoing negotiation of that relationship, than it has been about clearly defining the question of sovereignty.

These English-speaking countries with common law systems similar to Australia — Canada, New Zealand and the United States — have taken different approaches to Indigenous sovereignty. Although two of them may not explicitly recognise Indigenous sovereignty, they all recognise the power and authority of Indigenous people to make decisions affecting their lives. These different approaches provide a useful context for the current debates and concerns regarding treaty making in Australia.

## 5. *Some Related Objections to Treaty-Making in Australia*

### A. *Too Late in the Day?*

For those opposed to a treaty or treaties in Australia, perhaps the most difficult idea to accept is that more than two hundred years later, a society can do something that is normally thought to occur at the outset of settlement or colonisation. There is a simple factual answer to that concern: Canada took the step in the mid-1970s to recognise the capacity of its Indigenous peoples to enter into modern day treaties with its national and provincial governments. It was a *political* decision by the democratically elected government of the day. Treaty-making has been policy and practice in Canada for more than a generation and Morse suggests that the ‘process of treaty making is a long way from being finished’.<sup>201</sup> Certainly there have been issues, setbacks and problems with the process. Indeed, the same can be said of most political processes that address serious issues affecting the lives of ordinary people. However, Canadians can also point to many benefits from the recognition, from the commitment to negotiation and from the outcomes of the modern treaty era.

While Canada and Australia differ in some important respects, they share many of the same fundamental features. Both inhabit a large continent, originally occupied by many separate peoples whose society and culture are living contemporary realities. Both are also former British colonies with a parliamentary and common law tradition, modified by a federal structure. Both are also making belated attempts to come to terms with their history and to start down the path towards greater inclusion of Indigenous people within the nation, after their exclusion by law and government action for many decades.

Embarking on treaty-making now would mean Australia is making ‘a late start’. But societal values are constantly evolving. There is often a gap or lag between the values espoused by a political community and the degree to which

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<sup>201</sup> Morse, above n55.

those values are given practical effect. An example is the position of the ordinary individual elector in Britain or Australia. It was more than 400 years ago that the first hint of 'popular sovereignty' emerged with the idea that the legitimacy of government authority derived not from the divine right of a king to rule, but from the 'consent of the governed'.<sup>202</sup> This idea, that the government continues to enjoy legitimate political and legal authority because in some way the people consent to that authority, came to dominate English theories of government. It took hundreds of years for the institutions and processes of government to move more into line with that most fundamental of ideas. Major reform to give people the right to vote in periodic elections, to actually give concrete effect to that idea of consent, did not begin until the 1800s. The universal franchise is really a product of the 20th Century. In other words, it can take decades, even centuries, for a society to bring its institutions, its theory of government and its *realpolitik* into some kind of genuine alignment. The process of arguing out the terms of that political settlement is a work-in-progress inside Western liberal democracies.

As political landscapes constantly change, the concern regarding the 'lateness in the day' has less weight. It is true that Australia was taken without treaty or consent. It is also true today that many Australians view that event very differently from how we once did. Times have moved on and perceptions have changed. Australia's most basic legal assumptions have been recently revised. The High Court has all but explicitly recognised that, before the British arrived, sovereign authority over the continent was exercised by the separate Indigenous societies that occupied it. That Court, Australia's parliaments and its governments have all recognised the rights Indigenous peoples had over the lands and waters they occupied, and that those rights survived the acquisition of sovereignty by Britain. Inevitably the recognition of these basic facts, that Indigenous societies hold land and govern their societies according to their law, strengthens calls for sovereignty to be re-examined in order to re-evaluate how legitimate political and legal authority comes to be exercised over this continent.

### ***B. Obsessed by the Past?***

There is another common objection to re-visiting the legitimacy of Crown authority over *all* the people of the Australian continent, including the Indigenous peoples descended from its original occupiers. Some people say that a treaty is backward-looking, travelling over old ground and that it fixes on the past when the real problems confronting Indigenous communities are in the present and the future. Again, behind this objection is a frame of mind that sees sovereignty as a once-and-for-all-issue, rather than the continuous working out of agreed principles and values for the legitimate exercise of authority by government over people.

