

## 11 **Confounded by recognition**

### The apology, the High Court and the Aboriginal Embassy in Australia

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In postcolonial states reconciliation processes can be understood as attempts to redress historical injustices arising from misrecognition. Reconciliation begins, or rather an appreciation of the need for it arises, with the acknowledgement of the denigration of the identity of Indigenous peoples. It is only when past practices are negatively re-evaluated in light of contemporary norms – norms based upon and a new appreciation of the value of Indigenous culture – that postcolonial states are drawn towards making symbolic and material reparations for historical mistreatment. In this context, reparations serve the dual function of making amends for the past and restoring trust in the institutions of the state. By initiating a process of reconciliation, the postcolonial state undertakes to do whatever can still reasonably be done to restore dignity to the victims of injustice. At the same time, it seeks to restore legitimacy to its own institutions by disavowing the racial or ethnocentric assumptions that led to discrimination in the past. To the extent that these belated acts of recognition help to heal the past away, reconciliation provides a new beginning for the postcolonial state, the true measure of which is the degree of unity evident in the population.

Generally speaking, however, none of this occurs without a bitter struggle. Attempts by identity groups to stake ‘claims for recognition’ – which, in this case, means recognition as ‘victims’ of certain hegemonic cultural practices – have tended to spark ‘culture wars’ in which the extent of the harm, the nature of the wrong and the appropriate mode of redress are all contested. Despite the fact that their telos lies in consensus, reconciliation processes tend to be of an agonistic nature precisely because they open up a space of contestation and disagreement in relation to the claims identity groups make as victims of injustice. Such disagreement is not, of course, inherently problematic. As Duncan Bell has noted, ‘the struggle over interpretations of the past comprises a core dimension of agonistic politics’ and provides a necessary corrective to unitary conceptions of collective memory (Bell 2008: 151). When questions of reparations are at stake, however, such contestation must eventually give way, even if it is not brought to a close, to a governmental decision (e.g. whether to apologise, pay compensation, recognize land rights). Public processes of reconciliation might thus reasonably be characterised as forms of civic contestation and adjudication in relation to the harms of the past. Positioning itself in the role of mediator, the postcolonial state

enacts reconciliation as a way of establishing a consensus about the nature and meaning of Indigenous suffering.

Reconciliation processes can provide productive ways of responding to the ongoing legacy of colonial practices of dispossession and assimilation. Yet, in focusing upon the victim of injustice rather than the agent of injustice, such processes risk entrenching the view of the state as a neutral arbiter and diverting attention from the underlying source of identity-based harms. In line with Patchen Markell's more general critique of the politics of recognition, a potential problem with processes of reconciliation is that the meaning of misrecognition is only examined in relation to those who suffer it, not in relation to those who commit it. This leaves it open to treat misrecognition as an 'unfortunate fact', attributable to outdated belief systems, rather than interrogating its deeper sources in the desire for identity itself (Markell 2003: 21). Put differently, the transformative potential of the politics of reconciliation in postcolonial states might not lie in the recognition and reparation of indigenous suffering (though these are by no means insignificant). Rather it might lie in exposing the deeper sources of misrecognition in the identity-making practices of the colonial state itself. Viewed in a more antagonistic light, claims for the recognition of suffering present a challenge to existing social relations, not because their satisfaction requires the postcolonial state to engage in extraordinary acts of supplication but, because they draw attention to the deeper sources of misrecognition in the desire for sovereign unity.

In this chapter we seek to draw out some of the more agonistic (and antagonistic) dimensions of the demand for recognition by looking at the politics surrounding the two identity-based harms tangled up in the reconciliation debate in Australia: the removal of Aboriginal children from their families and the denial of Aboriginal sovereignty. As it unfolded in the 1990s, the reconciliation process gradually became identified with the tragedy of the 'Stolen Generations' and the poverty of the official response to the findings of *Bringing Them Home*, a report by the Human Rights and Equal Opportunity Commission into the removal of Aboriginal and Torres Strait Islander children from their families. By far the most publicly controversial aspect of the reconciliation process was the charge of genocide levelled in relation to such removals and the call for an official apology that would give due recognition to the suffering inflicted upon Aboriginal people through earlier policies of absorption and assimilation (Goot and Rowse 2007: 141). When the newly elected Rudd government finally delivered the apology in February 2008, therefore, it was officially hailed as the crowning achievement of the reconciliation process. What was largely obscured by the public celebration over this sovereign act of recognition, however, was the underlying cause of this terrible assault upon Aboriginal identity. While the apology provided a measure of recognition (both of the suffering endured by Indigenous people and of the value of their culture), it was marred by an ongoing failure on the part of the Australian state to properly acknowledge what the history of its relations with Indigenous people disclosed about *its* identity.

