Comment

Editor: Dan Meagher

WHY A FIRST NATIONS VOICE WILL NOT EXTINGUISH INDIGENOUS SOVEREIGNTY

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INTRODUCTION

If the opinion polls are to be believed, large majorities of both progressive voters and Aboriginal and Torres Strait Islander voters support enshrining a First Nations Voice in the *Australian Constitution*.[1] But among the Voice's progressive critics, and especially First Nations critics, one of their persistent concerns has been that constitutionally enshrining the Voice could extinguish Indigenous sovereignty. These are important and valid concerns, and Aboriginal and Torres Strait Islander people should have clear responses to them prior to the referendum. They are concerns which I seek to assuage in this comment. While the question of whether the Voice would extinguish Indigenous sovereignty has been addressed by legal scholars through brief commentary in the media, this comment is the first to give the question in-depth scholarly consideration.[2]

I begin by outlining the concerns expressed by some First Nations people that constitutional enshrinement of the Voice would extinguish Indigenous sovereignty. Next, I argue that the Voice cannot extinguish Indigenous sovereignty under either Australian law or international law because, according to each of those legal systems, Indigenous sovereignty does not exist in the first place. In other words, when it comes to the formal recognition of Indigenous sovereignty under Australian and international law, the problem is with the law as it currently exists, not with changes to the law produced by constitutional enshrinement of the Voice. The denial of Indigenous sovereignty is an injustice, the blame for which should be sheeted home to existing Australian and international law rather than to the effects of the Voice. I go on to show that, regardless of what Australian or international law says, Indigenous sovereignty exists as both a lived reality under Indigenous law and as a political claim against the settler state.

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[1] See, eg, Anthony Galloway, "Yes Vote for the Voice is Leading in Every State and Territory: Poll", *The Sydney Morning Herald*, 30 April 2023 <https://www.smh.com.au/politics/federal/yes-vote-for-the-voice-is-leading-in-every-state-and-territory-poll-20230429-p5d482.html>; Essential Research, *The Essential Report: 18 April 2023* (18 April 2023) <https://essentialreport.com.au/reports/18-april-2023> (see section on "Support for Voice to Parliament (by Voting Intention)"); David Crowe, "'Not Going to Chuck the Towel In': Voice Champion Pat Anderson Undaunted by Criticism at Invasion Day Rallies", *The Sydney Morning Herald*, 27 January 2023 <https://www.smh.com.au/politics/federal/not-going-to-chuck-the-towel-in-voice-champion-pat-anderson-undaunted-by-criticism-at-invasion-day-rallies-20230126-p5cfqm.html>; Reconciliation Australia, *Australian Reconciliation Barometer 2022 Full Report* (September 2022) 25.

[2] See Hannah McGlade, "Voice Will Empower Us, Not Undermine Sovereignty", *National Indigenous Times*, 16 January 2023 <https://nit.com.au/16-01-2023/4736/voice-will-empower-us-not-undermine-sovereignty>; Paul Karp, "Why a Voice to Parliament Won't Affect First Nations Sovereignty as Lidia Thorpe Fears", *The Guardian*, 26 January 2023 <https://www.theguardian.com/australia-news/2023/jan/26/will-indigenous-voice-to-parliament-impact-first-nations-sovereignty-explainer>; Jack Latimore, "What's Indigenous Sovereignty and Can a Voice Extinguish It?", *The Sydney Morning Herald*, 9 February 2023 <https://www.smh.com.au/national/what-s-indigenous-sovereignty-and-can-a-voice-extinguish-it-20230113-p5ccdk.html>; George Williams, "Voice Has Nothing to Do with Issue of Sovereignty", *The Australian*, 9 February 2023 <https://www.theaustralian.com.au/commentary/voice-has-nothing-to-do-with-issue-ofsovereignty/news-story/a4b8767a70d1ac87b49de853bb5f1059>; Referendum Working Group, *Communique* (2 February 2023) <https://voice.gov.au/news/communique-referendum-working-group-february-2023>. For more scholarly – albeit still brief – discussions of similar issues not specifically focused on the Voice, see Megan Davis, "Constitutional Recognition Does Not Foreclose on Aboriginal Sovereignty" (2012) 8(1) *Indigenous Law Bulletin* 12, 13–14; George Williams, "Does Constitutional Recognition Negate Aboriginal Sovereignty?" (2012) 8(3) *Indigenous Law Bulletin* 10, 11; Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (2012) 212; Bret Walker, cited in Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (25 June 2015) 72.

