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Indigeneity, Ethnicity and the State: Australia, Fiji and New Zealand

Abstract

This article draws on the politics of indigeneity to distinguish the claims of first occupancy from simple ethnic identity politics, illustrating that relative political marginalisation in Australasia is not so much a function of minority status but of indigeneity itself. The politics of indigeneity's aim is to create political space for self-determination and a particular indigenous share in the sovereign authority of the nation-state itself.

The Australasian states are compared with Fiji to demonstrate that the significance of historical constraints on political authority transcend the withdrawal of a colonial power and the restoration of collective indigenous majority population status.

Keywords

Indigeneity, indigenous peoples, postcolonial politics

Introduction

The politics of indigeneity claims extant political rights to challenge traditional assumptions of state power and authority. Its aim is to create political space for self-determination and a particular indigenous share in the sovereign authority of the post-colonial nation-state itself.¹ Indigeneity distinguishes the claims of first occupancy from simple ethnic identity politics to illustrate that relative political marginalisation in Australasia is not so much a function of minority status but of indigeneity itself. The politics of indigeneity confronts the political and legal assumptions of the contemporary state by looking to the cultural foundations of the past as a basis for setting forward looking political priorities.² The rights to culture, language and identity are essential to the substantive indigenous exercise of both individual and collective citizenship rights. For these reasons, liberal egalitarianism is a limited and limiting response to the claims indigenous peoples make against the state. Yet its retention of favour in Australian indigenous policy discourse and its claim for ascendancy over indigeneity and biculturalism in New Zealand means that it continues to have marked policy influence.

The Australasian states are compared with Fiji to demonstrate that the significance of historical constraints on power transcend the withdrawal of a colonial power and the restoration of collective indigenous majority population status. The restoration of power and influence is not an inevitable outcome of parliamentary dominance, nor the institutionalisation of indigenous entities into the national political system. Fijian indigeneity's fervent nationalist expression does, however, highlight the moral limits of indigeneity as well as the pragmatic imperative to admit self-determination's relative and relational character, within the context of ordered, shared and stable national sovereignty.

In Fiji, the moral limits to the politics of indigeneity appear in ways never tested in Australasia where pragmatism and possibility limit indigenous options. As well as highlighting philosophical constraints on claims to exclusive 'paramountcy', for example, the

Fijian experience suggests that majority status alone does not guarantee the re-acquisition of relative political dominance. Internal political stability and the ability to construct a coherent political philosophy and strategy capable of alignment with prevailing international theories of governance and government escape and compromise Fijian indigeneity.³

Political conclusions and theoretical propositions drawn solely from the experiences and aspirations of minority indigenous groups⁴ cannot capture the fullness of indigeneity's possibilities, limits and even abuses because it is not minority status *per se* that makes indigenous peoples politically vulnerable in post-colonial states. Vulnerability is the outcome of indigeneity itself and it is the post-colonial experience that sets indigenous claims apart from those of minority groups. For minority indigenous groups nationhood defines a claim to independent sovereignty within and over their own communities. On the one hand maximum possible independence is claimed, while on the other, reasonable influence in the national polity and access to state services is sought. In other words, 'shared sovereignties'⁵ provide ways of restoring some degree of indigenous power and authority.

The search for shared sovereignties remain even as the nature of the reclamation of power and authority differs between Australia and New Zealand, on the basis of different iwi (tribes) and nations making distinctive claims against the state, on the basis of New Zealand indigeneity's recourse to moral, political and jurisprudential authority in the Treaty of Waitangi, while indigenous Australia looks to the common law and the moral authority of reconciliation. Differences in the broader population's willingness to admit a distinctive, rather than just proportionate, indigenous voice in national politics is also significant. Yet, in spite of these significant cultural, political and contextual differences, the claim to particular political authority under similar national political arrangements means that there is sufficient cross-jurisdictional commonality for the Australasian experiences to show, collectively, that when indigeneity, as both political theory and political strategy, is juxtaposed with Western liberal ideas of government and governance it proposes the sharing of national sovereignty

to recognise the right of *all* people to political participation in government without compromising the concern for a specific, not simply proportionate, indigenous share in the distribution of public resources, power and authority.⁶