In principle revelations about the forced removal of Aboriginal children provided a perfect opportunity to focus critical attention upon the identity-making

practices of the Australian state: the history of strategic attempts to incorporate the Indigenous peoples of the territory into the Australian nation as citizens. Ironically, however, the apology presumptively addressed Indigenous people as members of the nation, passing over the fact that it was precisely the attempt to turn them into ‘fellow Australians’ that was responsible for the tragedy of the ‘Stolen Generations’. The ambiguity of this situation was heightened even further by Prime Minister Rudd’s attempt to put the apology into the service of the very nation-building project to which it provided an implicit critique by declaring it the moment of arrival of a fully unified people. It is this ongoing inability on the part of the Australia state to properly acknowledge the underlying connection between its own pursuit of identity and the damage inflicted upon the identity of others that provides the critical impetus for our examination of the struggle for the recognition of Aboriginal sovereignty. Turning our attention to the High Court case of *Coe v Commonwealth* (1979) and the establishment of the Aboriginal Embassy in Canberra, we highlight the way claims for Aboriginal sovereignty press the Australian state to confront the deeper sources of misrecognition in its own desire for unity and sovereign control. Paradoxically, we suggest, it is when the Australian state is forced to acknowledge the failure of its own identity and the project of identity-making, that it can begin to do justice to others.

### **The recognition of Aboriginal suffering**

When newly elected Prime Minister, Kevin Rudd, delivered an apology to the Stolen Generations in 2008, it was widely viewed as an important act of recognition by Aboriginal and non-Aboriginal Australians. Rudd’s apology was significant because it provided official acknowledgment of the injustice of child removal and its devastating impact on Aboriginal people. But the Prime Minister also attributed to his own apology a broader historic importance, claiming that it provided a rare moment in the nation’s history, which had the potential to transform the identity of the Australian polity and the place of Aboriginal people within it (Rudd 2008: 172).

Rudd’s claim about the power of the apology to reconstitute the identity of the polity is supported by recognition theory. Danielle Celermajer (2008: 31), for instance, observes that a political apology can function as an important ‘mechanism of recognition’. An apology recognizes the hitherto denigrated identity of the group that has been wronged, reaffirming them as moral and civic equals while preserving the cultural difference that was previously devalued. But it also has the potential to transform the cultural identity of the nation that was complicit in the wrong due to its paradoxical structure. On the one hand, a political apology entails a shameful identification with the perpetrator of a wrong (Celermajer 2008: 26). Yet, on the other hand, in aligning oneself with ‘concern for and recognition of the experience of the wronged other’ an apology ‘bespeaks in the present another identity’ that transcends the identity of perpetrator (Celermajer 2008: 20). Indeed, following Levinas, Celermajer sees in political apologies the possibility of an ‘ethical’ or non-sovereign politics, predicated on the recognition

of how our freedom is dependent on others. The 'constitutional shift in identity' that a political apology makes possible 'can only occur through [an identity] being called out of itself, towards the experience of the other, who has previously been excluded from our field of vision or definition of Australian identity' (Celermajer 2008: 26). Central to Celermajer's analysis is the insight elaborated by Charles Taylor (1995), among others, that our own self-understanding may be transformed through a struggle for recognition as we become aware of the limits of our own cultural horizon by apprehending these from the perspective of the other (see Schaap 2004, 527f.).

While we agree that Rudd's apology provided an important official acknowledgement of the abuse of state power against Aboriginal people, we want to caution against too quickly endorsing Rudd's own rhetoric about its transformative power. As Noel Pearson (2008) observed in *The Australian* at the time of the apology: 'The imperative for the apology was a product of cultural war. If that was not its original intention, then it immediately became a weapon in this war.' Aboriginal people campaigned for over twenty years for an official apology to the Stolen Generations. However, the public debate that dominated the formal reconciliation process often seemed internal to the settler society. If the apology emerged from a struggle for recognition, this was often as not a struggle among non-Aboriginal people about how they should see *themselves* as it was a struggle between Aboriginal and non-Aboriginal Australians over how they see *each other*. The voices of many Aboriginal people, who sought recognition both of the *genocide* perpetrated by the settler society and of the *sovereignty* of Aboriginal and Torres Strait Islander peoples, were often marginalized within the mainstream debate about whether the Prime Minister ought to apologize or not (see Gunstone 2007; Short 2008).