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202 This section of the paper draws on the analysis of Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991).

The example of ‘popular sovereignty’ is again relevant. In the early 19th Century, supporters of the Westminster system acknowledged that ‘consent’ had replaced ‘divine right’ as the source of legitimate authority. However, some would have opposed electoral reform on the basis that consent was sufficiently secured by the ‘limited democracy’ of the time. To accept that compromised system as the last word would have been to accept political institutions and *realpolitik* permanently out-of-synch with the underlying theory of government. To retain for all time the political ‘settlement’ between people and government as it existed then would mean the theory and the practice would fall more and more out of alignment with each other, and popular grievance would grow amongst those locked out of the settlement. Women and the un-propertied would have been excluded from participating in institutional politics not just then but on an ongoing basis. The consequences of their disenfranchisement, of this disparity between the principle of consent and the practical reality, would be continuously visited upon them.

In other words, the terms of the political ‘settlement’ in a society at a given moment in time (for example, at the planting of the flag at Sydney Cove by Governor Arthur Phillip or the Federation of the nation in 1901) are not only about the past, they are also about the present and the future. History shows that exclusion from the ‘settlement’ gives rise to grievance, but political choices can be made to address that grievance by revising the terms of the earlier settlement and bringing them into closer alignment with fundamental assumptions and values. When societies make that choice, a new and more inclusive settlement may lay the foundations for future social and economic development.

The recognition of native title is another example of how structural and legal change can be about both the past *and the future* at the same time. To clear the way for recognition of Indigenous rights to land, the High Court had to address past understandings. In particular, it had to re-examine assumptions behind Britain’s acquisition of sovereignty. The key assumption was the idea of Australia in 1788 as *terra nullius* — land belonging to no one. The High Court identified the discriminatory world-view at the heart of *terra nullius* and said it was no longer an acceptable assumption upon which to base ownership of the Australian continent. The merits of the Court’s reasoning and the outcomes achievable within the legal parameters of Australian native title law can be debated. Nevertheless, the outcome was that Indigenous groups who lodge a native title claim can pursue recognition of their rights today in order to build a future for their families and the generations to come. To get to that point, Australia as a nation, through its highest court, had to return to the events of 1788 when the British asserted sovereign control of the continent. Those events had to be re-examined in light of contemporary knowledge of the facts, and contemporary standards of political morality.

Raising the objection that a treaty is backward-looking ignores the connection between the current problems of Indigenous communities and the process by which Australia was colonised. The ‘change in sovereignty’ imposed a new set of laws and system of governance on Aboriginal people without their consent. This



change has had devastating effects on Aboriginal communities. To adequately address the problems facing Aboriginal communities, the root of the problem may need to be acknowledged. A possible first step could be recognition of the power and authority of Indigenous peoples to enter into treaties that re-negotiate their relationship with the Australian government.

### ***C. Australian Law Forbids It?***

In New Zealand, some of the nation's most senior judges have shown a willingness to wrestle with the concept of Indigenous sovereignty in court and in other forums.<sup>203</sup> In Australia, the High Court has been less inclined to explore the issue, despite occasional invitations. Asking the Court an international law question of whether the Crown in Australia validly holds sovereignty over the continent in the external sense of the word does raise difficulties. The authority of the High Court is derived from the Australian Constitution. Asking the Court to question Crown sovereignty requires it to question its own legitimacy.<sup>204</sup> Therefore, it is not surprising that the Court has refused to examine the question, stating it is a 'non-justiciable' issue for Australia's domestic courts.

The legal position regarding internal sovereignty is less obvious. History demonstrates that courts can deal rationally with the idea that internally, power and authority are shared between 'polities'. Disputes about federalism, for example, commonly raise questions about the internal allocation of authority between the national government and the states. These are disputes where the language of sovereignty is used in the courts.<sup>205</sup> In the United States, the Supreme Court has maintained for 170 years that Indian nations enjoy a subsidiary degree of sovereign authority, inside the American nation-state.