Indigeneity and Egalitarian Justice

Indigeneity is a developing theory of justice and political strategy used by indigenous peoples to craft their own terms of belonging to the nation state, as 'first peoples'.⁷ Indigeneity is a legal and political 'site of critical enquiry'⁸ which 'contests the exclusive sovereignty of the State to pass and enforce laws, define agendas, establish priorities, articulate patterns of entitlement, or demand compliance by decree if not by consent'.⁹ It envisages inclusive sovereignty 'grounded in the right of all citizens to shape the society in which they live'¹⁰ and is supported by international law's erosion of 'the traditional idea of sovereignty as the unconditional prerogative of the State'.¹¹

Indigeneity is a discourse of both resistance and transformation, distinguished from the simple identity politics of ethnicity by its neo-colonial context and focus on distinct, extant political rights. These rights are advanced to protect the broader and substantive right to self-determination that, at international law, belongs to *all* peoples.¹² Therefore, indigeneity transcends simple identity politics to recognise that justice can not be understood 'irrespective of issues about whose ancestors were here first, irrespective of any history of injustice that may have attached to the process by which these people came to be side by side in that territory'.¹³ History is a determinant of political agency and the group right to self-determination is diminished if its relationship with social, cultural, economic and political circumstances is not fully admitted. Nor can group rights be confined to the private sphere because the good life is expressed principally through culture, a necessarily public as well as private, construct. As Kymlicka points out, culture's centrality to the politics of indigeneity counters an alternative liberal position that holds that 'ethnic identity, like religion is something which people should be free to express in their private life, but which is

not the concern of the state... it is not the place of public agencies to attach legal identities or disabilities to cultural membership or ethnic identity'.¹⁴ However, indigenous Australians did not consent to colonisation and Maori consent was on the understanding that pre-existing rights would be protected.¹⁵ This makes their positions 'fundamentally different from that of voluntary immigrant minorities',¹⁶ and it makes their claims transcend Waldron's 'principle of proximity' which holds that 'people have a paramount duty to come to terms with, and to deal justly with, those with whom they are, in Kant's phrase, "unavoidably side by side" in a given territory, irrespective of cultural or national affinity'.¹⁷ For example, the right to education in one's own language is an expression of self-determination that distinguishes indigenous claims. It is a right admitted at international law¹⁸, broadly accepted in New Zealand,¹⁹ yet sharply contested in Australia where as Minister of Education, the former Prime Minister (2010-2013), Julia Gillard, for example, has argued against bilingual schooling for indigenous people.²⁰ Yet difference, in language and culture, is integral to indigenous peoples' construction of a post-colonial nationhood.

In Australasia, state initiatives 'for accommodating indigeneity as a basis for renewal and reform tend to digress into political discourses that miscalculate the magnitude and intensity of transformational politics'.²¹ Biculturalism is a New Zealand example discussed later in this article, while in Australia the point is illustrated in health policy where objectives are reduced to a goal of 'closing the [statistical] gap' in life expectancy between indigenous and other citizens. It is a well justified objective in egalitarian terms, but limited in its development of indigenous agency or the recognition it accords relationships between health and culture. It is, as Pholi et al. (2009) point out, illustrative of 'a substantial imbalance in power and control over the Indigenous affairs agenda... which is the 'gap' that must be addressed for the health and wellbeing of Indigenous Australians to improve'.²² However, a more expansive contextualisation of indigenous political claims is possible with reference to Kant's doctrine of freedom, which holds that

no-one can or ought to decide what the highest degree may be at which mankind may have to stop progressing, and hence how wide a gap may still of necessity remain between the idea and its execution. For this will depend on freedom, which can transcend any limit we care to impose.²³

New Zealand's recognition of a Maori right to education in their own language and, to some extent, according to preferred pedagogies, occur with reference to the Treaty of Waitangi which provides jurisprudential, moral and political context to distinctive Maori development above and beyond whatever claims might be justified in liberal egalitarian theory. For example, the Treaty obliges the state in legislation dealing with matters as diverse as environmental management, broadcasting and health as well as being incorporated into general principles of governance:

The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people and their use of their lands and waters to the fullest extent practicable.²⁴

