# CHAPTER 3

# *The Struggles of Indigenous Peoples for and of Freedom*

James Tully

How does political theory hinder or help the liberation of indigenous peoples? That is, in what ways can political theory help or hinder the struggles of indigenous peoples *for* and *of* freedom?

These are not new questions. They have been raised and answered in various ways since the first encounter of Europeans with indigenous peoples, and they have been raised in, and partly given rise to, the complex language (or multiplicity of languages) of modern, western, non-indigenous political thought.

This chapter is an attempt to address aspects of these complex and difficult questions from a non-indigenous perspective with reference to Canada. Western political theory here is used broadly to refer to the political, legal and social theories, reasoned legal decisions and legislative and policy documents written by European, North and South American, Australian and New Zealand non-indigenous authors from the beginning of the modern period in Europe to the present. These theories make up part of the complex, shared and continuously contested languages of modern, western political thought.

The motley language of western political thought has two well-known characteristics. It is a language woven into the everyday political, legal and social practices of these societies and, in a slightly more technical and abstract key, a language of interpretation and critical reflection on the practices of these societies in the institutions of law, policy and academia. In short, it is the language of both political self-understanding and self-reflection of these societies and their non-indigenous members. It is not the language of political self-understanding and self-reflection of indigenous peoples, even though they are constrained to use it. Indigenous people have, for lack of better terms, indigenous political theories and a complex and contested shared indigenous language of political



thought. These two languages are not closed, incommensurable or independent of each other, but massively unequal in their effective discursive power in the present. One is the dominant language that presents itself as a universal vocabulary of understanding and reflection; the other a subaltern language which, when noticed at all, is normally taken to be some kind of minority language within the dominant language of western political thought.[1]

The questions I ask at the start do not arise in a vacuum but in response to a fundamental problem in practice. *The practical problem is the relation between the establishment and development of western societies and the pre-existence and continuing resistance of indigenous societies on the same territory.* This problematic relation takes different forms in Canada, the US, New Zealand and Australia, varying widely within each of these societies in relation to different indigenous societies, and also over time. Despite wide variation, the relation is commonly called the 'internal colonisation' of indigenous peoples by the dominant societies. As systems of internal colonisation and the arts of resistance by indigenous peoples change over time, they periodically give rise in the dominant societies to the sorts of questions addressed in this volume. (These questions arise much more frequently in indigenous societies, where colonisation is the lived reality.) To address them effectively, it is necessary to understand the main features of systems of internal colonisation and practices of resistance, as well as the more specific features that have become problematic in the present and given rise to critical reflection. I restrict my investigation to North America and mostly to what is now called Canada.

## Internal Colonisation and Arts of Resistance

Internal colonisation refers, first, to the historical processes by which structures of domination have been set in place on Great Turtle Island/North America over the indigenous peoples and their territories without their consent and in response to their resistance against and within these structures. The relevant institutions of the US and Canada constitute structures of domination in Weber's sense because they are now relatively stable, immovable and irreversible vis à vis any direct confrontation by the colonised population, as the massive display of force at Kahnesatake/Oka, Quebec in 1990 was designed to show (MacLaine & Baxendale 1991; York & Pindera 1991). They 'incorporate' or 'domesticate' the subordinate indigenous societies. These two concepts are widely used by indigenous peoples to refer to the form domination takes: that is, as a matter of fact, and of the coloniser's law indigenous peoples exist *within* the dominant societies as minorities,

domestic, dependent nations, aboriginal peoples or First Nations *of* Canada and so on.[2]

Second, within the stable structures of incorporation, internal colonisation refers to the vast array of more mobile and changeable techniques of government by which indigenous peoples and their territories are governed within the American and Canadian political systems. Techniques of government refer to the totality of modifiable discursive and non-discursive ways and means used in strategies for guiding the conduct, directly and indirectly, and responding to the resistance of indigenous peoples. Ever since the consolidation of the control of the US and Canada over two-thirds of the continent and the effective assertion of exclusive jurisdiction by the mid-nineteenth century, the struggles of indigenous peoples on the ground have primarily involved attempts to modify the techniques of government to gain degrees of self-government and control over some of their territories, rather than direct confrontation with the background structures of domination. There is not a sharp distinction between structures of domination and techniques of government in practice, as what appears to be a part of the immovable background to one generation can be called into question and become the object of struggle and modification by another, and vice versa. The former is like the relatively stable riverbanks that change imperceptibly while the latter is like the changing waters of the river.

The processes of internal colonisation have developed in response to the struggles of indigenous peoples for freedom both against and within colonisation on the one hand, and in response to overriding objectives of the settler societies and the capitalist market on the other. There have been four major dimensions to these processes.[3] When Europeans invaded and began to settle in North and South America, they encountered free, vibrant, sovereign indigenous nations with complex forms of social and political organisation and territorial jurisdictions that were older (3000–30 000 years), more populous (60–80 million) and more variegated than Europe. First, through the spread of European diseases, wars and the destruction of indigenous societies, the interlopers reduced the population by roughly 90 per cent by the turn of the twentieth-century (from 10 million to 0.5 million in Canada and the US). Second, they usurped the existing traditional forms of government and subjected indigenous peoples to French, British and then Canadian and American governments, either directly, through various techniques of assimilation, or indirectly, through setting up systems of internal self-rule (band councils in Canada) governed by special authorities and departments of the dominant societies.

Third, to build western political societies on the territories and ruins of indigenous societies, the newcomers gradually displaced the rapidly



decreasing native population to small reserves, appropriated their territories by effectively exercising exclusive jurisdiction over them, and opened them to resettlement by the rapidly increasing immigrant population, and to capitalist development either indirectly (as in the early fur trade) or directly (agriculture, fishing, forestry, mining and other forms of resource extraction). Fourth, in the early stages and again in the present, where indigenous resistance has been effective, usurpation and appropriation have often been preceded or accompanied by treaty-making. This has modified the *processes* to some extent and created relations of cooperation. The long-term effects of these four dimensions for the vast majority of native people in Canada have been to reduce formerly economically self-sufficient and interdependent native societies to tiny overcrowded reserves, inter-generational welfare dependency, sub-standard housing, diet, education and health facilities, high levels of unemployment, low life expectancy, high rates of death at birth, and predictably, following these conditions on or off reserves that undermine their wellbeing and self-esteem, high levels of substance abuse, incarceration and suicide for native peoples.

This form of colonisation is 'internal' as opposed to 'external' because the colonising society is built on the territories of the formerly free, and now colonised, peoples. The colonising or imperial society exercises exclusive jurisdiction over them and their territories and the indigenous peoples, although they comply and adapt (are *de facto* colonised), refuse to surrender their freedom of self-determination over their territories and continue to resist within the system as a whole as best they can. The essence of internal colonisation, therefore, is not the appropriation of labour (as in slavery), for this has been peripheral, or depopulation (genocide), for indigenous populations have increased threefold in this century, or even the appropriation of self-government (usurpation), for at different times indigenous peoples have been permitted to govern themselves within the colonial system (as in the early treaty system and perhaps again today). Rather, the ground of the relation is the appropriation of the land, resources and jurisdiction of the indigenous peoples, not only for the sake of resettlement and exploitation (which is also true in external colonisation), but for the territorial foundation of the dominant society itself.

In external colonisation, colonies and the imperial society coexist on different territories. The colonies can free themselves and form geographically independent societies with exclusive jurisdiction over their respective territories, as Canada, the US, Australia and New Zealand have done in relation to the former British Empire. With internal colonisation, this is not possible. The problematic, unresolved contradiction and constant provocation at the foundation of internal

colonisation, therefore, is that the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that the indigenous peoples refuse to surrender.