In this context, Rudd's apology might be understood not only as an act of *recognition* of the suffering of Aboriginal people but a demand *for recognition* of the sovereignty of the Australian state and the unity of the people that it presupposes. As Patchen Markell (2003: 30) observes, a state's claim to sovereignty is less often perceived as a demand for recognition than are the claims of subaltern groups. More often, the sovereignty of a state is taken for granted, appearing as a pre-political or extra-political social fact. Indeed, this was evident in both PM Howard's refusal to say sorry and PM Rudd's apology in their invocation of national unity and shared citizenship between Aboriginal and non-Aboriginal people. The sovereignty of the Australian state over Aboriginal people was presupposed rather than acknowledged to be itself dependent on relations of recognition and therefore the potential object of politicization. As Markell also observes, despite the fact that the state can never fully realize the sovereignty it claims, the state commands substantial resources, which are partly due to the stabilized relations of recognition from which it derives its authority. Consequently, the political encounter between a subaltern group and the state is asymmetrical, often allowing the state to 'set the terms of exchanges of recognition, creating incentives for people to frame their claims about justice in ways that abet rather than undermine the project of state sovereignty' (Markell 2003: 30).

What terms of recognition, then, did Rudd's apology afford to Aboriginal people? To address this question we must situate the apology within the context of the reconciliation process that preceded it. The formal reconciliation process (1991–2001) was effectively inaugurated by Labor Prime Minister Keating in an extraordinary speech in 1992. Speaking in Redfern Park, the centre of Sydney's Aboriginal community, Keating (2000: 61) said that reconciliation 'begins with an act of recognition' that 'it was we [non-Aboriginal Australians] who did the dispossessing ... We brought the disasters ... We took the children from their mothers. We practised discrimination and exclusion.' An inquiry into the removal of Aboriginal children from their families was commissioned in 1994 as part of this reconciliation process. Relying extensively on the testimonies of people affected, the report produced by the inquiry described the devastating impact the practice had on Aboriginal individuals, families and communities and found that it amounted to genocide under the UN convention (HEROC 1997; see Orford 2006). Aboriginal people broadly embraced the term 'Stolen Generations' and endorsed the view that the removal of children from Aboriginal communities constituted an act of genocide against them (Behrendt 2001).

By the time the report was tabled in Parliament in 1997, however, there had been a change of government, with conservative John Howard elected as Prime Minister. The Howard government questioned the validity of the report's findings and dismissed most of its recommendations, including the call for an official apology. While governments, churches and police forces throughout Australia issued public apologies in response to the report, PM John Howard (2000: 90) insisted that 'Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control.' Howard objected to what he called a 'black arm band' view of history and a sentimental politics of shame embraced by the Left. Against what he derided as 'symbolic reconciliation' based on principles of reparative justice, Howard proposed 'practical reconciliation' based on principles of distributive justice. Rather than addressing particular historical wrongs, practical reconciliation would ensure that Aboriginal people have an equal opportunity to education, health, housing and employment, like other Australian citizens.

When Howard first articulated these views at a national Reconciliation Convention in 1997, a number of Aboriginal and non-Aboriginal people stood up and turned their backs on him. Incited by PM Howard's refusal to apologise, from 1998 there was a proliferation of unofficial apologies from ordinary Australians. Under pressure to respond to the report, Howard eventually tabled a 'Motion of Reconciliation' in Parliament in 1999. In contrast to Keating's act of recognition in Redfern Park 1992, Howard's Motion of Reconciliation appeared to most Aboriginal people and many non-Aboriginal Australians as a refusal to recognize the suffering of Aboriginal people. Rather than acknowledging the nature of the harm suffered by Aboriginal people through the practice of child removal, Howard offered only a 'generic' expression of regret for 'mistreatment of many indigenous Australians' in the past, during which 'mistakes had been made' (Howard 1999: 9205, 9207). His passing acknowledgment that 'injustices occurred' against

Aboriginal people was overshadowed by his concern about the injustice of judging *past* generations of non-Aboriginal Australians according to today's standards or of expecting *current* generations of non-Aboriginal Australians to be ashamed of events in which they did not participate (Howard 1999: 9207).