However, the Treaty can also be used to provide foundational arguments for biculturalism, a state initiated strategy of containment, which understates the extent of indigenous aspiration. Biculturalism establishes Maori and Pakeha [New Zealanders of European descent] as oppositional forces, and confuses Pakeha for the 'Crown' in whom it vests sole sovereignty. The colonial placement of Maori as the political 'other' undermines equal citizenship and a distinct share in national sovereignty. Indigeneity cannot privilege biculturalism as Waldron²⁵ suggests, because it locates Maori in junior partnership with the state and assumes that Maori and Pakeha are absolutely and always distinct; the significance of overlapping relationships through intermarriage and wider social and economic interdependence is understated.²⁶

The 1990 Fijian Constitutional Review Commission observed that: 'Nothing [in international law] gives an indigenous people superior or paramount rights in taking part in the government of their country'.²⁷ What is important, however, is that indigeneity can not

make its claims purely on the egalitarian grounds available to the ethnic minority politics of identity. Egalitarianism, alone, restricts indigenous claims to the individual rights of liberal citizenship, which diminishes the philosophical centrality of culture, language, collective resource management and recourse to restorative justice. Collective identity is not an essential egalitarian concern which means that it imposes no obligation on the state to recognise indigenous development as distinct peoples.

Justice is neither constant nor absolute. It is not politically neutral even though it might claim to be the outcome of philosophical objectivity. Conceptions of justice evolve as the political order continuously re-balances competing claims on the state. What is especially important, however, is that indigeneity holds that it is only through a process of substantive reconciliation of indigenous rights, with the claims of the state, that the state itself can secure moral legitimacy.²⁸ From this perspective, indigenous peoples ought to be able to extract policy concessions from governments and think about ways of re-ordering the institutions and practices that curtail indigenous freedom.²⁹

Indigeneity is distinguished from minority ethnic politics by its claim to a specific, rather than simply proportionate share, in national sovereignty. It counters Waldron's proposition that 'the general duty of a government to do justice to all people living in a territory is [not] trumped by any special duty it owes to those of the inhabitants who can claim indigenous descent'.³⁰ While injustices are not necessarily 'more egregious... just because they were perpetrated against tangata whenua' [indigenous peoples],³¹ their particular nature and impact demands contextualised and differentiated responses.

Indigeneity's limits

Historical constraints on substantive indigenous self-determination are grounded in unique post-colonial contexts of much greater significance than population status. The comparison between Australasian and Fijian indigeneity is instructive because the development and analysis of indigenous political theories solely from the perspective of

minority indigenous peoples risks conflating indigeneity with the minority politics of ethnicity.

Fijian indigeneity lacks a coherent philosophical rationale capable of admitting political authority's relative and relational character or considering the moral or pragmatic limits of indigenous claims, which is why the entrenched opportunities for parliamentary dominance and the institutionalisation of bodies such as the Great Council of Chiefs into the system of national governance did not increase the meaningful political authority of Fiji's indigenous peoples. Indeed, as Ratuva notes: 'The more the state becomes a vehicle for structuring educational and economic opportunities according to ethnicity, the more reliant are emergent elites on ethnically exclusive ideologies and practices', in a state characterised by 'a complex juxtaposition of ideologies and practices, which are both contradictory and accommodating'.³²

Fijian political behaviour is influenced by a multitude of factors. Religion, class, occupation, education, gender, place of residence and simple life experiences combine with ethnic identity to shape political aspirations and values. Fijian politics is not a simple binary with the indigenous on one side and Indo-Fijians on the other. Inter-ethnic conflict, and class and rural/urban divisions are also relevant as the central political problem 'is not really about having a Fijian head of government, but rather which Fijian leader would be acceptable to a particular group of Fijians at any given time.' As Lal continues:

Dr Timoci Bavadra was a Fijian, and Fijians ousted him in a military coup. Rabuka was a Fijian, and he was defeated by indigenous Fijian voters, first in 1994 and then again in 1999. Ratu Mara was a high chief – paramount chief of the province of Lau – and he was turfed from office after the 2000 coup by a group of Fijians. Commodore Frank Bainimarama is a Fijian, but his leadership of the armed forces was challenged by Fijian members of the military in a bloody mutiny in 2000.³³

A coup followed the Qarase Government's democratically legitimate return to office after the 2006 general election. The Government had prevailed over the army's active intervention in the election campaign, where military intimidation was blatant and

unapologetic.³⁴ It was clear that sovereignty was not the preserve of the Fijian people, even though the intervention was to counter established instances of racism and corruption in the administration of government. As Bainimarama told the *Fiji Sun*: 'This government continuously brings in racist policies and programs to justify its existence to the indigenous community'. In a pointed rejection of communal sovereignty the military chief went on to say that the 'military is willing to return and complete for this nation the responsibilities we gave this government in 2000 and 2001'.³⁵