It follows that the entire system of internal colonisation is seen by both sides as a temporary means to an end. It is the irresolution, so to speak, of the relation: a matrix of power put in place and continuously provoked by and adjusted in response to the arts of resistance of indigenous peoples. The temporary nature of internal colonisation is obvious enough from the indigenous side. They unsurprisingly would prefer to resolve it by regaining their freedom as self-governing peoples. It is not as obvious from the side of the colonising society, and is commonly overlooked in the theoretical and policy literatures, which tend to accept the colonial system as an end in itself and seek to justify and ameliorate it in some new form or another. However, since the beginning, the long-term aim of the administrators of the system has been to resolve the contradiction by the complete disappearance of the indigenous problem: that is, the disappearance of the indigenous peoples *as* free peoples with the right to their territories and governments. There are two major strategies of extinguishment and corresponding techniques of government by which this long-term goal has been and continues to be sought.[4]

The first type of strategy is that indigenous peoples could become extinct, either in fact, as was widely believed to be the trend in the late nineteenth century (through dying out) and is widely heard again today (through intermarriage and urbanisation), or in deed, as the overwhelming power of the dominant society could gradually wear down and weaken the indigenous population to such an extent that their will and ability to resist incorporation would be extinguished, as various marginalisation hypotheses have projected throughout the twentieth century (and as the appalling conditions on most reserves portend today). The second and more common strategy is the attempt to extinguish the rights of indigenous peoples to their territories and self-government.

Over the last three centuries there have been three enduring types of this second strategy of extinguishing the rights of indigenous peoples. The first is either to presume that indigenous peoples do not have the rights of self-governing peoples which pre-exist and continue through colonisation, or to try to demonstrate, once and for all, that they do not have such rights. The presumption of Crown sovereignty, *terra nullius*, the discovery doctrine, and the primitive or less-developed thesis are examples of discursive techniques employed.

The second strategy is to extinguish indigenous rights either unilaterally (through conquest, the assertion of sovereignty and the doctrine of discontinuity, supersession or by the unilateral effect of lawmaking) or voluntarily (through treaties and cession). The third and



equally familiar strategy and set of distinctive techniques is to transform indigenous peoples into members of the dominant society through re-education, incentives and socialisation so that they lose their attachment to their identity by outlawing indigenous political and social practices and establishing band councils in their place, residential schools, adoption, exchanging native status for voting rights, programs of de-indigenisation and westernisation, and fostering a co-opted native colonial elite to administer the system.[5]

Once one or more of these strategies of extinguishment is presumed to be successful, a number of different strategies of incorporation of indigenous peoples as members of the dominant society have been put into practice by mobilising a corresponding range of governmental techniques. There are two major competing strategies of incorporation in Canada today. The first is assimilation, where indigenous persons are treated like any other member of the settler society. Difference-blind liberalism, the policy of the Reform Party of Canada, the Statement of the Government of Canada on Indian Policy of 1969, and various forms of delegated, municipal-style self-government are examples of this approach. The second is accommodation, where indigenous people are recognised and accommodated as members of Canada and the bearers of, or at least claimants to, a range of aboriginal group rights, in exchange for surrendering or denying the existence of their rights as free peoples. Recent Supreme Court rulings, the present treaty process, and various policies and influential theories of Canada as a multicultural and multinational society (such as the Three Orders of Government of the failed Charlottetown Accord) are examples of this neocolonial approach. In the latter case, commonly called reconciliation, the prevailing system of incorporation is transformed to a legitimate system of group recognition and rights in the Canadian constitution with the agreement of the indigenous peoples themselves.[6]

These five strategies and techniques make up the dominant side of the complex agonic relation of colonial governance vis à vis indigenous resistance. From the side of the ruling peoples, this Goliath-versus-David relation is a political system that underlies and provides the foundation for the constitutional democracies of Canada, the US, Australia and New Zealand. The aim of the system is to ensure that the territory on which the settler societies is built is effectively and legitimately under their exclusive jurisdiction and open to settlement and capitalist development. The means to this end are twofold: the ongoing usurpation, dispossession, incorporation and infringement of the rights of indigenous peoples coupled with various long-term strategies of extinguishment and accommodation that would eventually capture their rights, dissolve the contradiction and legitimise the settlement (see section 2).

From the side of indigenous peoples, it is a political system that overlies and is illegitimately based on making use of their pre-existing governments and territories. It is a system established and continuously modified in response to two distinct types of arts of resistance and freedom: against the structure of domination as a whole in the name of the freedom of self-determination, and within it, by compliance and internal contestation of the strategies and techniques in the name of the freedom of insubordination and dissent (see section 3).

First, indigenous peoples' struggle *for* freedom as peoples in resisting the colonial systems as a whole, in each country and throughout the world of 250 million indigenous people. Given the overwhelming power of the dominant societies, indigenous peoples cannot confront them directly in liberation struggles to overthrow occupying imperial powers, as decolonisation has standardly unfolded in the modern period. Nevertheless, from appeals to the Privy Council in the seventeenth century to statements to the Working Group on Indigenous Populations of the Subcommission on Prevention of Discrimination and Protection of Minorities of the United Nations today, their 'word warriors' have never ceased to declaim the illegitimate system of internal colonisation and proclaim their sovereignty and freedom (see section 4).[7]

Second, they exercise their freedom *of* manoeuvre within the system. In any relation of power by which techniques of government are mobilised to govern the conduct of indigenous peoples, individually and collectively, there is always a range of possible comportments – ways of thinking and acting – that are open in response, from the minuscule range of freedom of hidden insubordination in total institutions such as residential schools to the larger and more public displays of the repatriation of powers of internal self-government, health care, education and territorial control. Over the centuries, indigenous peoples have developed a vast repertoire of infra-political resistance to survive and revitalise their cultures, nations and federations, to keep indigenous ways of being in the world alive and well for the next generations, to adapt these ways and stories to the present strategic situation, to comply with and participate in the dominant institutions while refusing to surrender, to regain degrees of self-rule and control over their territories when possible, and so to seek to transform internal colonisation obliquely from within (Alfred 1999a; Scott 1990).

### Legitimations of Internal Colonisation

The practical relation between internal colonisation and practices of resistance has been the focus of theoretical discussion in the legal, political and academic centres of the dominant societies over the last 30 years because of the capitalist expansion and intensification of the colonial appropriation of formerly neglected or under-exploited indigenous lands and resources, on the one hand, and the globally coordinated insubordination of indigenous peoples on the other. The conflicts on the ground have led to five major types of overlapping forms of conflict and dispute irresolution: recourse to the domestic courts and international law; legislative and constitutional change; treaty-making and other forms of political negotiations; unilateral action by domestic and transnational resource companies, interest groups and governments despite indigenous rights and protests; and native communities unilaterally governing themselves and exercising jurisdiction over their territories despite the law. Critical and historical reflection on these disputes has brought to light the long history of the unresolved system of internal colonisation and practices of resistance of which these contemporary struggles form a part.[8]



With this practical context in view, it is possible to consider how western political theory contributes to the colonisation of indigenous peoples. Written within the larger language of political self-understanding and self-reflection of western societies in general, these theories serve either to legitimise or delegitimise the colonisation of indigenous peoples and their territories. When they legitimise internal colonisation by justifying, defending, or serving as the language of governance and administration of the system and its conflicts, political theories play the (sometimes unintended) role of a discursive technique of government in one or more of the five strategies of extinguishment and accommodation. When they delegitimise the system in one way or another, political theories are a discursive technique in a practice of resistance. With a few notable exceptions, western political theory has played the role of legitimation in the past and continues to do so today.

Briefly, in the first two centuries of overseas expansion Europe emerged from relative obscurity to become the most powerful centre of nations and empires in the world, based largely on the wealth and power generated from the settlement and exploitation of indigenous lands and resources. When the colonies freed themselves from the British empire and developed modern societies on the continued appropriation of indigenous lands and resources, many of the colonies' leading legal and political theorists carried on and elaborated on the traditions of interpretation and justification of the legal and political system of internal colonisation their canonical European predecessors had begun.

In late nineteenth-century Canada, as the indigenous population was reduced and marginalised and internal colonisation firmly secured, the need for further legitimation was correspondingly diminished. The reigning ideology of the superiority of European-derived societies and the

inferiority of indigenous societies served as the taken-for-granted justification for the removal of indigenous populations, who were seen as obstacles to the progressive exploitation of their lands. The relative disappearance of the issue from the public agenda does not mean that resistance did not continue in less public ways. It signals that members of the immigrant society now took the exclusive and legitimate exercise of sovereignty over Great Turtle Island for granted as the unquestionable basis of their society. The question disappeared and was replaced by an abstract starting point for theories of constitutional democracy that had nothing to do with the way these societies were founded. The prior existence and sovereignty, as well as the continuing colonisation and resistance, of indigenous peoples was rarely mentioned until it began to reappear at the margins during the last decade of the twentieth century (Turner 1997; Williams 1990; Pagden 1995; Culhane 1998: 37–72; Tully 1993: 58–99; 1994).