When the National Apology to the Stolen Generations was finally delivered by newly-elected Labor Prime Minister Rudd in 2008, it seemed a momentous occasion. Echoing Keating's Redfern Park address, it provided unequivocal acknowledgement of the injustice of child removal and the suffering it caused. Rather than a generic acknowledgment of mistakes made in the past, Rudd sought to recognize the specificity of the harms perpetrated by recounting the story of Nungala Fejo, a Waramungu woman who had been taken from her community in the 1930s. The apology clearly affirmed the moral equality of Aboriginal people in asking non-Aboriginal people to 'imagine for a moment that this happened to you' (Rudd 2008: 170). And the apology recognized the justified resentment of Aboriginal people for the harms perpetrated against them, asking non-Aboriginal people to 'Imagine how hard it would be to forgive' (Rudd 2008: 171). Rather than expecting that Aboriginal people accept the apology, Rudd asked only that 'this apology be received in the spirit in which it is offered as part of the healing of the nation' (Rudd 2008: 167). By recognizing the suffering of Aboriginal people, the apology both justified their feelings of anger and resentment and it provided grounds for relinquishing them (see Muldoon 2009).

What are we to make, then, of the transformative power of the apology as an act of re-cognition? In his analysis of the apology, Michael Fagenblat (2008: 16) concurs with Rudd's self-understanding that the apology entailed an extraordinary act of recognition in which the nation was imagined anew. Following Celermajer, he discusses how this involved a twofold process of identification. On the one hand, it was predicated on a shameful recognition (that transcended the juridical conception of responsibility) of how the identity of the Australian polity was constituted 'by denying and assimilating Aboriginal identity' (Fagenblat 2008: 20–21). This experience of shame arose through the reflexive self-understanding in which non-Aboriginal Australians retrospectively came to perceive their national identity from the moral perspective of Aboriginal people. 'By way of shame,' Fagenblat argues, 'a relationship of recognition, moral respect and the preservation of the otherness or particularity of Indigenous Australians was forged' (Fagenblat 2008: 22). On the other hand, it entailed an extraordinary assertion of sovereignty in the 'mode of contrition' (Fagenblat 2008: 16). The exceptional power of the sovereign was revealed in the act of re-imagining the identity of the people, by invoking a sense of community that transcended the constitutional order in order to reconfigure that order. Implicit in the apology was an enactment of sovereignty in terms of 'kenosis' – a 're-conception of the idea of sovereignty as a mode of radical humility' (Fagenblat 2008: 28). As such the '[a]pology attested to an abasement of the power of the sovereign to transcend the law by an extraordinary recognition of the violence of its own sovereignty' (Fagenblat 2008: 28).



But how deep did this recognition of sovereign violence go? Occluded in Fagenblat's analysis as, indeed, carefully omitted from the apology, is the naming of the wrong perpetrated against Aboriginal people as *genocide*. As Tony Barta (2008: 210) observes, the description of the practice of child removal as genocide provided Aboriginal people with a 'validating truth about their suffering in all the long years when their trauma had no public recognition' (see also Behrendt 2001: 146). The *Bringing Them Home* report supported this perspective, including a carefully researched section which argued that the removal policies amounted to genocide under the Genocide Convention ratified by Australia in 1949. This was the most controversial aspect of the report, which became the primary focus of the culture wars. Consequently, when Rudd came to power seeking to galvanize a consensus of the Australian people behind the apology he omitted any reference to genocide. It is, indeed, unlikely that Rudd's apology would have been 'felicitous' if it had recognized the wrong perpetrated against Aboriginal people as genocide. For its success depended perhaps more from eliciting public sympathy from the non-Aboriginal addressors on whose behalf it was offered as it did on being accepted by its Aboriginal addressees. Yet, in omitting any reference to genocide, Rudd's apology did not countenance the antagonism between the settler society and Aboriginal people on which the colonial state was predicated. In Jacques Rancière's (1999: 115–116) terms, we might say that, in this regard, the apology exemplified a mode of consensus politics that re-presents the political community as a classless society, denying the relations of non-community inherent to the particular form of community that it presupposes.<sup>1</sup> As such, it failed to properly recognize the injustice perpetrated against Aboriginal people as a *political* wrong – that is, how the suffering they experienced was part of a terrible historical event that was legitimized or, at least, excused, for the sake of the common good of the Australian people (Barta 2008: 210).