Since the first coup in 1987, the state has been subservient to military rule. The inverse of the normative relationship between the military and government in a liberal democracy prevailed even when elected parliaments provided constitutionally appointed governments. The fragility of the relationship meant that governments were vulnerable and, in practice, accountable to the military leadership in more substantive ways than they were accountable to parliament and the people. Indeed, as Norton explains: 'The army now conceives itself to be the most important part of the state, as much in the protection of domestic order and governance as in matters of external defence. In this, it rejected paramountcy as the central argument in the Fijian politics of indigeneity'.³⁶

Paramountcy starkly illustrates the moral limits to indigeneity, which are never seriously tested in Australasia because demographic characteristics mitigate against a focus on political goals beyond those that can be negotiated with the wider polity. Paramountcy can, for example, depend on occasioning injustice to others and rejecting the relative and relational character of indigenous self-determination. One widely held perspective is that paramountcy demands ethnic Indian exclusion from the national polity as preliminary to fair and reasonable political organisation. An alternative position is that Indians may properly enjoy the right to vote and be elected to parliament, but ought to be excluded from the offices of President and Prime Minister. A third alternative is that all citizens reasonably enjoy full membership of a liberal democracy with paramountcy meaning the protection of

indigenous cultures and their guaranteed participation in public affairs. There is an obvious pragmatic, as well as moral imperative, to the construction of an inclusive polity marked by the capacity to protect indigenous cultural priorities and authority over traditional resources.

Exclusive conceptions of indigeneity are similarly used to marginalise urban and non-aristocratic indigenous Fijians who are politically disconnected from the wider indigenous population to undermine collective nationhood and political order. Disconnection occurs through difficulties urban indigenous peoples experience in gaining access to land and other natural resources and because aristocratic authority is privileged to restrict indigenous 'commoners' ability to participate in collective decision making.³⁷ These people's political dislocation was recognised, outwardly at least, by the Qarase Government's (2001-2006) Department of National Reconciliation and Unity, established to promote, among other things, 'greater unity within the indigenous Fijian community through various programs and activities at village, tikina [regional], provincial and national levels'.³⁸ But it was also *The Promotion of Reconciliation, Tolerance and Unity Bill 2005* which precipitated the military coup in 2006. Its intention to grant amnesty to people involved in the putsch in 2000 affronted military sensitivities, especially as some of those convicted individuals had been involved in an unsuccessful mutiny against Bainimarama. While the Bill was before Parliament, Bainimarama's position was that the army ought to prevent it from passing 'or get rid of the Government if it is passed. We can recover without this Government, we cannot recover from this Bill'.³⁹

Fiji's self-inflicted instability requires wide ranging and multi-faceted explanation. But at the core is a haphazard, incoherent indigenous conception of power and authority. There is not a considered position on what is or ought to be the relationship between indigeneity and the state. Fiji could, instead, have provided a model for peaceful co-existence in which the rights of indigeneity were paramount and the interests and aspirations of others respected,

even to the point of enjoying the right to vote and fully participate in government. Instead a fervently nationalist indigeneity coupled with unwavering military claims on national sovereignty has prevented the development of a political order capable of supporting security and cohesion. Even when parliaments, not the military, have provided governments the idea of popular sovereignty has been largely illusory.

Indigenous self-determination depends on the restoration of civilian rule and the subordination of the military to a freely chosen government, but at the same time, effective military sovereignty is by no means the only barrier to peaceful multi-racial co-existence. This also depends on indigeneity forging unity among indigenous Fijians to strengthen a sense of extra-tribal nationhood in a country where collective numeric majority does not eliminate negative colonial legacy nor diminish indigenous claims to still greater political authority. It is in this context, especially, that the question Fleras poses for Australia, Canada, and New Zealand is equally applicable to Fiji: 'is sovereignty indivisible or can it be shared without undermining integrity and cohesion?'⁴⁰ Fiji lacks a political process for thinking about this question, and consequently, for recognising the limits to indigeneity implicit in Horscroft's assertion that

linking Indigenous cultural rights to political control (including coups) undermines potential to forge consensus in Fiji's polity. Culture and language concerns are dismissed with the aggressive paramountcy claims of those who represent them. They could instead bridge the political divide by claiming legitimacy in liberal minority-rights paradigms. Therein, ethnic groups are entitled to protection because the cultural frameworks within which people make meaning are *prerequisites* for members to enjoy equal opportunities to live meaningful lives (Thompson 1997: 789; Kymlicka and Straehle 1999: 72). Equality requires recognition and protection of cultural groups; it cannot legitimately be deployed to undermine them.⁴¹

