Book Symposium

Stephen Curry

Indigenous Sovereignty and the Democratic Project[+]

Desegregating the 'Indigenous Rights' Agenda

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It's refreshing to read a proposal for indigenous sovereignty grounded in the right of all citizens to shape the society in which they live, because in recent years the defence of indigenous 'self-determination' in Australia has been conducted largely as an exercise in defending *difference*-based rights.

In a public culture as unaccustomed to handling ethnic diversity and history-based claims as Australia's, treating indigenous rights as *necessarily* different from those of other citizens can have at least four negative consequences, all of them over-compensations for historical exclusions, denials and blindnesses. First, the difference-based agenda turns the content of rights into something about which only 'indigenous' people - and all 'indigenous' people - are qualified to speak, placing considerable pressure on the definition of indigeneity and cutting off debate from wider humanist concerns. Other Australians, particularly 'white' ones, find as little to relate to in the 'indigenous rights' debate as they do in Aboriginal affairs generally. Secondly, inadequate attention is paid to the limits of difference-based rights, partly because 'self-determination' is conceived of, consistently with demographic patterns which reflect historical

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[+] Aldershot, Ashgate, 2004.

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extermination and segregation,[1] as something which largely happens in isolation from non-indigenous people. A related problem, which also owes a great deal to history (in this case, the lack of emphasis on upholding individual indigenous human rights at a mundane level), has been inadequate attention to the detail of the relationship between individuals and 'self-determining' collectives.

A final problem is the temptation to defend *anything* that looks interestingly different from the mainstream, at least when viewed from a distance. So you get people talking about things like 'the right to native title', when in fact there's no institution in which colonialism is more embedded. This is another reason, I think, why people can only talk about 'self-determination' as a form of segregation: living apart seems appropriately different, whereas living with everyone else must present an assimilationist threat to your cultural values, because that's what it has almost always meant historically.[2]

The alternatives to the 'difference' agenda aren't much more appealing. Aboriginal people get to choose from the 'take it or leave it' of formal equality, or various attempts to squeeze more out of citizenship rights through the concept of substantive equality. But as Curry points out, the first step under either of these approaches is to affirm Aboriginal people's historical loss of land and sovereignty in favour of either a 'Classical' (absolutist, indivisible) view of state power or one grounded in majoritarian representative democracy. Both require indigenous people to deal with a state whose institutions they must take as they find them - one which, despite assuming the role of 'umpire' in its dealings with them, will regularly act as a protagonist, sacrificing their interests for the sake of 'stability' or the maximisation of other, more important, interests.[3]

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1 67 per cent of the Australian population lives in urban areas. A similar proportion of the Indigenous population lives outside of those areas, mainly in rural towns. Almost one-quarter of the indigenous population lives in remote areas, often constituting a majority of the population in those areas. See Australian Bureau of Statistics, *2001 Census Figures*

2 Things could have been different: as Jeremy Beckett has pointed out, the promise of the assimilation policy was never fulfilled because it would have cost too much: 'Aboriginality, citizenship and nation state' (1988) 24 *Social Analysis* 3. The 'self-determination' policy which operated in Australia between 1972 and the late 1990s was largely a 'self-management' policy, under which state-defined 'communities' enacted state-defined policies which reflected changing state priorities: see, eg, G Cowlishaw, *Rednecks, Eggheads and Blackfellas* (1999).

3 Curry gives a fairly extreme example of the state's partisan role in his final chapter: the intervention of the Royal Canadian Mounted Police in a private leasehold dispute between some members of the Shushwap Nation and a

Curry's analysis is founded on the argument that 'every individual has the right[4] to fashion a society which will best promote their interests, provided they recognise the same right on the part of others and do no unnecessary harm to the interests of others' (p 132). He shares with James Tully[5] an appreciation of the extent to which the rights which liberal societies currently value are products of specific historical struggles - including some which were illegal or which otherwise defied prevailing institutions of governance.

