

DOES CONSTITUTIONAL RECOGNITION NEGATE ABORIGINAL SOVEREIGNTY?

by George Williams

In this article I address the question of whether recognising Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* would negate their claims to sovereignty. In approaching this important topic, I think that it is important to indicate my starting point. I do so because sovereignty can rightly mean different things to different people.¹

I approach this issue as a constitutional lawyer, and so as someone who is well versed in the language and technicalities of the document that forged the Australian nation in 1901. As such, I am especially aware that the *Constitution* sought to displace the claims to sovereignty of Australia's first peoples.

The attempt to do away with Aboriginal sovereignty is reflected in statements since by our political leaders and judges. It has been said that it is impossible to recognise Aboriginal sovereignty in Australia, and that to do so would fracture the nation. Prime Minister John Howard, for example, said that '[a] nation ... does not make a treaty with itself'.²

As a constitutional lawyer, I am aware that such statements are simply wrong as a matter of law. Australia can accommodate competing and diverse claims to sovereignty. Giving proper recognition to the sovereignty of Aboriginal peoples would not fracture the nation, and indeed I think it would make us stronger by recognising our past and also the legitimate claims of Aboriginal people.

My own view is that these claims can be properly dealt with by the Australian state when treaties are finally negotiated with Aboriginal peoples. Such a treaty must recognise the rights of self-government of Aboriginal peoples and their capacity to negotiate a fair and just outcome in regard to their historic claims. Such a settlement is of course centuries overdue.

RECOGNITION OF ABORIGINAL SOVEREIGNTY IN OTHER NATIONS

It is a nonsense to say that the concept of Aboriginal sovereignty cannot be recognised in this way within the

modern Australian state. This cannot be reconciled with the fact that sovereignty is already accommodated in the legal systems of other like nations.

In particular, the experiences of the United States, Canada and New Zealand with treaty-making show how each has a level of shared sovereignty. These nations have achieved this without undermining their structure as a nation. In each case, this reflects a recognition of the special status of Indigenous peoples as the first peoples of a country.

Indigenous sovereignty is simply accepted as a fact of life in these countries. Hence, even a conservative, Republican figure such as President George W Bush affirmed in 2001 that:

My Administration will continue to work with tribal governments on a sovereign to sovereign basis ... We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.³

Similarly, President Barack Obama:

recognizes that federally recognized Indian tribes are sovereign, self-governing political entities that enjoy a government-to-government relationship with the United States government.⁴

All this goes to show that Aboriginal sovereignty can and should be recognised in Australia. Far from this being a radical outcome, it could build upon what has already been achieved in other comparable nations.

CONSTITUTIONAL RECOGNITION DOES NOT NEGATE ABORIGINAL SOVEREIGNTY

I have expressed my opinion elsewhere that Indigenous sovereignty should be expressed and asserted through the making of one or more treaties in Australia. In fact, I have already explained how this can be achieved in a book called *Treaty*⁵ written with Sean Brennan, Larissa Behrendt and Lisa Strelein.

I support the idea of a treaty and do not see this important aspiration as in any way being compromised by the campaign to reform Australia's *Constitution*. These are complementary initiatives that should reinforce each other.

None of the contemporary proposals to change the *Constitution* deal with sovereignty or do anything to undermine claims to sovereignty. Voting Yes in a referendum will not amount to any surrender of sovereignty, and indeed this was not the case when like changes were made in 1967.⁶

In addition to recognition of sovereignty, it is past time that the *Constitution* recognised Aboriginal peoples and removed discrimination against them on the basis of their race.⁷ These are important, necessary changes that will, over the longer term, make a practical difference to the quality of people's lives.

The changes to the *Constitution* would do this by altering the way that laws are made in Australia. They would also provide a catalyst for rethinking national priorities and undermine as a matter of law the capacity to discriminate against Aboriginal people.⁸

None of the changes go beyond this in the sense of suggesting that Aboriginal people are submitting to the nation state or surrendering their claims to self-government. If that was the intention, it would need to be done in a completely different way.

And nothing can be smuggled into the *Constitution* to bring this about. All the changes to the *Constitution* must be set out clearly and made available to all voters. This will show that issues of sovereignty are simply left untouched. My view is that not dealing at all with these issues in the *Constitution* is the right course of action.

THE CONSTITUTION IS NOT THE PLACE TO RECOGNISE ABORIGINAL SOVEREIGNTY

Seeking to write Aboriginal sovereignty into the *Constitution* of the Australian state could actually have a perverse outcome. Doing this could undermine any strong assertion of Indigenous sovereignty due to it being given recognition within the foundational legal document of the settler state.

The sovereignty of Aboriginal people should be recognised in the deed and action of entering into a treaty, not by seeking to have this recognised on their behalf by the state.

Far from compromising claims to sovereignty, I believe that the constitutional reform agenda will work to the advantage of Aboriginal people in this regard. A referendum will require the community to look again at how this nation was settled and the future we have together as the joint inhabitants of this continent. Like a treaty,

this is one piece in the larger puzzle of what needs to be done in the law of Australia to recognise the aspirations of Aboriginal peoples.

The absence of this debate now hampers any realistic attempt to successfully assert Indigenous sovereignty, along with any discussion of the idea of a treaty. Hence, I see constitutional change as a necessary and important step to addressing those larger questions.

As a matter of pragmatic reality, constitutional change is also the issue that has been put on the agenda now. It is important to take the opportunity to fix the problem of racial discrimination in this law. In any event, I can see no political appetite for moving on to deal with a treaty or other questions of self-governance until the problems in our *Constitution* are dealt with.

CONCLUSION

Aboriginal people have legitimate claims to sovereignty. These claims should be recognised through the making of a treaty. Constitutional reform in no way undermines the ability to make such a treaty. In fact, the current constitutional reform agenda holds out the possibility of opening up the larger conversation that is necessary to achieve other important, long-term changes.

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- 1 See generally, Sean Brennan, Brenda Gunn and George Williams, "Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307.
- 2 John Laws, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000).
- 3 Proclamation 7500 of 19 November 2001, Presidential document Vol 37 No 46 <<http://www.gpo.gov/fdsys/pkg/WCPD-2001-11-19/html/WCPD-2001-11-19-Pg1649.htm>>.
- 4 US Department of the Interior, 'Secretary Salazar Pledges to Restore Trust, Strengthen Tribal Sovereignty, Promote Sustainable Economic Development' (News Release, 12 February 2009); See also 111, *Congressional Record* 4 (Laura Davis) (9 June 2010, House of Representatives).
- 5 Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (Federation Press, 2005).
- 6 See also, Megan Davis, 'Constitutional Recognition Does Not Foreclose on Aboriginal Sovereignty' (2012) 8 *Indigenous Law Bulletin* 12.
- 7 As sections 25 and 51(xxvi) of the *Constitution* allow: *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
- 8 See further, George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the *Constitution* Should Say and How the Referendum Can be Won' (2011) 5 *Land, Rights, Laws: Issues of Native Title* 1.