When the High Court of Australia recognised the prior ownership of land by Indigenous peoples in *Mabo (No 2)*, it raised new possibilities for the formal recognition of Indigenous forms of governance and authority. To some extent those questions have been pursued in the political sphere through agreement-

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203 See text at nn191, 193–194.

204 As Simpson puts it, 'The one element that could not be discarded, of course, was the sovereignty upon which the Court's jurisdiction rested. In discussing the issue of sovereignty the Court followed the *Coe* judgment and that in the *Seas and Submerged Lands* case, warning that the acquisition of sovereignty itself was an unchallengeable act of state. In other words, the existence of Crown sovereignty over the Australian land mass was not a justiciable matter. Despite the reservations of many Aboriginal groups, *this may be the only possible finding a court in Australia can make without undermining the very basis of its jurisdiction to hear the issue.*' [Emphasis added.] Simpson, above n85 at 206.

205 See, for example, *Seas and Submerged Lands Case*, above n48. See also, for example, in the United States the following comment in the dissent of Justices Ginsburg, Stevens, Souter & Breyer in the 2000 election case of *Bush v Gore*, 531 US 98 (2000): 'Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."'

making over land, resource use and service delivery. Yet when the issue has been put to the High Court, its response has been firm and negative:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty.<sup>206</sup>

In hastening to this answer, preserving the perceived status quo about this most fundamental question, the Court arguably overlooked or underplayed two key aspects of the decision in *Mabo (No 2)*. First, the systems of traditional law and custom survived the acquisition of Crown sovereignty, presently operating to regulate the rights enjoyed by native title holders and governing their decision-making.<sup>207</sup> Secondly, '[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.'<sup>208</sup> In other words, the High Court may abstain from dealing with arguments about whether the Crown's assertion of sovereignty over Australia was legal or not, but it can still talk about what effect that assertion of sovereignty has on the existing systems of law within the nation.

In its more recent decision in *Yorta Yorta*, the Court returned to some of these questions. Gleeson CJ, Gummow and Hayne JJ refrained from using the word 'sovereign' to describe the 'normative or law-making system' that existed before British colonisation in many places across the continent.<sup>209</sup> However, it was there implicitly, for example, in their acknowledgement of the 'change in sovereignty' in 1788.<sup>210</sup> Despite this, the Court in *Yorta Yorta* closed the door even more tightly against some quite logical implications from the two propositions in *Mabo (No 2)* set out above. They insisted that after 1788 'there could be no parallel law-making system'.<sup>211</sup> This assertion was sufficient to freeze the state of traditional law and custom in its 'ancient' state.<sup>212</sup>

206 *Coe v Commonwealth (No 2)*, above n95 at 115.

207 See for example *Native Title Act 1993* (Cth), ss251A and 251B, and *Native Title (Prescribed Bodies Corporate) Regulations 1999*, reg 8(4).

208 *Mabo*, above n54 at 32 (Brennan J, with Mason CJ & McHugh J agreeing).

209 *Yorta Yorta*, above n93 at 552.

210 Id at 555. Six judges of the High Court had already categorised British colonisation as a *change in sovereignty* in the earlier native title case of *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422–423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ): 'At common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory. Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended. That presumption is applicable by the municipal courts of this country in determining whether the acquisition of the several parts of Australia by the British Crown extinguished the antecedent title of the Aboriginal inhabitants.'

211 *Yorta Yorta*, above n93 at 552 (Gleeson CJ, Gummow and Hayne JJ).

In the short term, *Yorta Yorta* appears to close down any judicial exploration of a more nuanced, internal view of sovereignty. It did so only by opening up new flaws in the Court's logic. In particular, a legal system as 'a normative system of traditional laws and customs', cannot simultaneously stand still and yet exhibit 'continuous existence and vitality since sovereignty'. Legal systems simply do not work that way: 'the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this best, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.'<sup>213</sup> As was said in *Yorta Yorta* itself, laws and customs 'do not exist in a vacuum', they 'owe their ... life' to the society within which they operate,<sup>214</sup> and society surely changes as it adapts to new circumstances.<sup>215</sup> The Court insisted, however, that 'one of the uncontested consequences of the change in sovereignty'<sup>216</sup> was that after 1788 traditional legal development ceased, remaining operative yet frozen at the same time.

