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Constitutional Reform in Australia and the Struggle for Indigenous Sovereignty

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Abstract: this article did an analysis on the First Nation's thesis of their claim of sovereignty, and unlike what general Australian community would perceive, the actual ideology of First Nation sovereignty is more on self-governing under the Commonwealth title. This article also made some comparison between USA and Australian parliament on how their legislation take approach on this matter. Since the article is made before the commencing of 2023 Australian Constitutional Reform, this article is written from the perspective of advising the Prime Minister on some general yet widely misunderstood concepts as well as some potential consequences if such terms were not well explained to general public.

1. The unsatisfactory results and potential in future

The referendum on the voice has ended, whose resulting is not up the expectation with what the proposal of the Uluru Statement from the Heart[1] is seeking. Still, it would yield some great significance on analyzing how a future national treaty would take sovereignty into consideration, and what efforts would be required to gain the support from people of both Australia's aboriginal and Torres Strait Islander, as well as those from Australian community.

1.1 What is Sovereignty

To understanding the effects that the future national treaty might impact on the sovereignty, the very basic understanding of sovereignty must be made. There have been various form of sovereignty advocated by Aboriginals and Torres Strait Islander people, each contains different recognition and acknowledgement of cultures.

For Eualeyai and Kamillaroi people, sovereignty means self-governing while for the First Nations, it should be interpreted on a spiritual level of the connection to the land. They believed that due to the spiritual connection with the land, along with the manifestation in various forms, they would be expected to legally possess the sovereignty long before the establishment of Australian parliament.

1.2 The Sovereignty and Uluru Statement

The most recent Uluru Statement from the Heart is the full embodiment of such idea when it

further elaborate the idea of sovereignty as “a spiritual notion: the ancestral tie between the island”. It emphasis more on the tradition of the First Nation, and the tradition is the very root of their claim on sovereignty, which in return will be used to protect their tradition as they expect.

1.3 What First Nation Communities Desire?

Since the Indigenous sovereignty is connected to the very soil of Australia, it is fair to draw the assumption that the right of sovereignty is the right of every Aboriginal and Torres Strait Islander nation. And unsurprisingly, the right of sovereignty would expand to the Wiradjuri, Wik people as well as the Yorta Yorta Nation. And as a result of those connections, it is only nature for First Nation to support each other. And some have indeed began to practice sovereignty in an official content. For example, the APG, Aboriginal Provisional Government, not only proposed an “Aboriginal Nation” but also issued passports based on their claimed sovereignty for the separation from Australian Nation[2]. That is just an extreme example of how sovereignty is practiced as for most First Nations peoples, sovereignty is actually a way to request power within the commonwealth so that their rights and culture interests will be protected and preserved.

One conversation was given by a First Nations person to Expert Panel on Constitutional Recognition as they want Australian communities to interpret sovereignty as not forming a First Nation government, but trying to find a position and area within the government to practice domestic power and be members in deciding the operation of Australia.[3] This ideology is also the very bed stone for Uluru Statement from the Heart.

2. Difference within First Nation Communities

So while some Aboriginal and Torres Strait Islander people would use sovereignty to operate their territory as self-ruled government, many others would see sovereignty as an opportunity to getting more engaged in Commonwealth or state parliament for gaining more powers to run Aboriginal communities.

2.1 Historical Origins for Today’s Conflicts

The Australian law, however, did not always treat the Aboriginal’s sovereignty to the level of the expectation from the Aboriginals.

When the British began to cultivate the no man’s land and turning it into colonies, it was only righteous for them to declare the ownership of the land, however, such idea is not appreciated by the original occupier of the land, the First Nations People, estimated to be around 1 million by the time of British’s arrival[4], as they believed it that they were in fact the righteous owner, and they were entitled to the it long before the declaration of sovereignty. This idea was, no doubt, rejected by the British for the idea of Terra Nullius, meaning land belonging to no one.

Though the idea was abolished in 1992 in the Mabo decision[5], it had greatly influenced how Australia legislation treat the sovereignty claim. Because of Terra Nullius, the Australia law, made by the Australian Parliament, which can be interpreted as Parliamentary sovereignty, approached the First Nation’s sovereignty as non-existence, which was no surprising as during the era of global-colonization, many indigenous people’s title to land were ignored, be it in Australia or North America. In fact, in the decision of Cooper v Stuart[6] in 1889, the judicial committee of the Privy Council, deemed it that the First Nation’s claim of sovereignty did not exist at the time of British acquisition of sovereignty over Australia, and the very continent of Australia was a territory without occupation, settlement nor laws.

2.2 How Australian and US Take Their Approach

The view was later partially abolished by the High Court of Australia in Mabo (No2)[7], where the court delivered two points that are: first, the acquisition of sovereignty by the British cannot, and will not be challenged by any court in Australia, and second, the Aboriginal sovereignty was displaced when the Australia sovereignty was claimed by the British. The reasoning for unchallengeable sovereignty by the British Crown was explained later in Yorta Yorta decision [8], as the Australian law-making system is based on the foundation of British sovereignty. Again this ideology was practiced in Love v Commonwealth where the High Court found the Aboriginal people cannot be deported as aliens if they are not citizens, and the High Court emphasis it that the First Nations sovereignty did not persist after the assertion of sovereignty by the British Crown.