Concerns about the Voice's Effect on Indigenous Sovereignty

One widespread concern among critics of the Voice, especially those from the progressive side of politics, is that constitutional enshrinement of the Voice will extinguish Indigenous sovereignty. Many of those raising concerns over the Voice's effect on Indigenous sovereignty have been First Nations people themselves.[3] The most prominent figure to express these concerns has been Lidia Thorpe, a DjabWurrung Gunnai Gunditjmara activist and Senator. As one of seven delegates who walked out of the *2017 National Constitutional Convention* which produced the *Uluru Statement from the Heart* and its demand for a First Nations Voice, Thorpe declared her opposition to constitutional recognition "because it serves to disempower, and takes away our voice … We need to protect and preserve our sovereignty".[4] As a Senator, first for the Greens and subsequently as an independent, Thorpe has continued to raise concerns about the effect of a Voice enshrined in the *Constitution* on Indigenous sovereignty. On several occasions, Thorpe has questioned Ministers and other government officials in Parliament about whether the Voice would extinguish Indigenous sovereignty.[5]

For those worried that the Voice could extinguish Indigenous sovereignty, the source of their concern appears to be that the Voice would be enshrined in the *Australian Constitution*. Indeed, concerns about the extinguishment of Indigenous sovereignty have been raised against constitutional recognition of First Nations peoples generally, not only recognition through a constitutionally enshrined Voice. Back in 2012, First Nations concerns over sovereignty prompted the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to devote an entire chapter of its final report to the matter.[6] As Wiradjuri elder and activist Jenny Munro stated after walking out of the *Uluru Constitutional Convention* in 2017, "how does our sovereignty remain intact when we go into the white man's constitution?" Thorpe raised a similar concern in August 2022: "[i]n entering the colonial project, their constitution, we need to be 100 percent satisfied that we're not ceding our sovereign rights by going into the colonisers [sic] 'sovereign' rule book."[7]

There appear to be two analytically distinct but overlapping concerns here. The first concern seems to be about the power of Australian law: since the *Constitution* is the central expression and instrument of the settler state's sovereignty, explicit recognition of First Nations people within the *Constitution* through a Voice could result in Indigenous sovereignty being extinguished. The second concern appears to be about the actions of First Nations peoples: by approving of constitutional enshrinement of the Voice, First Nations people themselves could be ceding their sovereignty under international law.[8] This concern was expressly articulated in an early 2023 media release for the Sovereign Union, written by Euahlayi elder and activist Ghillar Michael Anderson: "[i]f First Nations agree to a Voice, which is only advisory, with no power of veto and for which the colonial parliament legislates its structure and composition, international law sees this as acquiescence and a relinquishment of First Nations sovereignty, which has never been ceded."[9]

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[3] See, eg, Caitlin Fitzsimmons and Jack Latimore, "First Nation Has Its Voice", *The Sydney Morning Herald*, 21 January 2023, 21.

[4] Claudianna Blanco, "'We Won't Sell Out Our Mob': Delegates Walk Out of Constitutional Recognition Forum in Protest", *NITV*, 25 May 2017 <https://www.sbs.com.au/nitv/article/we-wont-sell-out-our-mob-delegates-walk-out-of-constitutional-recognition-forum-in-protest/v42y9atu4>.

[5] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 1 August 2022, 282 (Lidia Thorpe); Evidence to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 7 November 2022, 28–30 (Lidia Thorpe).

[6] Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, n 2, Ch 9.

[7] Paul Gregoire, "Voice to Parliament May Threaten First Nations Sovereignty, Warns Thorpe", *Sydney Criminal Lawyers* (10 August 2022) <https://www.sydneycriminallawyers.com.au/blog/voice-to-parliament-may-threaten-first-nations-sovereignty-warns-thorpe>.

[8] According to international law, one state can acquire sovereignty over territory occupied by another state or group of people where the latter voluntarily cedes their sovereignty (through, for instance, a treaty). See further Ian Brownlie, *Principles of Public International Law* (OUP, 7th ed, 2008) Ch 7.