The High Court has developed its own 'working definition' of sovereignty, and Australia's system of public law continues to operate accordingly. The problem is that the formal judicial position on the relationship between Crown and Indigenous sovereignty contains logical flaws and provides, for many, an unconvincing answer to basic questions. However, the judiciary is only one arm of government and questions of settlement and legitimacy continue to be agitated in parliament and in discussion with government and in the public arena. As Langton and Palmer said, in describing 'the resilience of customary polities': 'A people do not desist from their political aspirations merely on the grounds of doctrinal denial of their existence or their capacity to engage politically with external entities'.<sup>217</sup>

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212 At least for the purposes of its recognition by Western law. The joint judgment contains a qualification that account may need to be taken 'of developments at least of a kind contemplated by that traditional law and custom' but elsewhere it is quite insistent that the only rights eligible for recognition are 'those that find their origin in pre-sovereignty law and custom'. [Id at 552.]

213 *Yarmirr*, above n48 at 132 (Kirby J). Similarly, in 1992, Deane and Gaudron JJ pointed out: 'The traditional law or custom is not ... frozen as at the moment of establishment of a Colony': *Mabo*, above n54 at 110.

214 *Yorta Yorta*, above n93 at 553–554 (Gleeson CJ, Gummow and Hayne JJ).

215 *Ward v Western Australia* (2002) 191 ALR 1 at 160 (Kirby J): 'When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.'

216 *Yorta Yorta*, above n93 at 555 (Gleeson CJ, Gummow and Hayne JJ).

## 6. *Conclusion*

There are no easy answers and few clear legal propositions that can be determined when addressing basic questions about Indigenous peoples and sovereignty in nations like Australia, Canada, the United States and New Zealand. So where does this uncertainty leave us? As the Chief Justice of New Zealand, Dame Sian Elias, recently suggested (when talking about changing conceptions of parliamentary sovereignty) ‘pretty much where we have always been. But, freed from a theory that does not fit, we are better able to confront directly the difficult issues thrown up at the edges of law. We can consider them on the basis of reason and principle, through the processes of democracy and under the security of law.’<sup>218</sup>

In Australia, we can do the same. The concept of sovereignty will remain a central part of ongoing debate about Australia’s history and future. However, it does not pose a roadblock to moving forward with innovative new settlements, including the idea of a treaty or treaties. Using Australia’s democratic processes and law as an anchor, the following aspects of the Australian public law system collectively demonstrate how issues of unfinished business can be tackled with reason and principle:

1. **The acquisition of external or State sovereignty over the Australian continent appears to be a matter for international law.** It is up to Indigenous peoples and Australian governments to make their decisions about where they go in that regard. There are limits to what can be asked of each of our domestic public law institutions (courts, parliament and government) and it is always important to consider which questions we appropriately address to which institutions.
2. **The consequences of that acquisition of sovereignty, for the internal distribution of authority and rights, is a matter for the domestic legal and political sphere.** This much is established by the High Court’s decision in *Mabo (No 2)*.
3. **Whether popular sovereignty is now the intellectual underpinning to Australian constitutionalism or not, there is one undeniable fact: the**

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217 Langton & Palmer, above n31 at 43. Later (at 48–49), after surveying a range of modern agreement making processes in Australia, they conclude that ‘the assertion of national sovereignty is contested by the assertion and exercise of Indigenous governance and customary authority. Indigenous forms of political legitimacy or jurisdiction compete both symbolically and politically with the declared nation-state sovereignty, which is often weakly exercised in the territory of the people, especially in remote areas. Some agreements in Australia today, while not treaties in the conventional sense of the term used in current international law, have effected mutual recognition of the respective jurisdictions of the Indigenous and settler parties, with the express purpose of constituting jural, political and economic relationships based in an agreed distribution of public and private rights in land.’