Rudd framed the apology as an extraordinary act of recognition by appealing to familiar tropes of reconciliation, resolving that: 'the injustice of the past must never, never happen again'; this 'be a new beginning for Australia'; and this should not be a moment of 'mere sentimental reflection' but 'one of those rare moments in which we might just be able to transform the way the nation thinks about itself' (Rudd 2008: 167–171). However, the potential of the apology to transform the terms of recognition between Aboriginal and non-Aboriginal people was diminished by the presupposition of a certain unity of the polity, the shared citizenship of Aboriginal people and of what they have in common (as Australians) with non-Aboriginal people. This is reflected in at least three further limitations of the apology. First, no tribunal was established to administer reparations to those affected. Instead Aboriginal people were left to seek compensation through the courts on a case-by-case basis, like any other citizens. This failure to provide material reparation reflects a failure to recognize that child removal was a general policy, enacted upon a specific minority group and legitimised in the name of the political community. Second, it sidelined the constitutional recognition of Aboriginal rights. If the government was serious about the promise 'never again' it should have made it a priority to enact constitutional amendments to ensure that

such discriminatory laws cannot be made in the future rather than leaving this to be considered at an unspecified future time. Third, while important in itself, the policy announced of ‘closing the gap’ between Aboriginal and non-Aboriginal people (in relation to socio-economic indicators of well-being as health, housing, education, employment) addresses issues of distributive justice within an established body politic. In the absence of attention to how these distributive injustices are related to the historical legacy of colonization and ongoing colonial practices, the state risks reproducing those same practices through a form of rights paternalism (see Muldoon 2009).

In contrast to Celermajor and Fagenblat’s account of the transformative power of political apologies, some critics argue that reconciliation in Australia and other settler societies is implicated in the further assimilation of Aboriginal people into the national community (e.g. Povinelli 2002; Motha 2007). As such, reconciliation is implicated in the same identity-making that underpinned the genocidal practice of child removal. Reconciliation is a new form of ‘settler nationalism’ (Moran 1998), the ‘latest phase in the colonial project’ (Short 2003), a ‘more penetrating stage of occupation’ (Goeder and Jacobs 2000: 245). By acknowledging their shame for the wrongs of the past, the settler society demands recognition from Aboriginal people of a newfound postcolonial identity, freed from the weight of the colonial past. In casting conflict between Aboriginal people and the settler society as already internal to the national community, reconciliation and the limited recognition it affords is implicated in the further colonization of Aboriginal people. Indeed, Alex Reilly (forthcoming) argues that while the apology *staged* a chastened, pluralistic sovereignty in its mode of supplication, it actually *perpetuated* the assumption of a monistic *sovereignty* that ‘made possible the forced removal of Aboriginal children in the first place.’ Reilly (forthcoming) agrees with Fagenblat that a genuine apology requires a certain loss of sovereignty. However, he suggests that Rudd’s apology failed to reflect on the limits of the state’s own sovereignty since it took for granted that it was within the (legitimate) power of the sovereign to pass those laws that made the practice of child removal lawful.

In failing to recognize the exceptional nature of the genocidal practices through which the state sought to ensure the unity of the Australian polity, Rudd’s promise that such practices would ‘never again’ be perpetrated appeared hollow. Particularly troubling in this context, was the fact that Rudd came to power supporting the Howard government’s controversial military and bureaucratic intervention in remote communities in the Northern Territory. The intervention (ongoing at the time of writing), was initiated in mid-2007, ostensibly to rescue Aboriginal children from sexual abuse and domestic violence (see Altman and Hinkson 2007). However, it appeared to be politically motivated as wedge issue prior to a national election and it has also been criticized by the affected communities and their supporters as a land grab (Behrendt 2009b). Among other special measures, it involved the extraordinary suspension of the Racial Discrimination Act, for which Australia has been criticized by the United Nations. The day prior to Rudd’s apology saw a large protest at the Aboriginal Embassy in



Canberra against the intervention (Short forthcoming). And speaking against the intervention in Sydney in 2009, Larissa Behrendt (who had broadly welcomed Rudd's apology the previous year) asked: 'What are the words that he is going to use or a government is going to use in twenty years time when they have to apologize to this generation of Aboriginal people for these policies? How are they going to make up for the legacy of what they are doing today?' (Behrendt 2009b). Gary Foley (2008) argues that, in treating Aboriginal people as victims and ignoring their history of struggles for land rights and sovereignty, the apology helped to justify the intervention, which is 'a complete step backwards from Indigenous self-determination'.