[9] Sovereign Union, "Acquiescence to the Voice Threatens First Nations Continuing Sovereignty" (Media Release, 2023) <https://nationalunitygovernment.org/content/acquiescence-voice-threatens-first-nations-continuing-sovereignty-0>. McGlade has rejected the argument that Indigenous approval of constitutional enshrinement of a First Nations Voice would amount to cession of sovereignty under international law: see McGlade, n 2.

The underlying premise of these concerns is that Indigenous sovereignty currently exists and is already recognised within an extant legal system. However, that premise does not hold under either Australian or international law. At least for these two legal systems, the key reason why the Voice will not extinguish Indigenous sovereignty is that both Australian law and international law already deny its existence. The Voice cannot extinguish something that, according to Australian and international law, does not exist in the first place. By contrast, Indigenous sovereignty continues to exist under Indigenous law and as a political claim made against the Australian state – and it does so regardless of what Australian and international law says.

Australian Law Already Denies Indigenous Sovereignty

The formal denial of Indigenous sovereignty is a longstanding doctrine of Anglo-Australian common law. To be sure, some judicial decisions in the early decades of British colonisation occasionally showed a degree of solicitude for Indigenous autonomy, particularly over violence committed by Aboriginal people against one another.[10] However, this limited recognition of Indigenous autonomy – never judicially described as "sovereignty" – was denied by the courts in other cases during the same period.[11] By the mid-19th century, colonial courts had quite firmly recognised an all-encompassing and exclusive settler territorial sovereignty.[12] When the Judicial Committee of the Privy Council was first asked to determine the manner in which British authorities had acquired sovereignty over New South Wales in the 1889 case of *Cooper v Stuart*,[13] it affirmed the colonial courts' earlier denials of Indigenous sovereignty. The Judicial Committee infamously declared that the colony had been "a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions".[14]

Since the 1970s, when First Nations people began to demand recognition through the Australian courts of their laws and sovereignty, the courts have continued to deny Indigenous sovereignty recognition under Australian law. In the 1979 case of *Coe v Commonwealth*,[15] in which Wiradjuri activist Paul Coe sought judicial recognition of Aboriginal sovereignty, Gibbs CJ (with whom Aickin J agreed) dismissed the claim:

> The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[16]

A similar conclusion was reached by Jacobs J, who held that it was impermissible for the High Court to entertain "a claim based on a sovereignty adverse to the Crown".[17]

This position was not modified by the High Court's 1992 decision in *Mabo v Queensland (No 2)* (*Mabo*).[18] *Mabo* gave judicial recognition to the existence of Indigenous laws and held that those laws were capable of furnishing Aboriginal and Torres Strait Islander peoples with ongoing rights to their traditional lands

[10] See Bruce Kercher, "Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales" (1998) 4(13) *Indigenous Law Bulletin* 7; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995) 10–11; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 168–169; SD Lendrum, "The 'Coorong Massacre': Martial Law and the Aborigines at First Settlement" (1977) 6(1) *Adelaide Law Review* 26, 26–27.

[11] Ford, n 10, Ch 7; Kercher, *An Unruly Child*, n 10, 9–10.

[12] Ford, n 10, Ch 8; Kercher, *An Unruly Child*, n 10, 11, 15.

[13] *Cooper v Stuart* (1889) 14 App Cas 286.

[14] *Cooper v Stuart* (1889) 14 App Cas 286, [11].

[15] *Coe v Commonwealth* (1979) 53 ALJR 403.

[16] *Coe v Commonwealth* (1979) 53 ALJR 403, 408.

[17] *Coe v Commonwealth* (1979) 53 ALJR 403, 410.

[18] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

and waters under the common law. However, the High Court has been at pains to point out that *Mabo* did not involve the recognition of Indigenous sovereignty. As Mason CJ held a year after *Mabo* in *Coe v Commonwealth*,[19] "*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia", since its recognition of native title was premised on "the paramount sovereignty of the Crown".[20] In the 2002 case of *Members of the Yorta Yorta Aboriginal Community v Victoria*,[21] Gleeson CJ, Gummow and Hayne JJ held that "the assertion of sovereignty by the British Crown necessarily entailed … that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty."[22] In all of these cases, the High Court has held that the sovereignty of the Crown is both unquestionable in domestic courts and exclusive, thereby ruling out the existence of Indigenous sovereignty.

