

Indigenous Sovereignty and the Democratic Project

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I want to begin by congratulating Steven Curry on a well written book, and presumably also before that a well written PhD thesis. I am no political philosopher. I have not read Hobbes, Locke and Rousseau since I was an undergraduate twenty five years ago. But I found his explication of their ideas, and the social settings in which they were developed, clear and to the point.

Curry's identification of a classical view of absolute state sovereignty in the work of Bodin and Hobbes, as part of an attempt to overcome civil wars and other feudal factional disputes, was informative and clear. This solved what Curry called 'the stability problem' by being not only absolute, but also 'indivisible', 'centralized' and 'perpetual (in the sense of being immune from change originating outside itself)' (p51). His account of how, through the Act of State Doctrine, this has restricted the recognition of Indigenous interests in court cases in 19th century America and 20th century Australia, was also pertinent and clear. Courts cannot, he argues, question the sovereignty under which they are established.

Others, however, can question such sovereignty, and Curry wants to show us how. In Chapter 5, he shows how colonizing European powers switched between a territorial notion of sovereignty in their homelands and a national, ethnic, or 'pseudo-genetic' notion in their colonial encounters, thereby also denying the territorial notion of sovereignty to the 'Indigenous Nations' they encountered. In doing so, he argues, 'imperialism treated like phenomena in different ways, privileging the European state and its constitutive nations over the nations of the New World' (p72). This contradiction emerged from seeing the state, and classical sovereignty, as at once 'contiguous with territory' and 'a body of people' (p81).

In Chapter 6, Curry begins to explore another notion of sovereignty, which he refers to as popular sovereignty. This he traces back to Rousseau

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and to a lesser extent Locke. Rousseau's popular sovereignty is also absolute and indivisible, but when it is given over to governments, unlike classical sovereignty, it is not perpetual: 'government is instituted, and may be disestablished, at the will of the People' (p93). Rather than perpetual, Rousseau's popular sovereignty is in fact 'inalienable', in that it always remains with the people.

Using James Tully's work, Curry then shows us that, for minorities in particular, even popular sovereignty can be imperialist and oppressive. However, he rescues popular sovereignty by finding within it what he calls an 'active principle', as opposed to a 'formal principle', of public life. He writes:

a People has a right to take a position of resistance towards a regime or institution of government, and can resume to themselves the rights of government and the ability to refound the state (p113).

In fact, through a discussion of Raz's work relating rights to interests, Curry develops this active principle of popular sovereignty into a right which inheres not just in groups of people but in every individual. His definition of this is that:

Every individual has the right to seek to fashion a society which will best promote their interests, provided they recognize the same right on the part of others and do not do unnecessary harm to the interests of others (p132).

This 'sovereign right', as Curry calls it, is asserted whenever we engage in political activity intended to shape, or reshape, the rules or a government or society; and given that individuals on their own 'can expect to gain little' from this process, it does normally emerge as 'a kind of group-differentiated right'. Indigenous peoples are among a number of identity groups through which individuals can engage in this process. Curry writes:

Where a society is forged on the basis of a workable compromise that balances promotion of interests against the good to be had from unity, and where it is able to accommodate new demands based on new interests (born either by new arrivals or by old members with changing circumstances) then it can be said to be a community of interests reconciled by a civil dialogue. The People, on this account, amount to that community of interests, resting on a negotiated compromise, always up for renegotiation, and mutually committed to the terms of that compromise (p135).

All this, I find well argued and helpful. Yet the real punch of Curry's book is still to come when, in part four, or Chapters 10 and 11, he looks at applications and limitations of Indigenous sovereignty and then the shape of new republics which recognize it. Indigenous sovereignty, he notes, is not just about 'separate communal enclaves'. It has, he notes:

Something to do with the whole country that once belonged to indigenous people and which now contains them. And it has something to do with the terms of engagement that will govern their membership of the state that now governs that country (p147).

Curry identifies seven necessary features of Indigenous sovereignty, or the exercise by Indigenous people of their sovereign right. First, drawing on Kymlicka's work, that Indigenous sovereignty is about being 'able to sustain a societal culture' and must be exercised by a people. Second that Indigenous sovereignty will be burdened by competing interests, as indicated in his definition of the sovereign right. Third, that because it is about fashioning a societal culture, Indigenous sovereignty cannot be limited in scope. Fourth, that it will change the laws, including the constitution, of the larger society. Fifth, that it will involve a 'retrospective re-imagining of the terms of engagement' between settlers and Indigenous peoples. Sixth, that it will not be just about Indigenous self-government, but will also necessarily alter non-Indigenous ways of doing things; and seventh, that there needs to be a 'presumptive right to secession' even if this would in fact be horrendously difficult, if not impossible to actually achieve (pp148-9).

If these are the *necessary* features of recognizing Indigenous sovereignty, then it is truly a massive task. Perhaps little wonder that it has not engaged the broader non-Indigenous public in Australia in the same way that it has engaged Curry. Yet there are at least some limitations on the assertion of Indigenous sovereignty which Curry also identifies, which might act as some reassurance, were that larger public to become so engaged. The first is that existing property rights of non-Indigenous individuals and communities should be respected. The second is that while, non-Indigenous people will be affected by Indigenous sovereignty 'not every aspect of that sovereignty will so affect every aspect of the state' (p152). And third that Indigenous sovereignty should be circumscribed so as not to lessen 'democratic liberty itself' by 'making other citizens subject to laws and policies over which they have either no control, or far less control than that enjoyed by indigenous citizens' (p154). Even with these limitations, recognizing Indigenous sovereignty is still a massive task in reorienting settler thinking.

In his final chapter, on new republics, Curry details how Canada has gone some way towards re-orienting its thinking. The other settler states

with which Curry says he is concerned, Australia, New Zealand and the United States of America, do not, however, get much of look in. Curry justifies this emphasis on the grounds that 'Canada is often regarded as the most advanced liberal-democracy in terms of its treatment of First Nations' and as such is an 'exemplar' of 'how we might proceed' (p159). This may be so, but I would also like to see Curry engage with recent Australian experiments in what I refer to as jurisdiction sharing. There have been a myriad of these developed over the last thirty years under a policy philosophy of self-determination and self-management. These include the Community Development Employment Projects scheme in which Indigenous organizations employ community members instead of receiving individualised unemployment payments from the social security system. There are also joint management arrangements between Indigenous organizations and State and Commonwealth governments for particular land areas, such as we saw announced in April 2005 for the Queensland wet tropics. There was of course, until recently, also the Aboriginal and Torres Strait Islander Commission, which through elected Indigenous representatives was a party to many of these arrangements. While these jurisdiction sharing arrangements in Australia may not be constitutional, they are still important and could potentially lay the ground work for more constitutional recognition of Indigenous interests in the future. So they deserve to be discussed in relation to Indigenous sovereignty.

In a sense my one disappointment with this book is that for a work which was written in Australia around the turn of the millennium and declared in its opening pages that it was 'situationist' and would do philosophy 'in the city, on the ground', rather than from some lofty universal standpoint, it did not greatly engage with material from contemporary Australia. I think Curry's next great challenge is to engage with Australian jurisdiction sharing arrangements of the last thirty years and to see within them some movement, if indeed ever so slight, in the direction that he would have settler states proceed. Other settler states besides Canada need to have their collective egos soothed and to be encouraged along post-colonial paths, rather than, by comparison or omission, having it suggested that they are not doing anything.