Curry acknowledges that promoting your interests entails living out those priorities and values through familiar cultural norms – something everyone in the 'mainstream' takes for granted – and that the state's imposition on indigenous minorities of alien cultural values alone might amount to a form of 'unnecessary harm' (144-5). So culture is important, but for Curry the focus is on the *individual right* to shape society to suit yourself.

Like the plethora of other individual rights which have emerged from past mass protests and revolutions, Curry says, this right is normally exercisable as part of a group. Where a group exercises the right, it does so because doing so is good for the interests of its individual members; it has no right to act otherwise, and the individual rights curtail what the group may do.[6] These limits are likely to be imposed largely internally. Curry's optimism on this front appears to be justified: where you have indigenous groups exercising something *approaching* well-resourced self-determination, as you do in a handful of economically successful US Indian tribes, taking care about individual rights[7] and preserving culturally distinctive ways of doing things[8] may go hand in hand with the enlarged sphere of decision-making which comes with prosperity.

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lessee of the nation's lands. It is very unusual for the state to intervene in private rental disputes.

4 'Right' in the sense of an interest worth protecting: see chpt 8.

5 *Strange Multiplicity: constitutionalism in an age of diversity* (1995).

6 In this sense his approach accords with that of Kymlicka, *Multicultural citizenship* (1995), chpt 2.

7 See, for example, the discussion of development of Navajo Nation Codes and 'common law' in Getches, Wilkinson and Williams, *Cases and materials on Federal Indian Law*, (1998, 4th ed) 388-418. While some of this development could be described as having occurred in the shadow of the *Indian Civil Rights Act* 1968, which extended many Bill of Rights protections to tribal governments, there are limited avenues for judicial review of tribes' actions under this legislation in the federal courts: ibid 505-14.

8 The work on tribal organization and economic development of the Harvard American Indian Economic Project shows that a factor in tribal economic success is the cultural responsiveness of tribal institutions: for an overview,

For Curry, the individual sovereign right is defended where groups engage with one another, producing compromises which may not maximise their members' interests but nonetheless protect them in a manner which outweighs the costs of seeking change. The right is *not* defended where, as is commonly the case for indigenous Australians, their interests are sacrificed for 'social peace' or 'stability' by a state that sees its main task as 'balancing' competing interests without acknowledging its own biased role. The motivations for requiring these sacrifices of Aborigines but not others, Curry shows, are either the crude majoritarianism of an ethnically-defined public culture,[9] or the bias towards indigenous dispossession inherent in the settler state.

Thus traditional concepts of sovereignty as popular or legal ('Classical') must be put aside to allow the 'sovereign rights' of indigenous people adequate sway. So must any idea that the accommodation of different 'sovereign rights' can be achieved without addressing issues of substance, such as what constitutes an appropriate system of property law for a society which wants to avoid privileging the rights of the dispossessors among its citizenry over those of the dispossessed.

In some ways, the most valuable contribution the book makes is to emphasise the potential for wider social integration and transformation consequent on the exercise of indigenous 'sovereign rights'.[10] As Curry puts it, 'whatever indigenous sovereignty is, it is more than the right to autonomy or regional self-government where this is possible. It has something to do with the whole country that once belonged to indigenous peoples and now contains them' (p 147). Importantly for Aboriginal policy, '[i]t is the exercise of fashioning a society which will best promote one's [ie, indigenous people's] interests, not an exercise of sheltering from a society that doesn't' (p 148). This should be good news for those Aboriginal and Torres Strait Islander people whose access to the benefits of Australian prosperity is being placed at an increasing remove by wider processes of rural decline.

For Curry, the starting point for the exercise of indigenous sovereignty should be 'a retrospective re-imagining of the terms of engagement, such that we will conceive of a state as being built on

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see the *Project Director's Statement before the US Senate Committee on Indian Affairs* (2001) <http://www.ksg.harvard.edu/hpaied/docs/Senate%20Testimony%20Andrew%20Lee.pdf>

9 On the existence of such a culture in Australia, see G Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (1998) and *Against Paranoid Nationalism: searching for hope in a shrinking society* (2003).