It is worth noting that, in the 2020 decision of *Love v Commonwealth* (*Love*),[23] the three judges in the minority claimed that the majority judges had effectively recognised Indigenous sovereignty or come close to it. According to the majority, Aboriginal and Torres Strait Islander people could not be considered "aliens" within the scope of the Commonwealth Parliament's legislative power over aliens (s 51(xix)), and therefore were not amenable to detention and deportation under the *Migration Act 1958* (Cth). Significantly, under the majority ruling, determinations of who is Aboriginal and/or Torres Strait Islander – and therefore who is incapable of being an alien – depend in part on a person's recognition by "the elders or other persons enjoying traditional authority" within a given First Nation.[24] For the minority judges, the decision handed the power to determine alienage under Australian law to Aboriginal and Torres Strait Islander peoples, in effect recognising their sovereignty or something approximating it.[25]

But none of the majority judges in *Love* believed that the effect of their decision was to have overturned the courts' longstanding denial of Indigenous sovereignty. Indeed, Gordon J's reasoning articulated a new basis for denying Indigenous sovereignty. She held that one reason why Aboriginal and Torres Strait Islander people could not be considered aliens was that, since Federation, Aboriginal and Torres Strait Islander people had formed part of "the people of Australia", as that phrase is used in the *Constitution*.[26] But according to Gordon J, "the people of Australia" exercise a singular form of popular sovereignty, one that underpins the *Constitution*.[27] For Gordon J, it followed that "[r]ecognition of Indigenous peoples as a part of the 'people of Australia' is directly contrary to accepting any notion of Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown".[28]

Even if some future Australian court took the unlikely step of accepting that *Love* recognised Indigenous sovereignty, this would demonstrate that First Nations recognition in the *Constitution* does not inevitably lead to the extinguishment of Indigenous sovereignty under Australian law. On the contrary, it would demonstrate that the *Australian Constitution*, far from being a mechanism for the extinguishment of Indigenous sovereignty under Australian law, can actually be a vehicle for its recognition.

International Law Already Denies Indigenous Sovereignty

The denial of Indigenous sovereignty is central to international law. As Antony Anghie has shown, the very idea of sovereignty in international law emerged from the efforts of European powers to assert

[19] *Coe v Commonwealth* (1993) 68 ALJR 110.

[20] *Coe v Commonwealth* (1993) 68 ALJR 110, 115.

[21] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58.

[22] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443–444; [2002] HCA 58.

[23] *Love v Commonwealth* (2020) 270 CLR 152; [2020] HCA 3.

[24] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70 (Brennan J), endorsed in *Love v Commonwealth* (2020) 270 CLR 152, 192 (Bell J), 253 (Nettle J), 261, 281–283 (Gordon J), 317 (Edelman J); [2020] HCA 3.

[25] *Love v Commonwealth* (2020) 270 CLR 152, 176–177, 179 (Kiefel CJ), 208, 211 (Gageler J), 226–228 (Keane J); [2020] HCA 3.

[26] *Love v Commonwealth* (2020) 270 CLR 152, 278–279; [2020] HCA 3.

[27] *Love v Commonwealth* (2020) 270 CLR 152, 277–278; [2020] HCA 3.

[28] *Love v Commonwealth* (2020) 270 CLR 152, 278–279; [2020] HCA 3.

their authority over Indigenous peoples outside Europe and reject Indigenous peoples' own claims to authority.[29] If the history of international law has occasionally witnessed instances where Indigenous sovereignty was arguably recognised – sometimes, for instance, through treaties negotiated by European powers and Indigenous peoples – the dominant position has been one of rejection.[30] Under contemporary international law, sovereignty is denied to Indigenous peoples on the basis that it is the exclusive preserve of states, indeed that statehood and sovereignty are more or less the same thing. As James Anaya has written, Indigenous sovereignty is "strongly resisted by contemporary international norms of state sovereignty that have survived robustly from historical doctrine and by existing political configurations that favor the sovereignty of already widely recognised states to the exclusion of any competing sovereignty".[31]

While the international legal entitlement to statehood – and thus to sovereignty – was expanded considerably in the mid-20th century through the independence struggles of colonised peoples around the world, this entitlement was not extended to Indigenous peoples. As states began to reformulate the rules about which groups of people were entitled to independent statehood, the situation of Indigenous peoples – as minority populations within existing settler states – was distinguished from the situation of non-European peoples who constituted majority populations within the colonies of empires. Whereas the latter were recognised as possessing a right of self-determination – essentially sovereign statehood – Indigenous peoples were denied the right of self-determination so as to preserve the territorial integrity of settler states.[32]