218 Elias, above n194 at 162.

**Constitution can be changed by a referendum of the people.** The Court can have its say on Indigenous sovereignty (and to some extent it has, though many would say without the necessary detailed justification). Despite this, s 128 of the Constitution ultimately puts the terms of the Australian settlement into the hands of its politicians and people. This shifts our focus from a legal conception of sovereignty towards a political one.<sup>219</sup>

4. **Canada and New Zealand show that in countries like Australia debates over sovereignty can go on (and given its elusive nature, they will go on) and in the meantime the choice can be made to re-negotiate or revisit the fundamental settlement between peoples.** Australia can get on with tackling unfinished business and the terms and conditions of co-existence. Sovereignty in the statist external sense of the word need not be seen as an impediment to treaty-making in modern-day Australia.

With these principles in mind, it is possible to move forward to consider other questions. These might include whether a treaty or like instrument is an appropriate way of achieving reconciliation between Indigenous and other Australians, and, if that is the case, the form any such treaty should take. As in Canada and New Zealand, Indigenous people in Australia can continue to develop their own conceptions of sovereignty or self-determination, while these and other questions are addressed. This process will include how peoples organise themselves, how they explain themselves to the rest of the world, how they develop strategies for community development in the short, medium and long-term and how they work internally on developing their own systems of good governance.

If Indigenous peoples in Australia do decide to go down the treaty path, they will make their own choices about the legal and political basis upon which they want to negotiate a fundamental agreement or agreements with the rest of the Australian community. Australian governments also have a range of options in deciding on what basis, if any, to conclude such agreements. As political decisions for the would-be negotiating parties, they are beyond the scope of this article. Instead, we have sought to explain the public law context in which these choices can be made and to explore sovereignty as an alleged constitutional impediment to that choice being made.

The treaty debate is about political agreements which have legal consequences. What these agreements are called and how they are conceptualised are some of the issues for debate. Indigenous peoples and governments need to define for themselves the respective bases upon which they negotiate. Treaties or like agreements can be reached even if the parties might agree to disagree on the

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219 William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002). See <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003).

conceptual basis of their discussions.<sup>220</sup> Indeed, the parties might decide to undertake treaty discussions by putting to one side any questions of sovereignty.<sup>221</sup> Whether sovereignty is addressed or not, any settlements, treaties or agreements resulting from a negotiating process can be given legal effect, in very explicit terms if necessary. On our analysis, Australian public law, and specifically the notion of sovereignty, puts few, if any, constraints on the outcomes that can be reached. The greater challenge lies in the ability of Australians to imagine new paths for moving forward and in our willingness to overcome any political obstacles.

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220 See also Oliver's comments on MacCormick's analysis of the relationship between Member States and the European Union at above n7. In the same passage he continues: 'Even if both parties to the relationship have come out and staked claims to having the last word, it may be that the closest we can come to describing the situation accurately is to say, as MacCormick does regarding Member States and the European Union, that from the perspective of the UK (or Germany) sovereignty (or supremacy) of Parliament (or the Constitution) is claimed, whereas from a European perspective supremacy of European law is taken for granted.' See also the comments of the Canadian Royal Commission on Aboriginal Peoples, above n124.

221 Michael Mansell has advocated a compromise solution of this kind: 'While the past spells out the basis of current and future entitlements, it has to be recognised that the nature of a treaty involves compromise. The past rights we had opens up the possibilities for our future, provides relevant information on which to base decisions and creates a political base from which a treaty can be entered into. The past is not a yoke around our neck: it opens our minds to the possibilities and gives our cause a focus. This point applies equally to governments, not just Aborigines. The competing claims and positions on sovereignty could be dealt with in a way that enables both sides to maintain their high moral positions while advancing an agreement.' Michael Mansell, 'A Treaty as a Final Settlement?', speech delivered at Murdoch University Treaty — Advancing Reconciliation Conference, Perth, 27 June 2002: <[www.treaty.murdoch.edu.au/Conference%20Papers/Michael%20Mansell.htm](http://www.treaty.murdoch.edu.au/Conference%20Papers/Michael%20Mansell.htm)> (16 August 2004).