It is, by way of contrast, indigeneity's capacity to provide a philosophical rationale for relatively substantive and ordered Maori political participation in public affairs that accounts for Maori enjoying a particular share in national sovereignty at a time when similar political authority eludes indigenous Fijians.

Indigeneity, stability and liberal democracy

Maori political participation is fostered by a stable political environment in which indigeneity and its aspirations are aligned with prevailing liberal democratic expectations of government to accommodate the specific, as well as proportionate, sharing of public sovereignty. If sovereignty belongs to the people it must, in the interests of cohesion, order and justice, belong to *all* the people, and answer questions of power and authority from an inclusive and emancipatory conception of Crown, sovereignty and state. The claims to particular and proportionate shares in the sovereignty of the nation-state arise from deeper philosophical reasoning than the laws of a benevolent state, to draw moral authority from the argument that disenfranchisement is an inevitable outcome of deprivation of 'the lands ancestrally occupied by them as entities actually owning the attributes of sovereignty pursuant to international law'.⁴²

Maori comprise a sizeable and growing proportion of the New Zealand population (15%). Since 1996 they have enjoyed at least proportionate representation in parliament, linguistic and cultural revival is well established and economic security is enhanced by increasing personal incomes.⁴³ Collective wealth has increased due to the settlement of Maori grievances against the Crown under the Treaty of Waitangi.⁴⁴ Indigeneity, therefore, gives theoretical context to particular political relationships, agendas, and ideas beyond the social and cultural priorities of multiculturalism. While the Treaty secures the territorial and political integrity of the state; its legitimation of Crown sovereignty explicitly and distinctively includes Maori in the sovereign whole. In this way biculturalism's positioning of the Crown as 'Pakeha' in a binary relationship with Maori as a distinct and separate group is challenged by a relative, relational and inclusive understanding of inter-ethnic political relationships. Specifically, the Treaty positions Maori within the sovereign whole to ensure that political power is contested and continually re-balanced by the influence of Maori claims on and against the state. Sovereignty is not institutionally fixed and must be

‘detached from the state’ because: ‘As a relational concept, the one thing sovereignty can not have is an exclusive and exclusionary character’.⁴⁵

Maori politics is characterised by a concern for constructing political institutions congruent with cultural priorities and with the political capacity to engage the nation-state in serious dialogue on the nature of shared national sovereignty. As Shaw explains it, ‘contemporary [state] practices are framed by discourses of sovereignty. These discourses are neither natural nor neutral. They reproduce a space for politics that is enabled by and rests upon the production, naturalization and marginalization of certain forms of “difference”’.⁴⁶ States may offer special recognition to minority groups in the interests of social cohesion, but only with reference to alternative theories of justice, rather than recognition of inherent rights. Migrant groups have no moral claim on the state to protect and uphold their cultures or especially guarantee their political participation in different form from other citizens, such as in New Zealand where Maori parliamentary representation is guaranteed and where public policy routinely requires Maori input into decision making.⁴⁷ In this way indigeneity engages with the liberal polities’ capacity to extend substantively the goals of liberty and freedom to all their peoples. There is a unifying imperative for indigeneity to engage notions of independent political status with western political theory to set a framework for thinking about how power and authority ought to be conceptualised for an inclusive acceptance of Locke’s ‘people’, from whom consent is required for legitimate government.⁴⁸

Indigenous peoples may view their rights as inherent, but pragmatically, they need to be justified to the international community. When indigeneity engages with normative liberal ideas about political arrangements it influences and shapes these to make them more responsive to indigenous claims. The adoption of the *Declaration on the Rights of Indigenous Peoples* by the United Nations in 2007 is illustrative even though its application is limited to minority indigenous populations. The Declaration assumes political stability and principled

arrangements for the distribution of public power and authority. Its potential to contribute to working out such arrangements, if it could be drawn in to Fijian political discourse is as the indigenous Chief Executive of the national Citizen's Constitutional Forum, Akuila Yabaki (2008), describes it:

It [would] recognize our right to be different, and to act as an individual or as part of a community as we choose. It encourages participation in matters which affect us all such as education, social welfare, health, environment and governance without discrimination. From it we should learn that multiculturalism is what makes us all part of the common heritage of mankind. We are all entitled to exercise and practice our beliefs, cultures and religions, and should not interfere in the rights of other people to do the same.⁴⁹

The *Declaration* is also useful as an instrument of order and stability because it implies shared relational and relative national sovereignty:

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.⁵⁰

Conversely, indigeneity is limited if it is ill-equipped to admit the relationship between all groups' economic and political engagement with one another and any one group's capacity for self-determination. There are examples from other jurisdictions where the politics of indigeneity transcends, rather than encourages, the

mistaken premise that a choice must be made between an ethnic conflict model and an "integration" model. The assumption has been that focusing on the ethnic division necessarily means stressing antagonistic polarity, and that the debate must be between such a model and an opposing one - which transcends the division by arguing that it is, in politics, mainly a function of elite or ruling-class strategies.⁵¹

In Canada, for example, the 'inherent right of self-government of indigenous peoples':

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.⁵²

The Declaration would, then, contribute to a theoretically cohesive and pragmatically instrumental account of indigeneity if its applicability were extended to jurisdictions such as PG where it is clear indigenous majority status in a multicultural population does not, in and of itself, remove post-colonial constraints on indigenous political authority.

The Declaration sets out principles capable of codifying indigenous claims on the state and is equipped to set the terms of indigenous engagement in the state itself. While the context means that these general principles would need to be operationalised in different ways than in Australia or New Zealand, for example, they remain relevant because it is indigeneity rather than population status alone that contextualises the rights, opportunities and constraints of post-colonial indigenous politics. The Declaration's failure to consider indigenous politics in these terms is a significant weakness, especially in respect of Fiji where the principles enunciated in the Declaration are exactly those that might fill the significant intellectual and political void in contemporary Fijian understandings of power and inter-ethnic relationships.

The Declaration similarly proposes responses to the central problem in contemporary indigenous Australian politics which is '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.'⁵³ The extent to which such an aspiration ought to be admitted is sharply contested. For example, indigenous participants in national sovereignty have a reasonable expectation that states will recognise them as distinct political entities – rather than, for example, prescribe the nature and construction of national indigenous political representation, as the Rudd Government (2007-2010) did by assuming for itself the task of determining the form of an indigenous body to replace the Aboriginal and Torres Strait Islander Commission abolished by the Howard Government (1996-2007) in 2005. The government's position accorded normative privilege to exclusive national sovereignty, with the state positioning itself over indigenous people themselves as agents of political change.

Yet, it is also true that a new public narrative calling for the radical reshaping of indigenous/state relationships is incrementally emerging. Indigenous voices and perspectives have been admitted into mainstream public discourse through, for example, the *Mabo* (1992) and *Wik* (1996) decisions of the High Court, the Report of the Royal Commission into Indigenous Deaths in Custody (1996) and the Bringing them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997).

Just as in New Zealand, recent indigenous Australian claims have been recognised more substantively in judicial rather than parliamentary contexts. Although there are definite limits to judicial recognition, courts are generally less constrained by populist politics in their interpretations of the law. *Mabo*, for example, challenged the basic assumptions and foundations of a racially exclusive state. Justice Brennan observed that the law would

perpetuate an injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.⁵⁴

Courts can take a broader view of justice than parliaments which tend to 'recoil from the prospect of inherent sovereign rights that supersede the sovereignty of the State as the exclusive repository of authority and entitlement'.⁵⁵ It is in this context of on-going political and legal paradoxes that reconciliation has emerged as a political discourse capable of positioning reparative justice at the forefront of indigenous state relationships. Just as in New Zealand, reparation and reconciliation reflect a form of 'transitional justice' in which 'indigenous and western worldviews confront each other in fundamental ways' and where indigeneity's goals 'transcend those of the reparations system'.⁵⁶