Even as international law has subsequently evolved to recognise Indigenous peoples' right of self-determination, it has continued to strongly reject Indigenous peoples' entitlement to sovereign statehood. This position is made plain in the *2007 United Nations Declaration on the Rights of Indigenous Peoples*. The *Declaration* remains the most fulsome international elaboration of Indigenous rights, even going beyond the extant international law in certain respects.[33] Significantly, the *Declaration* recognises that Indigenous peoples possess the right of self-determination and associated rights to self-government through their own political institutions in their internal affairs.[34] However, the *Declaration* makes clear that, unlike formerly colonised peoples for whom the right of self-determination has meant sovereign statehood, Indigenous peoples are not entitled to sovereignty realised through independent states. As Art 46(1) of the *Declaration* stipulates:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

In other words, the *Declaration* expressly denies that Indigenous peoples have the right to establish their own sovereign states by seceding from the "sovereign and independent States" in which they reside. As Tanganekald Meintangk Boandik legal scholar has written, the *Declaration* is not "effective in protecting and affirming the sovereignty of Aboriginal peoples".[35] The self-government exercisable by Indigenous peoples, according to the *Declaration*, must operate within the confines of the states that have colonised them. It does not amount to sovereignty as international law conventionally understands it.[36]

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[29] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005) especially Ch 1.

[30] S James Anaya, *Indigenous Peoples in International Law* (OUP, 2nd ed, 2004) Ch 1.

[31] Anaya, n 30, 6–7. See also Patrick Macklem, *The Sovereignty of Human Rights* (OUP, 2015) Ch 6.

[32] Anaya, n 30, 53–54; Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples" (2008) 41(4) *Vanderbilt Journal of Transnational Law* 1141, 1149–1152.

[33] International Law Association, Committee on the Rights of Indigenous Peoples, *Final Report* (2012) 29–30.

[34] *United Nations Declaration on the Rights of Indigenous Peoples* (2007) Arts 3–5, 18–20.

[35] Irene Watson, "The Future Is Our Past: We Once Were Sovereign and We Still Are" (2018) 8(3) *Indigenous Law Bulletin* 12, 14.

[36] Patrick Macklem has made a similar point: Macklem, n 31, 154–156. It is possible to argue that the *Declaration* recognises a form of Indigenous sovereignty that is not the same as independent statehood, and that it thereby reconfigures what sovereignty means

Indigenous Sovereignty Exists Regardless of Australian and International Law

Throughout the generations of denial of Indigenous sovereignty under both Australian and international law, Indigenous sovereignty has continued to exist, for one simple reason: the existence of Indigenous sovereignty does not depend on what Australian law or international law says. There are two senses in which Indigenous sovereignty can be said to exist, even in the face of its rejection under Australian and international law. The first is as a lived reality under Indigenous law. The second is as a political claim articulated against the Australian state.

For many First Nations people, their sovereignty continues to exist as *an everyday practice under their own legal and philosophical systems*, regardless of whether it is recognised or rejected under Australian or international law. As Goenpul scholar Aileen Moreton-Robinson has explained, for Goenpul people and other Aboriginal people, "sovereignty is derived from the ancient era of creation which provides the precedents for what is believed to have occurred in the beginning in the original form of social living created by creator beings".[37] Aboriginal sovereignty comes from the fact that Aboriginal people today are "the embodied representations of our creator beings".[38] Notwithstanding the settler state's "sovereign claims to exclusive possession of our lands", says Moreton-Robinson, "every day our sovereignties exist and are operating despite these claims".[39]

A similar conclusion has been drawn by Watson:

> Our sovereignty and right to self-determination have never been surrendered or lost; they cannot be extinguished. Our sovereign laws were birthed by the creative processes of the natural world and given to us to care for country and to pass on its teachings. The Australian state cannot extinguish them.[40]

Watson has also explained how, despite the non-recognition of Indigenous sovereignty under international law, "[w]e are as we have been since time immemorial", which is "sovereign and independent peoples".[41] If international law was to recognise Indigenous sovereignty, Watson says that this would simply be "a reaffirmation of who we have always been".[42] As these scholars clearly explain, Indigenous sovereignty exists under Indigenous law regardless of what is said about it under Australian or international law.