Following this line of critique, the demand by Aboriginal people for recognition of the suffering inflicted on them through child removal served only (in Markell's terms) to 'abet rather than undermine' the sovereignty of the (post)colonial state. However, in a survey of public responses by Aboriginal people to the apology, Dirk Moses (2011: 146) finds these were 'overwhelmingly positive.' Overall, public comments by Aboriginal people indicated that they found the recognition of their suffering personally significant and welcomed being recognized as equal citizens of the Australian nation (e.g. Behrendt 2009a; cf. Behrendt 2009b). On this basis, Moses (2011, 146) takes issue with critics of the reconciliation process who presume 'the persistence of colonial domination, irrespective of legal and policy changes, by the tautological and essentialist reasoning that colonialism by definition cannot tolerate Indigenous alterity'. The problem with such radical critiques of reconciliation, he argues, is that they reduce the possibilities for Aboriginal agency to a choice between co-optation or resistance to the colonial state, which fails to account for the complexity of Aboriginal politics and the way in which Aboriginal people negotiate a 'sense of simultaneous national belonging and enduring difference' (Moses 2011, 155). Tim Rowse (2010) similarly takes issue with the Damien Short's (2007) account of the reconciliation process in Australia, which he says fails to examine the variety of Aboriginal political actors' engagement with the formal reconciliation process – for instance, as part of the Council for Aboriginal Reconciliation or the Australian and Torres Strait Islander Commission throughout the 1990s. Consequently, Aboriginal political presence registers in Short's account of the politics of reconciliation only as 'thwarted sovereign', their political history reduced to a 'narrative of the settler colonial state's persistently limited concessions to the Indigenous grievance' (Rowse 2010: 72, 80). Moses and Rowse thus take issue with the tendency of critical approaches to reconciliation to reproduce and reinscribe the binary identities of colonizer-colonized even as they aim to overcome them.

Moses (2011: 155–156) suggests that agonistic pluralism provides a framework for conceptualizing the political agency of Aboriginal people outside the resistance/co-option binary, which he thinks prevails in much postcolonial theory. Indigenous agency, he writes, 'entails conflict in a space that constitutes a national political community while recognizing difference' (Moses 2011: 146). There is something in this. It is certainly important to avoid fetishizing either the alterity or the political agency of socially and politically marginalized people. The

thematization of social struggle in terms of the ancient concept of the *agon* was recuperated by some political theorists who were concerned to find an adequate vocabulary in which to understand the praxis of new social movements, which neither emerged from nor could be reduced to the binary of class antagonism. And it has proved fruitful for understanding the ways in which plural identities are constituted through action, how freedom is always exercised within relations of power.

Yet neither should we too easily dismiss the antagonistic moment of struggles for recognition in the name of recognizing complexity or affirming plurality and contingency. Since antagonism is often a starting point for politicization, it is important politically and conceptually in order to understand the conditions of possibility for social transformation (Deranty and Renault 2009; Muldoon and Schaap forthcoming). Indeed, reconciliation often becomes ideological precisely to the extent that it domesticates or elides those antagonistic social relations that are constituted through material relations of power. Politicization depends on contesting the political unity in which the terms of recognition are inscribed, the possibility of making visible a rival image of the common. Rudd's apology may not have effaced Indigenous alterity by further assimilating Aboriginal people into the Australian nation, as a certain meta-political critique of reconciliation suggests. But neither could it redeem its own promise to fundamentally transform the Australian polity through the recognition of Aboriginal suffering as those committed to the ethical turn in political theory hoped. That possibility, we want to suggest, is better afforded by an ongoing and more antagonistic struggle for recognition of Aboriginal sovereignty waged by activists against the Australian state. For it shifts our attention to the identity-making practices of the state itself, its implication as a party to the struggle for recognition and its own history of thwarted sovereignty.