Yet, even in late nineteenth and early twentieth-century conditions of maximum western self-confidence and dogmatic superiority, a lingering uncertainty about the legitimacy of the settler society remained unresolved in practice. Under the cover of public complacency, officials none the less found it necessary to sign a series of extinguishment treaties with a handful of indigenous peoples who were portrayed in the dominant discourse as too primitive to have any rights or to require their consent to take their lands and subject them to colonial rule. Incredibly, the officials asserted that scrawled Xs by a few native people on written documents constituted agreements to cede and extinguish forever whatever rights they might have to tracts of land larger than the European continent. The signatories were said to agree to this in exchange for tiny and crowded reserves (which were soon reduced further) and a few usufructuary rights that exist at the pleasure of the Crown. Indigenous people understood these treaties in the same way as the earlier peace and friendship treaties: as international treaties among equal nations to agree to work out ways of sharing the use of land and resources while maintaining their freedom as nations (Canada, Royal Commission 1995a: 1–59; 1996a: 148–200; 1996b: 9–64; Tobias 1991).

Although indigenous communities began to rebuild, reorganise and fight for their rights during the first half of the twentieth century, their activities did not make a significant impact on the public agenda until the 1970s. The Nisga'a Nation's assertion of their rights to collectively use and occupy their traditional lands led to the judgment of the Supreme Court of Canada of *R* v. *Calder* (1973), which is now seen as marking the transition to the present period. Six of seven judges agreed that Nisga'a Aboriginal rights derived from their occupation of their traditional territories before contact. In the oft-repeated phrase of Mr Justice Judson,



'when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.'[9] Three judges went on to say that their Aboriginal rights had been extinguished unilaterally by general legislation; three said Aboriginal rights could not be extinguished unilaterally except by specific legislation; and the seventh decided against the Nisga'a on the traditional British Columbia argument that this case could not be brought against the province of British Columbia without the appropriate legislation. Although the Nisga'a lost their appeal, the Court found that Aboriginal rights existed at the time of contact and was split evenly on whether or not such rights had been extinguished. So, the contradiction at the foundation of Canadian society and its underlying system of internal colonisation once again entered the public agenda.

Two major official strategies of incorporation have been advanced to resolve the contradiction: to incorporate indigenous people by means of assimilation or accommodation. The assimilation approach has support among some federal and provincial parties, the lower courts, economic interest groups and about half the general public, especially when they are polled on more specific and detailed questions about indigenous self-government. The accommodation approach has support in the higher courts, the federal Conservative Party when it was in office, the current Liberal Government of Canada and the province of British Columbia in the current treaty process, and the other half of the general public, especially when polling questions are posed in general terms (Warry 1998: 20–30, 249–55; Smith 1995). Although incorporation by accommodation is legitimated by policies and theories of multiculturalism, it is more illuminating to investigate the basics of the strategy in two fora: the Supreme Court of Canada and the treaty process. While each approach gives different degrees of recognition and accommodation to indigenous peoples, both do so within the indubitable sovereignty of the Canadian state over indigenous peoples and so do not question, let alone challenge, the continuing colonisation of indigenous peoples and their territories, but serve to legitimise it.

In a series of decisions from *R* v. *Sparrow* (1990) to *Delgamuukw* v. *BC* (1997) the Supreme Court has defined the rights of Aboriginal peoples as those rights that are recognised and affirmed in section 35 of the *Constitution Act 1982* (Asch 1997; 1999). The Court advances four main steps to define these constitutional rights.

First, the Court incorporates indigenous peoples into Canada and subjects them to the Canadian constitution in the very act of recognising their rights as rights within the Canadian constitution. In so doing, it reaffirms the system of internal colonisation. The Court does not acknowledge that indigenous peoples possess any rights that pre-exist

the assertion of sovereignty by the Crown in 1846 (in British Columbia) over the territory now called Canada; rights which may render the establishment of Crown sovereignty subject to their consent and which may have survived unsurrendered into the present. The rights that Aboriginal peoples have in Canada are said to have their source or foundation in the pre-existence of organised Aboriginal societies, systems of laws and the occupation and use of their territories since time immemorial. Nevertheless, these activities, institutions and practices, which are the universal criteria of sovereignty and self-determination, did not give rise to any rights until they were recognised by the Crown as common law rights until 1982, and as constitutional rights thereafter. As the Court explains with respect to Aboriginal title (the aboriginal right to land):

> from a theoretical standpoint, aboriginal title arises out of the prior occupation of the land by aboriginal peoples and out of the relationship between the common law and the pre-existing system of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this [underlying] title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.[10]

As a result of the nonsense of speaking about rights of indigenous peoples to their territories before the recognition of their rights within common law, there is no reason to doubt that the unilateral assertion of sovereignty by the Crown over their territories, without their consent, constituted the legitimate achievement of sovereignty:

> [I]t is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown . . . [11]

Thus, indigenous peoples are subject to internal colonisation by a combination of a doctrine of *terra nullius* and a doctrine that discovery, settlement and recognition by other European powers constitute legitimate sovereignty and subjection.[12]

The second defining characteristic of the Aboriginal rights that indigenous peoples are recognised as having, only in virtue of being members of the Canadian society and subject to its sovereignty, is that such rights derive exclusively from the distinctiveness of Aboriginal peoples as *aboriginals*. They do not derive from any universal principles, such as the freedom and equality of peoples, the sovereignty of long-standing, self-governing nations, or the jurisdiction of a people over the territory they have occupied and used to the exclusion and recognition of other peoples since time immemorial. The Court explicitly rejects any appeal to such universal general rights of the liberal Enlightenment as a ground of aboriginal rights.[13]



The Court has shown that a wide range of cultural, ceremonial and economic rights, including rights to the land, can be derived from the distinctiveness of Aboriginal peoples and that these rights need not be limited to the distinctive practices, customs and traditions they engaged in at the time of contact. A limited right of self-government within the Canadian constitutional structure may also be derived from aboriginal distinctiveness in future cases. This exclusive ground of Aboriginal rights in the politics of difference (without the universal demand for freedom that underlies and justifies it) has thus ushered in a higher degree of internal autonomy for indigenous people within the colonial system than they have been permitted since the mid-nineteenth century, when administrative intervention in their internal affairs began in earnest. Nevertheless, it denies indigenous peoples the right to appeal to universal principles of freedom and equality in struggling against injustice, precisely the appeal that would call into question the basis of internal colonisation.[14]

The third step in defining Aboriginal rights concerns the content and proof of Aboriginal title (aboriginal rights to land). The right of an Aboriginal people to land is derived from their distinctive occupation of the land at the time of contact and the Crown's recognition of that occupation as a common law and constitutional right. Aboriginal title is a distinctive or *sui generis* proprietary right, yet similar to fee simple. It is a right to the land and its exclusive use, alienable only to the Crown, and held communally. The land may be used for a variety of purposes, which do not need to be distinctive to the Aboriginal community, such as resource extraction, subject to the limitation that the land cannot be used in a manner that is irreconcilable with the distinctive nature of the attachment to the land by the Aboriginal people claiming the right (*Delgamuukw* 1997: 112–39; McNeil 1998: 2–6).

Following from the first two steps, the onus of proof is not on Canada to prove that it has the underlying title to all indigenous territories. This is not a claim but an assertion validated by its acknowledgment by other European powers. Rather, the burden of proof is made to rest with indigenous peoples, who are presumed not to actually possess aboriginal title, but to be making a claim to it before the Court. For an indigenous people to possess and be able to exercise title to their land, they have to prove to the satisfaction of the colonial Court that they occupied the claimed land at the time the Crown asserted sovereignty over them, and that the occupation was exclusive (*Delgamuukw* 1997: 140–59; McNeil 1998: 7–8).

No such proof has been made. Even if such a proof is successful in the future, the structure of the process further entrenches the taken-for-granted colonial relationship in which the claim is presented and the proof granted or withheld.