10 In this respect, Curry is more successful than Germaine Greer – compare the garbled *Whitefella Jump Up: the Shortest Way to Nationhood* (2003).

indigenous possession and sovereignty, so that the relationship is reconstructed as if settler societies had sought and been granted permission to enter indigenous lands on agreed terms' (p 149). This approach has the theoretical potential to throw up new ideas of how to proceed. It would also have the benefit of forcing Australians to reflect on 'our' wider national practices of 'whiteness'[11] and our position in this part of the world. One obvious consequence of such a revision of history would be that a real 'Aussie' may well come to mean a person who is some shade of brown!

A useful (although not original) proposal which for Curry stems from this re-imagination of the colonial encounter is the replacement of the state's radical title right to continue alienating indigenous land with some kind of negotiated compromise, possibly the reversion of land to an indigenous nation once existing property rights expire. Land councils put a proposal of this kind to the Woodward Commission on Northern Territory Aboriginal Land Rights in the 1970s, but its rejection at a policy leveleven for the pre-self-governing Northern Territory[12] shows how centrally dispossession is implicated in Australian nationhood.

Is there any chance that Curry's proposals could have some practical operation? Of course not!

Now is a very interesting time in indigenous affairs, because of a renewed emphasis[13] on the 'rights' of individuals to pursue the same resources and destinies as other Australians. This is a fine idea where those resources and destinies exist nearby, but a more difficult one to realise under conditions of *de facto* geographical segregation like those which obtain in much of remote Australia. Like its predecessors, this policy change raises questions about the extent to which Aboriginal people really are permitted to define their own vision of the good life and require other Australians to let them live it. There are also the perennial problems of policy lurch and rights tradeoff: the tendency to base comprehensive reform on the proven defects of the old regime (which play on the consciences of non-Aborigines), rather than the considered prospects of the new (which do

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11 See Hage, above n 9, and Aileen Moreton-Robinson, *Whitening Race* (2005).

12 Woodward was disinclined to support the proposal but recommended its further exploration: see *Aboriginal Land Rights Commission: Second Report* (1974) paras 191-216. The NT's population was then around 110,000. Underlying title to pastoral leases remains with the Crown in right of the NT.

13 This was once the focus of the assimilation policy, which pursued it through fairly heavy-handed focus on cultural assimilation (including continuation of earlier practices of child removal) as well as, in most states, a move to town housing and better education.

not), and to require at least some Aborigines to give up something valuable (in this case, title to land) in order to achieve change.

There seems to be the promise of jobs where there are presently none, home ownership where there is presently only poor public housing, marginal land and limited income, and the 'freedom' to open up traditional lands to outsiders. But all of this is being driven by the state, which reserves the right to *require* people to move hundreds of kilometres from home in order to train or look for work, the right to amend or repeal land rights legislation, or even the right to close down the outstation when it is deemed no longer 'viable'.[14]

If indigenous people from rural and remote areas instead decided to assert their 'sovereign rights' to fashion Australia as a society in which they have access to the same services as other Australians, in the places where they presently live and on terms that make sense to them,[15] the most likely state response would be to keep ignoring them. But if they tried to commandeer the state's local resources (such as they are), the response could be more like the heavy-handed 1973 Wounded Knee incident with which Curry opens his book[16], or similar incidents in Canada.[17] For all the rhetoric of 'Reconciliation', the pointy end of 'Classical Sovereignty' is still pointed at Aboriginal people who challenge the state's right to govern them as it does.

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14 Senator Amanda Vanstone, Minister for Indigenous Affairs, *Beyond Conspicuous Compassion: Indigenous Australians Deserve More than Good Intentions*, Address to the Australia and New Zealand School of Government, Australian National University (December 2005) <http://anzsog-research.anu.edu.au/pdfs/Public%20lecture%20series/BeyondConspicuousCompassion%20-%207Dec05.pdf>

15 On the lack of correspondence between present service delivery and personnel on the one hand and Aboriginal priorities on the other, see Richard Trudgen, *Why Warriors Lay Down and Die*, (2000) and Cowlishaw, above n 2.