### **The recognition of Aboriginal sovereignty**

It is indicative of the capacity of political initiatives to develop in unanticipated ways that the official reconciliation process should bring genocide forward as a question for the Australian state to address. No retrospective appreciation of the emergent radicalism of the reconciliation movement can, however, escape the fact that it was undertaken in the wake of (yet another) failed bid for Aboriginal sovereignty. When the Commonwealth Parliament voted unanimously to establish the Council of Aboriginal Reconciliation in 1991, it was responding in part to the collapse of a more ambitious proposal for a Treaty that had been a prominent feature of the national political landscape throughout the 1980s. The high point of the Treaty proposal came in June 1988 when Galarrwuy Yunupingu and Wenten Rubuntja presented then Prime Minister Bob Hawke with the Barunga Statement. Among other things, the Barunga Statement called on the Commonwealth Parliament to negotiate 'a Treaty or Compact' with Indigenous peoples recognising their 'prior ownership, continued occupation and sovereignty' (Attwood and Markus 1999: 317). The Prime Minister responded by declaring that '[t]here shall be a treaty

negotiated between the Aboriginal people and the Government of Australia. We would expect and hope and work for the conclusion of such a treaty before the end of the life of this Parliament' (cited in Short 2003). In the face of hostile opposition, however, Hawke betrayed his earlier commitment, abandoning the Treaty proposal in favour of a ten-year process of reconciliation. If the creation of the Council for Aboriginal Reconciliation provided a new opening, therefore, it was also a moment of closure. In the face of a radical new possibility of shared sovereignty, reconciliation represented a return to the logic of nation building in which claims for recognition would be procedurally adjudicated in reference to the identity of the Australian state.

The way in which this forecloses on the possibilities of political transformation is perhaps best illustrated by returning to those instances where Aboriginal people have challenged the very terms of recognition by staking a claim to sovereignty. In the long and complex history of Aboriginal assertions of sovereignty, one of the primary sites for this claim-making has been the courts of the Crown. It is here that Indigenous people have challenged the presumption, legally known as the doctrine of *terra nullius*, that there was no *recognisable* legal or political organisation on the continent prior to the arrival of the British settlers and it is here that their aspirations for sovereignty have been repeatedly defeated. One of the most revealing of these challenges was the landmark case of *Coe v Commonwealth* (1979) in which the plaintiff, Paul Coe (a Wiradjuri man who played a central role in the Aboriginal Embassy and the Aboriginal Legal Service) disputed the accepted, legally entrenched, view that Australia was founded as a 'settlement.' In his wide ranging statement of claim Coe made three particularly controversial assertions: first, that '[f]rom time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia' (121); second, that the British Crown had accordingly acquired the territory by conquest rather than settlement (125); and third, that agents of the Crown had 'unlawfully dispossessed certain of the aboriginal people from their lands' (122). Taken together, these claims amounted to the suggestion that the Australian state was illegitimately founded and had unlawfully dispossessed the Indigenous people of their lands without fair compensation.

Given that the foundation of Australia as a 'settlement' was an established legal precedent dating back to the nineteenth century, it was not surprising that the majority judges took a dim view of Coe's line of reasoning. Though the court left open the possibility that Aboriginal people, *as citizens of the Commonwealth*, might be found to still enjoy certain rights and interests in the land arising from their original occupation, the assertion that Aboriginal people might once have exercised sovereignty was summarily dismissed. In his leading judgment, Gibbs suggested that the statement of claim contained allegations that were 'quite absurd' and had no hesitation in declaring that '[t]he contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain' (129). Two separate rationales for this conclusion were offered based upon two different interpretations of the nature of the claim. If, suggested Gibbs, the plaintiff had intended to assert the existence of

an Aboriginal nation with sovereignty *over the territory* of Australia (territorial sovereignty), the claim had to be denied on the basis that the acquisition of the Australian continent by the British Crown was an 'act of state' that could not be challenged in a municipal court. If, alternatively, the plaintiff had intended to assert the existence of an Aboriginal nation with sovereignty *over its own people* (domestic sovereignty), the claim had to be denied on the basis that Aboriginal people had 'no legislative, executive or judicial organs by which sovereignty might be exercised' (129).