The fourth and final step is that once a claim to Aboriginal title is proven, and presuming the land and resources have not been developed in the interim, the title has still to be reconciled with the sovereignty of the Crown. That is, the Crown must take into account the justifiable objectives of the larger Canadian society that conflict with an Aboriginal land right, infringe the right accordingly, and compensate the aboriginal people for the infringement. The Court explains in *Delgamuukw* that proven Aboriginal title can be infringed by the federal and provincial governments if the infringement furthers a compelling and substantive legislative objective and if it is consistent with the fiduciary relation between Crown and Aboriginal peoples. The sorts of objectives that justify infringement are:

> the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. (*Delgamuukw* 1997: 165, 166–69; McNeil 1998: 8–14)

It is difficult to see in these objectives much difference from the early justifications of dispossession in terms of the superiority of European-derived societies and their developmental imperatives.[15] The federal and provincial governments are not obliged to gain the consent of the Aboriginal people whose right they infringe (another unique feature of this constitutional right) or to bring them in as partners in the developmental activities. As in the nineteenth century, governments are under a duty only to compensate the Aboriginal people for taking their land. Compensation involves consultation (consent if it involves fishing and hunting regulations) and the compensation paid should vary with the nature of the title affected, the severity of its infringement and the extent to which aboriginal interests are accommodated.

In summary, the underlying reason why the land rights of Aboriginal peoples can be treated in this imperial manner is that Aboriginal societies unquestionably are distinctive colonies incorporated within and subject to the sovereignty of the larger Canadian society:

> Because . . . distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantive importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[16]



That is to say, the internal colonisation of indigenous peoples itself provides the ultimate justification for the infringement of the rights they have within Canadian society.

In *Delgamuukw*, the Supreme Court recommends that the Gitxsan and Wet'suwet'en peoples turn to the treaty process to settle their lands, guided by the framework the Court sets out, rather than returning to an expensive retrial. An example of this alternative strategy is the negotiations of the Nisga'a Nation of Northern British Columbia with the federal government and, after 1990, the provincial government of British Columbia. Twenty years of negotiations led to the *Nisga'a Final Agreement* in 1998, which shows fairly clearly what can be expected from the present treaty process.

The Nisga'a treaty follows for the most part the framework set out by the Supreme Court. The Preamble states that the objective is the same as the Court's – to reconcile the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown – but to achieve reconciliation by negotiation rather than litigation. Like the approach of the Supreme Court, the Nisga'a are recognised from the outset as Aboriginal people within Canada and subject to the Crown. They are an Aboriginal people or a first nation *of* Canada. Furthermore, the aim of the negotiations is to define the undefined distinctive aboriginal rights that the Nisga'a have under section 35 of the *Constitution Act 1982* exhaustively and completely in terms of the rights and remedies set out and agreed to in the treaty.[17]

In place of the Court's step of infringement of and compensation for the lands they occupied at the time the Crown asserted sovereignty, the Nisga'a voluntarily gave up to the Crown in the negotiations 93 per cent of their traditional territory. Over the remaining 7 per cent (approximately 2000 square kilometres), they are allotted Aboriginal title in the form of an estate in fee simple proprietary right under the constitution, some rights with respect to trap lines, wildlife and migratory birds outside Nisga'a lands, and approximately $200 million in compensation. Unlike the Court, which has not ruled on an Aboriginal right of self-government, but following the federal and provincial government's policies of recognising such a right in principle, the Nisga'a Nation negotiated an Aboriginal right of limited, western-style self-government,

with more powers than a municipality yet less than a province, and within the bounds of the constitution.[18]

Like the Court, the federal government has never questioned the legitimacy of the unilateral exercise of sovereignty over the indigenous peoples and their territories.[19] Nevertheless, as we have seen, governments of Canada have always been concerned to extinguish whatever rights indigenous peoples might have independent of the Canadian legal system. Therefore, unlike the Court, which does not acknowledge such rights, the treaty stipulates that the rights set out are the full and final settlement of the Aboriginal rights of the Nisga'a, not only under section 35, but any rights they may have or come to have as indigenous peoples from any other source. For greater clarity, any such rights are either modified and continued in their entirety in the treaty rights or the Nisga'a Nation releases them to Canada (*Nisga'a* 1998: 20–1).

Although the term is 'release' rather than the traditional 'extinguishment', the legal effect is the same. As far as I am aware, this is the first time in the history of Great Turtle Island that an indigenous people, or at least 61 per cent of its eligible voters, has voluntarily surrendered their rights as indigenous peoples, not to mention surrendering over 90 per cent of their territory, and accepted their status as a distinctive minority with group rights within Canada. This appears to be the first success of strategies of extinguishment (release) and incorporation by agreement.[20]

## Struggles *for* Freedom

Western political theories need not legitimise colonisation. Political theorists can employ the language of western political thought critically to test these dubious justifications, to delegitimise them and to test the claims of indigenous peoples for and of freedom. This orientation takes up the second question made at the beginning: what resources exist in political theory for thinking about the possibilities of a non-colonial relation between indigenous and non-indigenous peoples?

Recall that indigenous peoples resist colonisation in two distinct ways. First, they struggle against the structure of domination as a whole and for the sake of their freedom as peoples. Second, they struggle within the structure of domination vis à vis techniques of government, by exercising their freedom of thought and action with the aim of modifying the system in the short term and transforming it from within in the long term.

A people can struggle directly against colonisation in two ways: by words and deeds. In this case the recourse to deed – a direct confrontation in a revolution to overthrow the colonial system – is next to impossible. The states against which the revolution would take place are the most powerful in the world and exist on the same territory as the colony.



Turning to direct confrontation by the pen rather than the sword, two underlying presumptions, firmly held in place by the day-to-day activities that reproduce these societies, serve to legitimise the system of internal colonisation. The first is that the exercise of exclusive jurisdiction over the territories of indigenous peoples is not only effective but also legitimate: it was either legitimately established in the past or the present irresolution is in the process of being legitimately resolved today by one or more of the five main strategies. The second presumption is that there is no viable alternative. Given the modern system of independent nation states, each with exclusive jurisdiction over its territory, either the dominant state exercises exclusive jurisdiction or the indigenous people do after a successful colonial revolt, but the latter is impossible. These two presumptions reinforce each other. They are among the 'hinge' propositions around which the political and economic way of life of these modern societies turns.[21]

Although it is impractical to struggle for freedom in deed by direct confrontation, it is possible to struggle in words by confronting and seeking to invalidate the two legitimating hinge propositions. This is the way of indigenous word warriors and of western political theorists who take a critical stance towards the legitimating and deeply embedded myths of their society. This critical activity consists in three major exercises:

- to test if the freedom and equality of indigenous peoples as peoples with jurisdiction and governance over their territories is defensible by the principles of western political thought;
- to test the alleged validity of various legitimations of their incorporation; and
- to show that the second hinge proposition is a false dichotomy that conceals a way of resolving the underlying contradiction of the colonial system: namely, indigenous peoples and settler peoples can recognise each other as free and equal on the same territory because jurisdiction can be shared as well as exclusive.

Dale Turner explains that indigenous word warriors have their ways of engaging in these three exercises by presenting indigenous political theories that draw on the indigenous language of political thought. By listening to and responding to these presentations in critical discussions, members of the dominant society can begin to free themselves from the hold of the hinge propositions and take a critical stance. These intercultural dialogues are the best and most effective way, for they enable Westerners to see their conventional horizon as a limit and the dialogues are themselves intimations of and indispensable groundwork for a future non-colonial relationship between genuinely free and equal peoples (Turner 1997; forthcoming). A second-best, monological approach is to

draw on the resources of critical self-reflection available within the dominant western language of political thought to challenge the comfortable and unexamined prejudices of self-understanding and present a non-colonial alternative.

In the second-best approach, employed by indigenous and non-indigenous scholars over the last forty years, the three critical exercises go together. To show that indigenous peoples are self-determining peoples with jurisdiction over their territories entails that the standard legitimations of their colonisation are false, since these legitimations presuppose that indigenous populations are not peoples, and the third exercise then follows. The two most thoroughly researched and reasoned arguments of this comprehensive kind are the prior and coexisting sovereignty argument and the self-determination argument.