As a lived reality under Indigenous law, Indigenous sovereignty would therefore be able to continue after the constitutional enshrinement of a First Nations Voice, just as it has been able to survive in the face of numerous past encounters between Aboriginal and Torres Strait Islander peoples and the constitutional instruments of the Australian settler state. There are both formal and substantive elements to those many past constitutional encounters. Formally, the constitutional instruments of the Australian state – including the pre-federation colonies and the post-federation Commonwealth, States and Territories – have at times encompassed both explicit textual references to and complete silence about First Nations peoples. While most colonial constitutional documents were silent about Aboriginal and Torres Strait Islander peoples, there were express references to Aboriginal people in the Letters Patent establishing South Australia and in Western Australia's original *Constitution Act 1889* (WA).[43] It is well known that the original *Commonwealth Constitution* contained two exclusionary references to Aboriginal people,

under international law. My argument is that the *Declaration* and international law generally continue to deny that Indigenous peoples possess sovereignty in the dominant sense of independent statehood. See further Wiessner, n 32; Federico Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" (2006) 42(1) *Texas International Law Journal* 155.

[37] Aileen Moreton-Robinson, "Incommensurable Sovereignties: Indigenous Ontology Matters" in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 257, 262.

[38] Moreton-Robinson, n 37, 264.

[39] Moreton-Robinson, n 37, 259.

[40] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 161.

[41] Watson, n 40, 145.

[42] Watson, n 40, 145.

[43] *Letters Patent Establishing the Province of South Australia* (19 February 1836) (UK); *Constitution Act 1889* (WA) ss 42, 70.

both of which were removed with the 1967 referendum.[44] Between 2004 and 2016, all of the State constitutions were amended to provide explicit symbolic recognition of First Nations peoples.[45] Aside from what all of these constitutional instruments have formally said (or not said) about Aboriginal and Torres Strait Islander peoples, they have each substantively empowered the institutions of the Australian state to govern Aboriginal and Torres Strait Islander people – frequently with dire consequences for First Nations individuals, families and communities.

Throughout all of these encounters between First Nations and settler constitutional instruments, Indigenous sovereignty has continued to operate as a lived reality for First Nations peoples, even as their capacity to exercise it has been impeded by the institutions of the settler state. For the same reasons, constitutional enshrinement of a First Nations Voice would not extinguish Indigenous sovereignty as an everyday reality under Indigenous law. In fact, according to the *Uluru Statement*, the Voice would enable First Nations "ancient sovereignty" to be more fully exercised within the Australian state.

Alongside the existence of Indigenous sovereignty as part of Aboriginal and Torres Strait Islander peoples' daily lived experience under their own law, Indigenous sovereignty continues to exist as a *political claim* made against the Australian settler state and the international community, even in the face of their refusal to recognise it. First Nations people began to expressly articulate political claims of sovereignty against the Australian state from around the 1970s, as Paul Coe's 1979 High Court litigation demonstrated.[46] Importantly, even after the High Court had denied his claim, Coe continued to assert the existence of Aboriginal sovereignty, most notably in his successful efforts with other activists to re-establish the Aboriginal Tent Embassy and issue a Declaration of Aboriginal Sovereignty in 1992.[47] The continuous presence of the Embassy on the lawns of Old Parliament House since 1992 has been the most persistent and visible assertion by First Nations people of a political claim to sovereignty against the Australian state. Clearly, Aboriginal and Torres Strait Islander peoples can continue to maintain political claims of sovereignty in the face of their ongoing denial by the Australian state and the international community.

The constitutional enshrinement of a Voice would not extinguish Aboriginal and Torres Strait Islander peoples' political claims to Indigenous sovereignty, since the only way these claims can be extinguished is if Aboriginal and Torres Strait Islander peoples stop making them. There is no reason to think that Aboriginal and Torres Strait Islander peoples will stop asserting their political claims to sovereignty once a Voice is established. For progressive critics such as Thorpe, the Voice's perceived shortcomings will almost certainly see them continuing to assert political claims for the recognition of Indigenous sovereignty. As Thorpe said at the 2023 Invasion Day rally in criticising the Voice: "[t]hey want to put the colonial constitution on top of the oldest constitution on the planet … we are sovereign and this is our land. And we deserve better than an advisory body. … We want real power and we won't settle for anything less."[48] For its proponents, the Voice represents a vehicle for having their political claims to sovereignty realised, both because the Voice itself can be understood as an institutionalisation of Indigenous sovereignty and because the Voice is a platform from which to pursue further realisation of Indigenous sovereignty through treaties.[49]

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[44] *Constitution*, ss 51(xxvi), 127.