16 Activists occupied the historically significant village of Wounded Knee, on the Oglala Sioux Reservation in South Dakota, to protest corruption by the tribal president and the difficulty of achieving reform under the federally-imposed Indian Reorganisation Act 1934. Instead, they reclaimed government under the 1868 Sioux treaty, which among other things recognised Oglala Sioux sovereignty, proclaimed an independent state, and demanded to deal only with the White House. This challenge to US sovereignty attracted hundreds of federal police and law enforcement officers and 'represented the crushing by armed force of a legitimate attempt to exercise sovereign rights inherent in Indian peoples' (Curry p 16).

17 Curry p 164.

This was evident in events surrounding the death of Cameron Mulrunji Doomadgee in police custody on Palm Island,[18] perhaps Australia's most egregious example of a racial ghetto, lying as it does in a literal sea of prosperity.[19] Most islanders attributed Doomadgee's death to police brutality, an allegation still before the coroner.[20] Police responded to their protests by sending 14 extra officers to assist the four on the island (population about 2500, one-third of them children). A week later, a coroner released an interim autopsy finding that Doomadgee had died from a ruptured liver and broken ribs, but refused to rule out accidental causes.[21] Up to 300 people rioted, burning down the police station, barracks and court house. Police invoked emergency powers, flew in an extra 80 officers including a tactical response team, unlawfully entered houses while armed wearing balaclavas, kicked down doors, pointed weapons at and used 'stun guns' on individuals, arrested dozens of islanders and deported about 20 to the mainland.[22] Bail conditions kept these men, including some later not committed for trial,[23] off the island and away from their families for three months (including Doomadgee's funeral and Christmas)[24] until the Court of Appeal allowed their return[25].At a protest two weeks after the riots, an alleged 'ringleader' was hailed by Doomadgee's sister as a 'warrior' while a cousin urged the crowd to 'deck that policeman hurting your brother, burn

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18 Mr Doomadgee, aged 36, died at 11.20 am on November 19, 2004, half an hour after being taken into custody on a minor public order charge by Snr Sgt Chris Hurley.

19 Unlike other Queensland Aboriginal 'communities', the under-developed Palm Island lies close to the Queensland city of Townsville, among a string of islands developed for tourists, many to exclusive luxury standards. However, it rarely appears on tourist maps.

20 The coroner has considered allegations of other assaults by the arresting officer on Palm Island residents: see *Doomadgee and Anor v Clements and Ors* [2005] QSC 357.

21 *Clumpoint v DPP (Qld)* [2005] QCA 43. Such injuries are reportedly usually seen in cases of serious road accidents: T Koch, 'Island of Distress', *The Australian*, 29 November 2005.

22 See, for example, Koch, above n 19, M Todd, 'Tropic of Despair', *Sydney Morning Herald*, 4 December 2004.

23 'Palm Island rioters case dismissed', *The Age*, 20 July 2005.

24 There is no public transport between Palm and the mainland – families who wanted to visit these men would have had to charter planes (a prohibitively expensive option) to Townsville. At least one of the accused became unemployed as a result of his banishment, costing his family $15,000 in wages: *Clumpoint v DPP (Qld)* [2005] QCA 43.

25 *Clumpoint v DPP (Qld)* [2005] QCA 43. The accused in this case was Mr Doomadgee's cousin. The Court of Appeal observed: 'Apart from actual imprisonment, it is difficult to imagine a more onerous bail condition' (at [31]).

that police station protecting a murderer... [g]o for an honourable crime'.[26] An even more pronounced climate of resistance to authority – common in interactions between individual Aborigines and police[27] - was evident during the similarly grief-fuelled Redfern riot nine months earlier.[28]:

A few matters of detail:

First, ch 4 of the book contains a useful summary of the effect of the 'Act of State' doctrine on indigenous sovereignty and title to land. It is worth showing to those non-lawyers who are yet to understand that the courts cannot decide (justly) claims that challenge the sovereignty on which their authority to adjudicate depends.