The prior and coexisting sovereignty argument begins with a historical investigation of the situation at the time that Europeans arrived on Great Turtle Island and the Crown asserted sovereignty. America was inhabited by indigenous peoples, divided into separate stateless nations, independent of each other and the rest of the world, who governed themselves by their own laws and ways, occupying and exercising jurisdiction over their territories. As a consequence, they met the criteria of free peoples and sovereign nations in the law of nations, and so were equal in status to European nations. The question is, how can the Europeans legitimately settle and establish their sovereignty; that is, acquire their own territory and exercise jurisdiction over it and establish their own political and economic institutions? This is the starting point for an inquiry into justice and legitimacy of governments and jurisdiction in the US and Canada, not the fictitious and counter-factual original position that has dominated most political theory for the twentieth century.[22]

The only defensible answer in accordance with unbiased western principles of international law at the time and today is that the legitimate achievement of non-indigenous sovereignty in North America consists of two steps. First discovery, some settlement, the assertion of sovereignty by an European nation, and the international negotiation of boundaries with other affected European colonising nations is sufficient to establish sovereignty vis à vis other European nations. However, this step has no effect on the indigenous nations of the territories over which sovereignty is asserted because these nations, unlike the other European nations, have not given their consent. To legitimise their exercise of sovereignty on Great Turtle Island, the European nations had next to gain the consent of indigenous peoples. This second step is fundamental to legitimation, for it follows from the basic principle of western law, both domestically and in international relations among independent nations, that the exercise of sovereignty must be based on the consent of those affected by it.[23]



To gain the consent of indigenous peoples, representatives of the Crown are required to enter into negotiations with indigenous peoples as nations equal in status to the Crown. The negotiations are nation to nation, and the treaties that follow from agreement on both sides are, by definition, international treaties. If the Crown pretends that the treaty negotiations take place within its overriding jurisdiction, then it fails to recognise the status of indigenous peoples, and incorporates and subordinates them without justification, rendering the negotiation illegitimate. The indigenous nation in question thus has the right to appeal not only to domestic courts for redress of infringement, but, if this fails, to international law, like any other nation.[24]

Under these circumstances, the indigenous peoples were and are willing to give their consent to the assertion of the coexisting sovereignty of the Crown on three conditions. First, that the indigenous peoples continue to exercise their own stateless, popular sovereignty on the territories they reserve for themselves and the newcomers are not to interfere. Second, the settlers can establish their own governments and jurisdictions on unoccupied territories that are given to them by indigenous peoples in return for being left alone on their own territories. Third, indigenous peoples agree to share jurisdiction with the newcomers over the remaining, overlapping territories so that one party to a treaty does not extinguish its rights and subordinate itself to the other. Instead, they treat each other as equal, self-governing, and coexisting entities, and set up negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence, and to deal multilaterally rather than unilaterally with the legitimate objectives of the larger society, subject to review and renegotiation when necessary, as circumstances change and differences arise.[25]

Such a stance constitutes a genuine resolution of the problem of internal colonisation. It shows that indigenous peoples were independent peoples or nations at the time of the assertion of sovereignty by the Crown, that this status has not been legitimately surrendered, and, consequently, the prevailing legitimations of exclusive Crown sovereignty are indefensible. The presumption that jurisdiction must be exclusive is replaced with two (indigenous) principles: free and equal peoples on the same continent can mutually recognise the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination. This is a form of treaty federalism with the capacity to negotiate fairly all the legitimate objectives of the now much larger settler society (including obligations beyond Canadian borders) much better than the present system of infringements, protests, lawsuits, negotiations and uncertainty. In summary, prior and continuing 'sovereignty' does not refer to state sovereignty, but, rather, a stateless,

self-governing and autonomous people, equal in status, but not in form, to the Canadian state, with a willingness to negotiate shared jurisdiction of land and resources.[26]

Notwithstanding the availability and legitimacy of this resolution, it has been overwhelmed by the drive of colonising states to establish their exclusive jurisdiction and to legitimate it by doctrines of discovery and incorporation and by interpreting treaties as domestic instruments of extinguishment and release. Hence, indigenous peoples have turned to international law to gain recognition and protection of their status as peoples with the right of self-determination. The extensive research and reasoning that support their prior and coexisting sovereignty also, and *eo ipso*, support the recognition of indigenous populations as internally colonised peoples to whom the principle of self-determination applies.[27] The principle or right of the self-determination of colonised peoples is one of the fundamental and universal principles of the United Nations and international law. In Article 1(2) of the Charter and the Covenants of the UN self-determination is equal in status to individual human rights. Moreover, it is in general the principle that has justified decolonisation struggles since the Enlightenment, including those of Canada, the US, Australia and New Zealand.[28]

Indigenous peoples have gained a modicum of support at the UN. In an advisory opinion of the International Court of Justice, *Western Sahara*, the International Court of Justice rejected the doctrine of discovery and asserted that the only way a foreign sovereign could acquire a right to enter into territory that is not *terra nullius* is with the consent of the inhabitants by means of a public agreement. The Court further advised that the structure and form of government and whether a people are said to be at a lower level of civilisation are not valid criteria for determining if the inhabitants have rights, such as the right of self-determination. The relevant consideration is if they have social and political organisations. This line of reasoning calls into question the doctrines that continue to serve to deny the prior and continuing rights of indigenous peoples in Canada.[29] In addition, indigenous peoples managed to have established within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights a working group on indigenous populations in 1982. The working group provides a forum for presentations by indigenous peoples and has issued a draft Declaration on the Rights of Indigenous Peoples which states that indigenous peoples have a qualified right to self-determination.[30]

Despite such occasional glimmers of hope, indigenous peoples are not recognised as colonised peoples to whom the principle of self-determination applies. The reason for this is that international law, the UN



and its Committees are created by existing nation states that will do everything in their power to deny the application of the principle of self-determination whenever it threatens their exclusive jurisdiction.[31] The four main ways its application to indigenous peoples is denied in international law are analogous to and complement the earlier arguments in domestic law to incorporate and assimilate or accommodate indigenous peoples within the exclusive jurisdiction of existing nation states. As in the domestic case, indigenous and non-indigenous scholars have critically examined these rationalisations, shown them to be dubious, and defended the application of the principle to indigenous peoples.

The first argument is that indigenous peoples do not meet the criteria of 'peoples' but are 'populations' or 'minorities' within states. This strategy is not difficult to employ because there is no official agreement on the criteria and the general guidelines are vague. Even so, studies by Special Rapporteurs at the UN tend to substantiate what independent research has shown: the indigenous peoples of the Americas are peoples in the clear meaning of the term as it is used in the Charter and the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, and thus the principle of self-determination enunciated in the Declaration applies to them.[32] It is difficult to see how peoples who have governed themselves over their territories for millennia and have not surrendered under a few centuries of colonisation can be denied the status of peoples by those who have colonised them, without introducing a biased criterion that the ICJ has said to be inadmissible.

The second argument is the 'saltwater' thesis that the right of self-determination applies only to colonised peoples on geographically separate territories from the imperial country. This notorious and arbitrary thesis in the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples neatly legitimises the dismantling of external colonies in the twentieth century while excluding internal colonies, thereby denying indigenous peoples the same right as other colonised peoples and protecting the exclusive jurisdiction of the major drafters of the Declaration.[33]

A more serious argument is that the right of self-determination of colonised peoples is subordinate to the protection of the territorial integrity of existing nation states from disruption.[34] There are two cogent responses to this argument. First, it presupposes what is in question: namely, the legitimacy of the present territorial integrity of existing nation states. The second and more important response is that the recognition of the right of indigenous peoples to self-determination does not entail the disruption of the territorial integrity of existing nation states. This would be the case only if the exercise of the right of self-determination by indigenous peoples took the European and third-world form of deco-

lonisation and the establishment of sovereign nation states with exclusive jurisdiction over their territories. For indigenous peoples, the exercise of self-determination consists of decolonisation and the recognition of indigenous peoples as free, equal and self-governing peoples under international law, with *shared* jurisdiction over lands and resources on the basis of mutual consent.[35] This achieves rather than disrupts territorial integrity (if 'integrity' has any normative content) by amending an illegitimate exclusive jurisdiction into a legitimate shared jurisdiction. This kind of post-Westphalian, multiple and overlapping governance and jurisdiction is said to be the general tendency of global politics in many spheres. There is no non-discriminatory reason why it should be denied in this specific case, only the tenacity by which existing states hold on to their exclusive jurisdiction, inherited from an earlier period in which state sovereignty ruled supreme.[36]

The final and most prevalent argument is that the principle applies only to colonised peoples, whereas indigenous peoples are said already to enjoy the right of self-determination within existing nation states. This comes in two varieties. The first is that the right of self-determination is satisfied when indigenous peoples are counted as part of the fictitious, homogeneous sovereign people of a nation state and are able to exercise the same individual rights of participation as other citizens.[37] Here, the reduction of the rights of peoples to undifferentiated individual rights of participation is used to gloss over the existence of more than one people in an existing nation state and so to legitimise their assimilation. Given the dispossession, usurpation and cultural genocide this ruse conceals, it is beneath contempt. Even so, critical liberal theorists have responded that it undermines the individual liberties and goods that liberal democracy is supposed to secure, by destroying the appropriate institutions of self-rule in which they are cultivated and protected.[38]