[45] Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 39–40, 47–48, 54–55.

[46] See further Julie Fenley, "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981" (2011) 42(3) *Australian Historical Studies* 372; Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014).

[47] Foley, Schaap and Howell, n 46, 190–193.

[48] Campbell Kwan, "'We Want Real Power': Lidia Thorpe Tells Invasion Day Rally", *Australian Financial Review*, 26 January 2023 <https://www.afr.com/politics/federal/body-image-advocate-taryn-brumfitt-named-australian-of-the-year-20230126-p5cfkf?post=p54j65>.

[49] See, eg, Eddie Synot, "What We Mean When We Say 'Sovereignty Was Never Ceded'", *The Conversation*, 28 November 2022 <https://theconversation.com/what-we-mean-when-we-say-sovereignty-was-never-ceded-195205>; Sana Nakata, "On Voice, and Finding a Place to Start", *Indigenous Constitutional Law* (3 March 2021) <https://www.indigconlaw.org/sana-nakata-on-voice-and-finding-a-place-to-start>. On the Voice as a vehicle for Indigenous sovereignty, see also Gabrielle Appleby, Ron Levy and

Conclusion

While the existence of Indigenous sovereignty does not depend on its recognition under Australian or international law, that does not mean Australian and international law are irrelevant to the practical realisation of Indigenous sovereignty. Both Australian law and international law affect the capacity of Aboriginal and Torres Strait Islander peoples to exercise their sovereignty in practice. For instance, where the exercise of Indigenous sovereignty under Indigenous law conflicts with Australian law (such as in dealing with rights over land), the Australian state's effective monopoly on the use of violence can ensure, however unjustly, that it is Australian law which prevails. In the case of Indigenous sovereignty as a political claim articulated against the Australian state, the capacity for Aboriginal and Torres Strait Islander peoples' to exercise their sovereignty – over and above asserting the claim itself – is largely or entirely dependent on its institutionalisation under Australian or international law.

So, if First Nations peoples are to be able to effectively exercise their sovereignty, the terms of Australian and international law matter. For many Aboriginal and Torres Strait Islander people, enshrining a Voice in the *Constitution* – alongside processes of treaty-making – is a means within Australian law by which their sovereignty can be better expressed and exercised in practice, even if Indigenous sovereignty continues to go formally unrecognised under Australian and international law. According to the *Uluru Statement*, the "substantive constitutional change and structural reform' it proposes – including a constitutionally enshrined First Nations Voice followed by treaty-making – would be a mechanism through which Aboriginal and Torres Strait Islander peoples" "ancient sovereignty can shine through".[50] Other Aboriginal and Torres Strait Islander people believe that, to effectively exercise their sovereignty, different reforms to Australian or international law will be necessary.[51] But for those of us who want formal recognition of Indigenous sovereignty under Australian or international law, we do not need to worry that the Voice will extinguish Indigenous sovereignty. The real problem – the real injustice – is that neither Australian nor international law formally recognises Indigenous sovereignty in the first place.

Helen Whalan, "Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis" (2023) 46(3) *UNSW Law Journal* (forthcoming).

[50] *Uluru Statement from the Heart* (26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.pdf>.

[51] See, eg, Irene Watson, "There Is No Hope in a Voice to Parliament", *Pearls and Irritations* (29 October 2022) <https://johnmenadue.com/there-is-no-hope-in-a-voice-to-parliament>; Lidia Thorpe, "Only a Treaty Will End the War against First Nations People", *NITV*, 24 January 2023 <https://www.sbs.com.au/nitv/article/lidia-thorpe-treaty-invasion-day-voice-to-parliament/cxe0tkgme>; Michael Mansell, "Depending on Your Reasons, It's Okay to Oppose the Voice", *NITV*, 21 April 2023 <https://www.sbs.com.au/nitv/article/opinion-depending-on-why-its-ok-to-oppose-the-voice/sr20y558k>.