Like others, Curry describes the citizenship of settler colonies as newly nationalistic, unlike the more universal citizenship of Europe. He's fascinated by the change from old nations - which he says based their sovereignty and citizenship on territory to which a 'law of the land' applied - to new ones - which denied the right of indigenous sovereigns to do the same, to the extent that the settlers brought their nationality with them, even to 'international' disputes in the New World. But there have always been

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26 Murrandoo Yanner, quoted in 'Hundreds join march over Palm Island death', ABC News Online, 9 December 2004 <http://abc.net.au/news/australia/qld/townsville/200412/s1261661.htm>

27 The 1991 Royal Commission into Aboriginal Deaths in Custody commented that, to Northern Territory Aboriginal people, 'the police are still an army of occupation and still serve the purpose of instilling terror in the Aboriginal population as they did in the early years of this century': *National Report* volume 2, [13.3.4], http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol2/94.html.

28 Riots erupted in this inner-Sydney ghetto after 17-year-old TJ Hickey impaled himself on a fence while riding his bicycle at speed. A coroner found that, while police were in the area, they were not pursuing Hickey: see *Inquest into the Death of Thomas Hickey* no 287/2004, <http://www.lawlink.nsw.gov.au/lawlink/coroners_court/ll_coroners.nsf/pages/coroners_findings> Nonetheless, the view that police were responsible for his death triggered a riot in which many Aboriginal children were involved, parts of Redfern railway station were burnt and bricks and molotov cocktails were thrown. 40 police were injured. 'Leader' Lyall Munro was quoted receiving a favourable crowd response to his observation: 'If Palestinian kids can fight war tanks with slingshots, our kids can do the same': L Colqhoun, 'Why Australia is not all Cuddly Koalas', Aljazeera.net, 29 February 2004, <http://english.aljazeera.net/NR/exeres/FB107BD2-4C82-4F4E-83EC-1C7F74A12273.htm>

European nations (notably Germany)[29] in which citizenship was based on ethnicity, and even in Britain citizenship was limited for centuries by ethnicity's stand-in, religion.[30] It's possible to over-state the impact of the 'law of the land' in Imperial Britain: leaving aside the obvious example of Ireland,[31] Scotland was subject to its own private legal system, the Channel Isles were run by their own parliament and so was the Isle of Man. Nationalism may have been more noticeable in settler colonies because their populations were originally more ethnically mixed.

Finally, some of the discussion in the final chapter canvasses the desirability of open territorial indigenous governments, like Nunavut. As Curry's critical analysis of the much-vaunted British Columbia Nisga'a agreement shows, most other north American indigenous governments are not like this – for reasons of (sometimes quite recent)[32] historical chauvinism, their authority is exercisable over their *members* only. By contrast, Nunavut is a territorial government controlled by Inuit, because Inuit predominate in this isolated Arctic territory of 30,000 people and its land and resources are not of interest to non-Inuit – for now. While Nunavut does represent 'the fullest possible expression of [Inuit] sovereign rights short of secession' (p 166), this could all change: if not in response to a major resource discovery in the territory, perhaps as a result of global warming? There is no real guarantee that getting the original 'terms of engagement' right will ensure that indigenous sovereign rights are fulfilled into the future. The commitment to those terms must be an ongoing one.

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29 Since 2000, German law has recognised citizenship based on *jus soli* as well as *jus sanguinis* basis.

30 Curry's argument on this point could be clearer. His opening reference to Marx's concern with the British occupation of Ireland suggests an awareness of this racialised environment in 19th century Britain. It may be that his arguments about the rise of nationalism are arguments about *the era of colonialism*, including in Europe, not just about the colonies.

31 The Irish penal laws, which operated from the mid-16th to the mid-18th century, effectively disenfranchised the whole island, except for Protestants, many of whom were descended from Scottish settlers.

32 For example, the United States Supreme Court only ruled in the late 1970s that Indian tribal courts lacked jurisdiction over non-Indians committing crimes on tribal land, and over non-Indian-owned fee simple land within tribal boundaries (this 'fee' land is a legacy of the 19th century 'allotment' era, in which alienable individual titles were carved out of reservations): see Getches, Wilkinson and Williams, above n 7, 531-55.