The more sophisticated version of this argument is that forms of accommodation that recognise degrees of self-government and land rights within existing nation states satisfy the criteria of *internal* self-determination. The right of internal self-determination is the right of a people within a larger state to govern themselves in a wide range of matters, including culture, religion, education, information, health, housing, welfare, economic activity, land and resource management, environmental practices and membership.[39] If a people exercise such a right, they are not colonised but internally self-determining. Only if this right of *internal* self-determination is thwarted by the encompassing society may a people in principle exercise the right of *external* self-determination: that is, free themselves from the dominant society and set up their own nation state. Since societies with systems of internal colonisation



claim to be moving in the direction of recognising the right of internal self-determination, the demand for self-determination is being met and these societies are legitimate under international law.[40]

The response of indigenous people is that this argument perpetuates rather than dismantles the system of internal colonisation by giving international legitimacy to domestic policies of incorporation and accommodation (Venne 1998: 119–22, 138–63). Indigenous peoples are not recognised as peoples under international law, but as peoples under domestic law. Also, their jurisdiction over their territories is not recognised. Rather, they are given a form of proprietary right to a small portion of their territories under the domestic legal system. As a result, they are precluded from appealing to international law as peoples to redress infringement of their rights under the guise of domestic law – the very reason they turned to international law. Finally, the contradiction generated by the presumption of exclusive jurisdiction is reproduced rather than questioned by the distinction between internal and external self-determination, thereby eliding the resolution indigenous people offer.

It follows that internal self-determination is not a valid form of self-determination at all. The principle or right of self-determination is, on any plausible account of its contested criteria, the right of a people to govern themselves by their own laws and exercise jurisdiction over their territories, either exclusively or shared. A people are said to govern themselves, and thus to be a free people, when the laws by which they are governed rest on their consent or the consent of their representatives. The condition of consent holds for legislation and even more fundamentally for the constitution. If the constitution does not rest on the consent of the people or their representatives, or if there is not a procedure by which it can be so amended, then they are neither self-governing nor self-determining, but are governed and determined by a structure of laws that is imposed on them and they are unfree. This is the principle of popular sovereignty by which modern peoples and governments are said to be free and legitimate.[41]

Yet, this principle of popular sovereignty and condition of self-determination is not met by the concept of internal self-determination. An alien constitution, the constitution of surrounding nation state, is imposed over indigenous peoples and their territories without their consent and to which they are subject. Their internal self-determination exists within the constitution, which functions as a structure of domination. They will be free and self-determining only when they governed themselves by their own constitutions and these are equal in international status to western constitutions. Internal self-determination, therefore, is not a form of self-determination or freedom. It is a form of indirect colonial rule, not unlike earlier forms of British indirect colonial rule, which

Canadians, Americans, Australians and New Zealanders found to be an intolerable form of unfreedom and the justification for their own successful and purportedly universal struggles for freedom. Yet, for reasons that do not withstand public scrutiny, they do not hesitate to impose such a yoke on weak and captive peoples within their own borders.[42]

### Struggles *of* Freedom

Despite the cogency of research and arguments supporting the freedom of indigenous peoples in domestic and international arenas, the system of internal colonisation remains firmly in place and the two presumptions reinforcing it remain largely unquestioned. One reason for this inertia is the overwhelming power and interest of the existing nation states with internal indigenous colonies. Another is that propositions which play the hinge role in a society – of being presupposed by and legitimising its routine way of political and economic life – are relatively immune from direct criticism. They are background norms of the daily operation and criticism of the institutions and practices, not objects of criticism – the riverbed, not the river (Wittgenstein 1974: 341, 343, 655; Zerilli 1998). The irresolution thus remains in theory and practice, as East Timor tragically illustrates.

If such hinge propositions and the social system they legitimise change over time, they do so obliquely, by means of more local and indirect criticism and modification within the system they frame. The multiplicity of immanent activities of challenging specific strategies and techniques by the democratic means of dissent and insubordination available may not only modify this or that rule of the system, which is important in itself, but may also in the long run bring about the self-overcoming of the system itself (Foucault 1998: 316; Scott 1990). Consequently, the arts of resistance involved in struggles *of* freedom to modify the system of internal colonisation from within are arguably more important and more effective than the complementary arts of legitimising and delegitimising struggles for freedom with which political theorists have been preoccupied.

The diverse range of possibilities of thinking and acting differently vis à vis the relations of knowledge and techniques of government that reproduce the system – of working with and against, of complying and adapting while resisting the allure of the co-opted native, male colonial elite, of indigenising the degree of self-government and land use recovered, of connecting reserve and off-reserve native people, and innumerable other arts of resistance – constitute a vast field of human freedom, not unlike any other colonial system. These arts of words and deeds have been practised since the beginning of colonisation. In addition to the



spectacular public displays of resistance mentioned earlier, they are mostly quotidian acts of protecting, recovering, gathering together, keeping, revitalising, teaching and adapting entire forms of indigenous life that were nearly destroyed. The persistence of traditional medicine, healing and child-rearing practices, the revitalisation of justice circles, indigenous languages and political ways, and the astonishing recovery and renaissance of indigenous art are some examples of these arts of resistance and indigenisation that Taiaiake Alfred calls 'self-conscious traditionalism' (Alfred 1999a: 80–8; Simpson, this volume).

These practices of freedom on the rough ground of daily colonisation usually fall beneath the attention and interest of Western political theorists unless they are members of an oppressed group, and it is the big, abstract questions of normative legitimation that tend to capture the attention of most of the field. Yet it is these unnoticed contextual struggles of human freedom in the face of techniques of government and strategies of legitimation that have brought the internal colonisation of indigenous peoples to the threshold of public attention and critical reflection in our time. And it is these which have the potential to lead in the long run to the same kind of freedom for indigenous peoples that western political theorists and citizens already enjoy, but which is currently based on the unfreedom of indigenous peoples.

9 It has been argued on the grounds of liberal neutrality that the state has no business subsidising the cultural choices of individuals, but equally, has no business interfering with them. Hence there are no grounds for group rights, but individuals should be free to form or re-affirm their commitment to various kinds of associations (cultural or otherwise). See Kukathas 1997b.

### 2 Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Māori

1 *Colonial Office memorandum CO 209/2*:409. Reference given by Paul McHugh in Kawharu 1989: 31, 57.
2 For Chief Justice Prendergast's judgment in the case *Wi Parata* v. *Bishop of Wellington 1877*, see Kawharu 1989: 110–13.
3 For a short statement of the view that this was a 'Declaration of Independence' intended to establish a Māori sovereign state and countered by the Treaty of Waitangi, see Durie 1998: 2–3. For the historical circumstances, with emphasis on the role of James Busby as resident on behalf of the Crown, see Orange 1987: 19–23.
4 For the enlargement of vocabulary from *rangatiratanga* into *mana*, see Durie 1998: 2–3. He uses the latter term to constitute the entire Māori world-view as a basis of identity and sovereignty. I continue to use *rangatiratanga* as a starting point for the non-Māori reader who is encountering the question.
5 The term 'contact' is a key one in Pacific historiography, denoting the moment at which the encounter between cultures began.
6 I owe much here to conversations with Mark Hickford at St Antony's College, Oxford.
7 See Windschuttle 1994 and the ensuing exchange in La Capra, Baswick & Leeson 1999: 709–11, alluding to the exchange between Peter Munz and Anne Salmond (Munz & Salmond 1994: 60ff).
8 For Locke on 'federative power', see *Second Treatise*, chapter 12, sections 143–48; it is mentioned last.
9 For a reconstitution of the Māori universe of *utu*, see Salmond 1997. The Māori cosmogony is set forth, and stated as the basis of cultural claim, in Durie 1998, and many other authors.
10 For questions about *pākehā* identity and history, and whether the word *pākehā* adequately ascribes them, see Sharp 1997: 64–9.
11 A meeting place where strangers are challenged, then recognised as guests, and where debate occurs among those qualified to take part in it.
12 The *waka* is the sailing vessel, single or double-hulled, in which Polynesians navigated the Pacific. The connotations of 'galley' make it a better English translation than 'canoe'. It is here used as a Māori translation of 'ship'. For *tau iwi* and its ambivalences, see Sharp 1997: 65–6.