It should be reminded that Australia is not the only country that approached this issue in such ways, and US had practiced a similar idea in Johnson v Mclntosh 8 Wheat[9] where the Chief Justice narrowed the issue down to that the rights of the original inhabitants were never entirely disregarded as they were always the rightful occupants of American land, but the rights to sovereignty were never acknowledged, which resulted in their inability of dealing with their land due to lack of title over land.

If the Aboriginal sovereignty were to be considered into Australian legislation system, one of the ultimate concerns was from the Australian communities that it would crumble the integrity of commonwealth. Their concerns were not without reasons as some First Nations people had practiced the sovereignty to an extreme level, from issuing passports to proposing an Aboriginal nation. But the main issue is the lack of legal definition of Aboriginal sovereignty and the wrongful assumption had proven to be costly, with much more resistance to recognition. But aside from the political perspectives, the legal communities would hesitate to interpret the Aboriginal sovereignty as it is in conflicts with State sovereignty and the court will likely to draw the conclusion that, based on their recognition of the native title from previous dealings, the Aboriginal sovereignty will demolish the core of legal system.

Being rejected by the court is in fact an optimistic result because it has already assumed that the matter could be heard in court without being rejected in the first place as no court would accept matters that are non-justiciable, or beyond the jurisdiction of the Court. This loop has ended up in a dead end where the Aboriginal sovereignty cannot challenge the State Sovereignty in Court under legal system because no Court can challenge the imposed legitimacy of the State sovereignty. In fact, the High Court decision from Coe v the Commonwealth(1979) explicitly found it that the sovereignty is not justiciable by any Courts.

Once again, the US has been a good example in how the Constitution handling the Indian sovereignty. The US Constitution created two distinct sovereignty under Article 1, Section 8, Clause 2 by granting the Congress the power to regulate Indian Tribes. And addition acts like The Indian Trade and Intercourse Act (1970) allows the Federal government to handle issues with Indians. Although this section has basically demolished the sovereignty of native American people, they still retains the right to practice their jurisdiction within the nation, so why it is the opposite case for the Aboriginal people in Australia?

Another contrast between the Indian Nations and the Aboriginal Nations are their right in title of land where in US, the transfer of land with Indian titles to third parties will only be extinguished by Congress, and until then the Indian title would still burden the title of the new owner, meaning that a grant of a fee simple interest by a state cannot extinguish the Indian title as it is only to be exercised by the Federal government. Meanwhile in Australia the Aboriginal title can be diminished by both the State and Commonwealth Government, as well as a third party's acquisition of a fee simple title. So what about other European nations? The Chief Justice Marshall in Johnson v

Mclntosh shared an opinion that the Europeans, in their process of claiming colonies, claimed the ultimate dominion over the continents and deprived the native people's title of land as well as the right to deal with land, leaving them only the right of occupancy.

If taken from a historical perspective point of view that the Aboriginal people were deprived the right to claim or practice sovereignty for the reasons of global colonization, then the international law had not assisted in lift any obstacles of claiming sovereignty as international law operates on the basic of acknowledging the sovereignty of States and Nations, uninterrupted from interference. This idea remains the dominated approach for international laws when dealing with Indigenous people though it is now under constant challenge since WWII, following the campaigns of decolonization and human rights movement, with their rights to self-governing and culture reservation being acknowledged.

3. The Future for First Nation Sovereignty

Still, the current law system is no where sufficient enough to recognize all the rights of Indigenous people, and the Referendum, based on such fact, was planning to propose a treaty to bring the Indigenous sovereignty into Commonwealth Constitution. It did not reach its goal, which is unfortunately yet understandable as misunderstandings still exist to prevent the treaty. So what the future treaty can act to attract the support from Australian communities and First Nation people? Again the very core issue would be to address the concept and definitions of sovereignty. It is never meant to endanger the integrity of the State sovereignty but rather a co-existence relationship with it, as Indigenous sovereignty seeks recognition and exercise of their rights under Constitution and various statute. So the Treaty might as well functions in the way corresponding to this idea, and instead of treating the Indigenous communities as independent, isolated communities, the Treaty should encourage them to actively deliver their culture and various forms of traditions to boarder communities, like translating their customary law and oral traditions into English, or vice versa like translating Common Law system into Aboriginal language. It is expected to generate more mutual understanding in each other, and provide potential opportunities for spreading the concept of sovereignty.

And speak of sovereignty, it is the result of the sovereignty that the First Nations people seek, not the enforcement of the title. If the title of "Aboriginal Sovereignty" has high risks of attracting hostility from government, then perhaps a mild title could ease the tension between parties. Still, people should bear in mind that sovereignty is a right should be claimed, not a gift to be given by government, so it is the Aboriginal people that bears the burden to define, claim and exercise it. Another issue that is worth people's attention, is that sovereignty is never an artifact that remains frozen and belong to a museum. In fact, it is a living thing that constantly evolves and adapts to fit the bigger picture. In fact, the Treaty should not set a definite rules of sovereignty, or it will restrict itself from being recognized by future generations, which is always against the principle of the Treaty.

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