Pragmatically, each must engage with other groups to draw out commonalities as the basis of shared nationhood. But indigeneity can reasonably claim that the state, in return, recognise the independent status of individual groups whose cultures and occupation of

their lands pre-date the creation of the state itself. Yet even numeric dominance and institutionalised political privilege does not, as a matter of course, secure the claims of a post-colonial indigenous population. In 1996, for example, the Fijian Constitutional Review Commission found that international law upholds political authority only in relation to the internal affairs of the indigenous group.⁵⁷ The assumption that such affairs are neatly separable from wider public policy constrains indigenous political authority by overlooking the possibilities of a two-tiered indigenous citizenship – citizenship of an indigenous community and citizenship of the nation state.⁵⁸ Conversely, however, as Justice Brennan explained in the *Mabo* decision:

In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and consistency.⁵⁹

Even the Australian *Wik* judgement which gave greater legal meaning to indigenous land rights left no doubt about whose interests must prevail in the event of conflict. Where pastoral leases were at odds with native title it was to be the native title rights that would yield (*Wik*, 1996). What this showed, as did the foreshore and seabed legislation in New Zealand in 2004, is the liberal state's difficulty with the expression of equal citizenship of the one polity in specific indigenous context. It showed the limits of egalitarian justice and the government's unease with growing Maori political assertiveness.

In 2003, the Clark Government (1999-2008) wrongly presented a Court of Appeal decision on customary access to the foreshore and seabed as a restriction on non-Maori recreational use of the country's coastline. The Government's anxiety was in response to a popularly received speech by the Leader of the Opposition, Don Brash, which argued that public policy was becoming increasingly subservient to an alleged Maori claim to a 'birthright to the upper hand'.⁶⁰ The argument presented Maori claims in terms comparable with Fijian demands for paramountcy which, in fact, differ markedly from arguments for the recognition of extant

political rights through specific as well as proportionate shares in national sovereignty. In response, a Maori minister in the Government resigned her seat in Parliament to seek re-endorsement under the auspices of a new political movement which became the Maori party. The Maori party now holds 3 of the 7 Maori seats in the House of Representatives and is a coalition partner in the Government led by the conservative National party.

Conclusion

Indigenous political claims are distinguished from the rights and claims of ethnic minorities by the historical deprivation of sovereignty and wider neo-colonial context. Indigeneity's claims do not 'trump' the claims of others, but the unique circumstances in which they are made mean that the egalitarian principles of distributive justice can not, on their own, provide a useful philosophical framework for thinking about the contemporary rights and obligations of indigenous peoples. Access to culture, language and traditional resources are preliminary to consideration of the ways in which indigenous peoples can exercise the rights of citizenship individually as well as collectively. The right to development as distinct peoples is among indigeneity's principal objectives and essential to fuller political freedoms. The conflation of indigeneity with the rights of ethnic minorities understates the significance of history and political context to the contemporary circumstances of indigenous life.

Although Fijian indigeneity is marred by a series of missed political opportunities and marked by constant testing of the moral limits to indigenous claims it remains instructive to draw comparisons with a jurisdiction where the impact of historical deprivations of authority continue to shape national political arrangements almost 40 years after the withdrawal of the colonial power. Contemporary Fijian politics is not so much concerned with managing inter-ethnic political disagreements, but with working out the extent to which rights of first occupancy ought to influence the distribution of power and authority so that a 'people' can be constructed in whom national sovereignty might be vested.

In Australia and New Zealand indigeneity is concerned with the inclusive construction of citizenship and sovereignty to include first occupants among the national 'sovereign' whole. It is simultaneously interested in securing rights to language, culture and resources as foundational to development as distinct self-determining peoples. In this way, indigenous peoples claim a specific rather than simply proportionate share in national political authority. The extent to which indigenous peoples may assume authority over their own affairs is, however, deeply contested. In both jurisdictions paradoxical legal and political developments incrementally provide greater scope for indigenous authority and freedom but at the same time the state pursues opportunities to re-assert its own authority as guardian of an absolute indivisible non-indigenous sovereignty.

One of the ways in which indigenous authority is curtailed is through the reductionist positioning of indigenous groups among the minority populations of a multi-cultural society. Comparison with contemporary Fijian politics exposes the folly of this approach. In spite of significantly greater opportunities for political power and authority and majority population status, Fijian indigeneity lacks the coherent theory of power, political strategy, or capacity to engage with internationally prevailing liberal conceptions of government that are necessary to assert substantive self-determination. These political characteristics suggest that the relative marginalisation of minority indigenous peoples elsewhere is not a simple function of minority status alone.

NOTES

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