### 3 The Struggles of Indigenous Peoples for and of Freedom

1 For the failure of Western political theorists to enter into a just dialogue with indigenous peoples and their political traditions, see Turner 1997. I am greatly indebted to this Anishnabai political philosopher for helping me to understand the shortcomings of Western political theory in relation to indigenous political theory, as well as the possibilities for a fair dialogue. See also Turner forthcoming.



2 The best introduction to how these two concepts are used by indigenous peoples is Turner 1997; forthcoming, and Alfred 1999a. I am greatly indebted to this Kanien'kehaka Mohawk political scientist for helping me to understand the system of internal colonisation and the two arts of resistance and freedom practised by indigenous peoples. See also Alfred 1995.
3 For a summary of the historical research on the four dimensions of colonisation over four historical periods in Canada, see Royal Commission on Aboriginal Peoples 1996a.
4 Accordingly, the techniques of government standardly have two objectives: to cope with the immediate situation in the short term and to move indigenous peoples towards extinguishment in the long run. See, for example, the four policies analysed by the Royal Commission 1996a: 245–604.
5 For a summary of historical research on the three strategies of extinguishing rights, see Royal Commission 1996a: 137–200, 245–604, and the subhead 'Legitimations of Internal Colonisation'.
6 For the strategies of assimilation and accommodation, see Armitage 1995; Royal Commission 1996a: 201–44, 245–604; Culhane 1998: 90–110; Warry 1998 and 'Legitimations of Internal Colonisation'.
7 For the concept of a 'word warrior', see Turner forthcoming, and the subhead 'Struggles for Freedom'. For a recent statement of indigenous sovereignty and self-determination, see Alfred 1999b.
8 The extensive research commissioned by the Canadian Royal Commission on Aboriginal Peoples from 1991 to 1996 is a good introduction to this field.
9 *Calder* et al. v. *AG BC* (1973), 34 DLR (3rd) 145 [1973] SCR 313: 156. For background, see Raunet 1996.
10 *Delgamuukw* v. *BC* [1997] 1 CNLR 14: 145. (Henceforth in text as Delgamuukw 1997.) For an analysis of *Delgamuukw*, to which I am greatly indebted, see McNeil 1998. For a broad textual and contextual analysis of the cases leading up to *Delgamuukw* in 1997, see Culhane 1998.
11 *R.* v. *Sparrow* [1990] DLR (4th): 404, cited in Asch 1999: 439.
12 The date the Court gives for the assertion of sovereignty over indigenous peoples and their lands is 1846, the year of the Treaty of Washington between the British Crown and the US in which the southern border of the colonies of British Columbia and Vancouver Island was settled between them. 'Settlement' is perhaps a misnomer as the immigrant settlements were resettlements on lands from which indigenous peoples had been removed (see Harris 1997). These resettlements covered a tiny portion of British Columbia and were nowhere near the Gitxsan and Wet'suwet'en territories. The indigenous population still outnumbered the non-indigenous population when the colony joined Canada in 1871 and their lands were transferred to the Crown in Canada without their consent. See the subhead 'Struggles for Freedom' for the rejection by the International Court of Justice of the Supreme Court's type of argument that settlement and recognition by another European power without the consent of indigenous peoples legitimates sovereignty.
13 *Delgamuukw* 1997: 114, 141. For the appeal to their 'distinctness' as 'aboriginals' as the sole basis of aboriginal rights in earlier judgments, see Asch 1999: 432, 436–37, 439. For the Court's rejection of any appeal to the general and universal rights of the Enlightenment as a source of aboriginal rights, see *Van der Peet* (1996) 137 DLR (4th): 289 (SCC): 300, cited in Asch 1999: 435, 439. Asch argues that this feature of the Court's judgments legitimates and continues the colonial status of indigenous peoples.

14 This is the main thesis of Asch 1999.

15 For these justifications, see Turner 1997; Williams 1990; Pagden 1995; Culhane 1998: 37–72 and Tully 1993: 58–99, 104. McNeil 1998: 11–12 comments:

> This sounds very much like a familiar justification for dispossessing Aboriginal peoples in the heyday of European colonialism in Eastern North America – agriculturists are superior to hunters and gatherers, and so can take their land. But Lamer CJ was not referring to the seventeenth and eighteenth centuries – he was talking about the present day, as justification for infringement only became relevant after Aboriginal rights were constitutionalized in 1982!

16 *Delgamuukw* 1997: 161. Lamer CJ is citing with approval an earlier case, *Gladstone*, para 73.

17 The Government of Canada, the Government of British Columbia and the Nisga'a Nation, *Nisga'a Final Agreement* (1998), Preamble, clauses 2, 3, 6, p.1. The Agreement was signed by the three parties on 4 August 1998 after twenty years of negotiation. The Nisga'a people ratified the Agreement by a vote of 61 per cent in a referendum and the people of British Columbia ratified it by a narrow majority vote in the provincial legislature. As of September 1999 the federal government has not ratified the Agreement. There are two court challenges to the Agreement that the self-government provisions violate the constitutional division of powers and that it violates the Charter rights of non-aboriginal citizens. One indigenous nation, the Gitanyow, claim that the original Nisga'a land claim includes part of their traditional territory. For an overview of the arguments *pro* and *contra*, see the articles in *British Columbian Studies* 1998–99. For the legal and historical background, see Foster 1998–99 and Raunet 1996.

18 See *Nisga'a* 1998: 31–158 (land and resources); pp. 159–95 (self-government and justice). For details of the land settlement, see Appendices.

19 See, for example, the 1989 submission of the Attorney General of Canada in defense of the earlier, lower-court challenge by the Gitxsan and Wet'suwet'en peoples for legal recognition of their rights to jurisdiction over their traditional territories. It states (cited in Asch 1999: 444, *n.* 29):

> The plaintiffs' claim to ownership and jurisdiction over all the lands in the claim area. The Attorney General of Canada responds: Ownership and jurisdiction constitute a claim to sovereignty. If the Plaintiffs ever had sovereignty, it was extinguished completely by the assertion of sovereignty by Great Britain.

20 Although the provincial government has heralded this treaty as a 'template' for the treaties now under negotiation with fifty other First Nations, most of the other First Nations have said that it is not a template. For a devastating criticism of the Agreement, and the modern treaty process in British Columbia more generally, as a strategy of assimilation, see Alfred 1995: 119–28.

21 For hinge propositions, see 'Struggles of Freedom' and note 42.

22 This starting point is a paraphrase of John Marshall, an early Chief Justice of the US, in *Worcester* v. *the State of Georgia* in 1832 (6 Peter's Reports, 515–97). The two-step procedure, international treaties and continuing sovereignty are also features of Marshall's famous argument. See Tully 1993: 117–27. This is incompatible with his earlier statement that indigenous nations are domestic and dependent, unless an indigenous nation has agreed to this status in international negotiations, but there is no evidence of this. For the limitations of Marshall's use of the prior and continuing sovereignty argument, see Turner 1997. Another famous articulation of the prior and continuing sovereignty argument is the *Kaswentha* or Two Row Wampum model of treaty-making between free and coexisting peoples of the *Haudenosaunee* or Iroquois confederacy. See Tully 1993: 127–29 and Alfred 1999a: 52–3, 104, 113.



23 This fundamental principle has been upheld by the International Court of Justice in its *Advisory Opinion Concerning the Western Sahara* (1975). See note 28.

24 This understanding of treaties and of the Royal Proclamation of 1763, as international treaties among equal nations or peoples, is the way treaties are understood by indigenous peoples and it has gained considerable historical and normative support by Western scholars. See Burrows 1997; Venne 1997; Royal Commission on Aboriginal Peoples 1995a: 59–70; 1996b: 18:

> In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making . . . represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.

25 See Royal Commission on Aboriginal Peoples 1996a: 675–96. That is, indigenous peoples are equal partners *with* Canada, not subordinate partners already *in* or *of* Canada. For the latter view, see Canadian Royal Commission 1993. There is a tension between these two views in the final Report of the Royal Commission. For a more detailed account of the former view, see Tully 1999. For an attempt to discuss the argument in the context of Australia, see Tully 1998.

26 For this conception of non-state and non-exclusive sovereignty, as 'popular' sovereignty or a 'free people', see Alfred 1999a: 54–72 and Turner 1997: 19–30. For a comprehensive account and pragmatic defence of this and the self-determination argument, based on a critical review of the extensive literature generated by the Royal Commission, see Murphy 1997. For a similar study for Australia, with more emphasis on the self-determination argument, see Strelein 1998. I am greatly indebted to these two excellent theses. See also the reconstruction and application of the prior and continuing sovereignty argument by Williams 1997.

27 See Murphy 1997; Strelein 1998; Venne 1998 and Macklem 1995 for the complementarity of the two arguments. When these two arguments are presented from an indigenous perspective, there is always in addition the reference to the special relation that indigenous peoples have to the lands they have occupied and identified with for millennia, a relation that is not captured by Western notions of private property or jurisdiction. For an introduction to this holistic understanding of being-in-the-world, see Alfred 1999a: 42–4; Royal Commission on Aboriginal Peoples 1996: 434–63 and Venne 1998: 122–28.

28 See Venne 1998: 68–106 for a careful survey of these documents and the major commentaries on them. Compare Murphy 1997: 116–51 and Strelein 1998: 54–86. Recall that the Supreme Court of Canada rejected an appeal to the universal right of self-determination as a ground of Aboriginal rights (see note 13).

29 International Court of Justice (1975) summarised in Venne 1998: 45–7. The Court continued this line of reasoning in *Case Concerning East Timor (Portugal* v. *Australia)* (1995). For the Supreme Court of Canada's use of the argument

of discovery and non-consent that the ICJ rejects in *Western Sahara* see note 12, and for the use by the Attorney General of Canada of an extinguishment argument that the IJC also rejects, see note 19.

30 See Venne 1998: 51–3, 92–4, 107–63 for the struggles over the Draft, and 205–28 for the Draft Declaration. The right of self-determination is asserted in Article 3 and qualified in Article 31.

31 Collective rights embodied in a claim to self-determination are seen as a threat to the sovereignty of the dominant state. This tension between indigenous self-determination and the state's assertion of [exclusive] sovereignty is a recurrent theme throughout this discussion [at the UN] as it is the basis of arguments against the recognition of a right of Indigenous peoples to self-determination (Strelein 1998: 55–6).

32 *Declaration on the Granting of Independence to Colonial Countries and Peoples* Resolution 1514 (XV) 14 December 1960, GA Official Records, 15th session, Suppl. no. 16. For the studies of four Special Rapporteurs see Venne 1998: 75–82, especially the study by Aureliu Cristescu, cited at 76.

33 *Declaration on the Granting of Independence to Colonial Countries and Peoples* Resolution 1514 (XV) 14 December 1960, GA Official Records, 15th session, Suppl. no. 16, 66, paras 6–7 together with Resolution 1541 (XV) GAOR 15th session, Suppl. no. 16, Principle IV, 29. See Strelein 1998: 59–60. This saltwater restriction on self-determination was introduced in 1960 in explicit opposition to the Belgium initiative to extend it to peoples, including indigenous peoples, within independent states.

34 'Any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations', *Declaration on the Granting of Independence to Colonial Countries and Peoples* Resolution 1514 (XV) 14 December 1960, GA Official Records, 15th session, Suppl. no. 16, 66, paras 6–7 together with Resolution 1541 (XV) GAOR 15th session, Suppl. no. 16, Principle IV, 29. This is reinforced by the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Resolution 2625 (XXV) of 24 October 1970. See Venne 1998: 73–4; Strelein 1998: 59–61.

35 In addition to the references in note 25, see Venne 1998: 92, Strelein 1998: 16–33 and Moss 1995.

36 See Young forthcoming for a cogent theory of global democratic governance that recognises individuals, minorities, peoples and states, and her chapter in this volume.

37 *The Declaration on Friendly Relations*, para 1. See Strelein 1998: 60–2.

38 See Laden 1997; Murphy 1997 and Kymlicka 1995. Turner 1997: 1–30 and Murphy 1997: 59–74 argue that while Kymlicka's well-known theory protects indigenous peoples from assimilation, it preserves colonial accommodation.

39 This is a paraphrase of the rights of internal self-determination in the Draft Declaration on the rights of Indigenous Peoples, in Venne 1998: 205–28.

40 This distinction between internal and external self-determination reflects the way the right of self-determination has evolved within a framework of the territorial integrity of existing states. The Draft Declaration on the Rights of Indigenous Peoples accepts internal self-determination at Article 31.

41 This universal principle is endorsed by the Supreme Court of Canada in *Reference re Secession of Quebec*, file no. 25506, 1998.

42 For a detailed presentation of this argument with respect to Canada, see Tully forthcoming; for Australia, Strelein 1998; and in general, Young forthcoming.



## 4 Beyond Regret: Mabo's Implications for Australian Constitutionalism

My thanks to Bill Wagner for research assistance, and to Duncan Ivison, Garth Nettheim and Paul Patton for their comments on earlier versions of this manuscript.

Some of the more frequently mentioned cases have been abbreviated after their first mention in the text: *Delgamuukw* v. *British Columbia* (1997) 153 DLR (4th) 193 (SCC) becomes *Delgamuukw*; *Mabo* v. *Queensland (No. 2)* (1992) 107 ALR (HC) becomes *Mabo*; *Sparrow* v. *R* [1990] 1 SCR 1075 becomes *Sparrow*; *Ward* v. *Western Australia* (1998) 159 ALR 483 (FC) becomes *Ward*; *Wik Peoples* v. *Queensland* (1996) 141 ALR 129 (HC) becomes *Wik*; and *Yorta Yorta* v. *Victoria* [1998] 1606 FCA (18 December 1998) becomes *Yorta Yorta*.

1 *Mabo* v. *Queensland (No. 2)* (1992) 107 ALR 1.

2 *Wik Peoples* v. *Queensland* (1996) 141 ALR 129: 230.

3 This essay is a companion to Webber 1995a, which examined the process of moral reflection that underpinned the High Court's recognition of indigenous title.

4 For a discussion of Australian constitutional law as it affects indigenous people, see Clarke 1999.

5 This is the approach adopted in Brennan J's judgment in *Mabo* and implicitly followed by the great majority of subsequent commentators and judgments. See especially his discussion of the recognition and enforcement of native title by the ordinary courts at 42–5 of that decision:

> Native title is conceived as specific interests in land, which survive the assertion of sovereignty by the colonial power in much the same way that, under international law, rights held by private parties survive a change in sovereignty in the wholly non-Indigenous context. Indigenous title is enforceable before the general courts by the usual legal and equitable remedies. Its content is determined by the courts as a matter of fact, based on the customs and traditions of the people. The persistence of native title requires a measure of adjustment in the general property regime in order to take account of the title's continued presence, but the adjustment of rights and the enforcement of the interests is accomplished by the courts as an integral part of their adjudication of the common law.

Some commentators have criticised the confining of indigenous title to a purely private right, although they have generally conceded that that is the effect of the definition of native title in *Mabo*. See, for example, Grattan and McNamara 1999. Here, I argue that that limited conception of indigenous title (as a purely private right) is untenable, even on the terms laid down in *Mabo*.

6 *Mabo* 1992: 42. See also 65 and 83, *per* Deane and Gaudron JJ.

7 *Mabo* 1992: 44. See also 83, *per* Deane and Gaudron JJ.

8 In *Mabo* 1992: 20–1 and 51 (*per* Brennan J) and 57–8 (*per* Deane and Gaudron JJ), the High Court held, following the *Seas and Submerged Lands* case, *New South Wales* v. *Commonwealth* (1975) 135 CLR 337, that the sovereignty of the Australian state could not be questioned in proceedings before the courts of Australia. See also *Coe* v. *Commonwealth of Australia* (1993) 118 ALR 193 (HC) at 198–200 and, at an earlier stage of the development of the area, *Coe* v. *Commonwealth of Australia* (1979) 24 ALR 118 (HC). The recognition of that overarching sovereignty need not exclude a lesser right of self-government, however (although there are some comments that would suggest otherwise in the first *Coe* decision at 129 (*per* Gibbs J)). Within general Australian

# POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES

EDITED BY

DUNCAN IVISON
*University of Sydney*

PAUL PATTON
*University of Sydney*

WILL SANDERS
*Australian National University*

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UNIVERSITY PRESS