Somewhat ironically, then, Gibbs invokes the very concept of domestic sovereignty used by Marshall CJ in *Cherokee Nation v State of Georgia* (1831) as a way of recognising that the Cherokee, while not sovereign in the territorial sense, still formed a 'distinct political society', only to refuse its application to the Aborigines. What first appears as an anomaly is, however, quickly accounted for by the pronouncement of the court on the matter of Coe's identity. As ultimately becomes evident, the distinction between the two forms of sovereignty – territorial and domestic – is in fact entirely superfluous in this case, because the Court rejects the idea that there is an 'aboriginal nation' in whom sovereignty *of any sort* could be vested. Towards the end of his judgment Gibbs finally raises the question 'whether the appellant has any standing to sue for the relief which he seeks.' 'That involves,' he goes on to add, 'whether there is a body of persons properly described as the aboriginal community and nation of Australia.' Gibbs, tellingly, refuses to endorse such a proposition. If, he suggests, acknowledging his reliance upon 'European standards,' the term nation is taken to mean 'a people organised as a separate state or exercising any degree of sovereignty', its use in reference to the kinds of communal organisation evident among the Aborigines is a misnomer. From the perspective of the High Court, in short, the fundamental problem with Coe's claim for sovereignty, whether taken in its territorial or domestic form, is that it is not properly constituted 'as to parties'. Sovereignty, even of a limited kind, emerges as an 'impossible' legal proposition for the simple reason that 'there is no aboriginal nation' (131).

It is tempting, in light of this explicit refusal of recognition, to treat *Coe v Commonwealth* (1979) as a failure. Like other cases in which the question of Aboriginal sovereignty has been raised, however, Coe's case remains politically significant to the extent that it pressed the Australian state to acknowledge itself as a participant in, rather than simply an adjudicator of, the struggle for recognition. By re-asserting the prior claim of the Aboriginal nation to the territory *now known* as Australia, Coe drew attention to a forgotten antagonism, a struggle over the right to act as the sovereign power in which the Crown was not so much an agonist, as a combatant. Viewed as a strategic exercise in historical retrieval, in other words, Coe's case works to disinter the antagonism between the coloniser and the colonised buried under the legal fiction of *terra nullius* and, in that way, to make the political stakes of the colonial enterprise more visible. If nothing else, the act of challenging the established precedent of 'acquisition by settlement' brought to light the hidden dependence of the colonial sovereign upon the recognition of Indigenous people. Indeed Coe's action can be considered effective to the extent

that it made visible the demand for recognition that the Australian state makes in all its dealings with Indigenous people – a demand that it (*and it alone*) be recognised as the legitimate sovereign.

Of course, part of what makes this case politically significant is the way in which the attempt to force the state to acknowledge itself as a participant in the struggle for recognition – a struggle *between potential sovereigns* – is displaced in favour of its preferred image as an arbiter of struggles for recognition *among citizens*. Though Coe may have succeeded, albeit briefly, in making a displaced antagonism visible, his ambitious attempt to renew the struggle over the right to act as the sovereign power was quickly domesticated by the institutional setting in which he pursued his action. Consequently, Coe's claim effectively fails before it begins since the identity he asserts for himself is incompatible with the terms of recognition available within the institutions of the Australian state. As the judgment of Gibbs makes clear, the only legal personality Coe is permitted to assert in the High Court is that of citizen of the Commonwealth of Australia. No other identity can be granted legal recognition without contradicting the foundations upon which the constitutional order (including its judicial arm) is built. Regardless of its historical merits, in other words, Coe's attempt to bring an action as a representative of a sovereign Aboriginal nation can be summarily dismissed on the grounds of procedural absurdity. His bid for recognition cannot be made intelligible to the court because it contradicts the judgments about identity that are built into the institutional setting – judgments that do not simply precede, but in fact ground, the legal judgment proper. Put simply, Coe's claim is confounded by the identity that the High Court pre-assigns to him as a claimant.

In its own way, then, *Coe v Commonwealth* (1979) illuminates Markell's point that it is not simply marginalised groups who practice the 'politics of recognition.' Though it has become customary to assume that such politics 'is a matter of how much or what kind of recognition *we* – speaking in the voice of universality, for the 'larger society' – ought to extend to *them*,' this characterisation conveniently forgets that 'it takes at least two to struggle' (Markell 2003: 6). As Markell highlights, those who speak in the name of the 'larger society' and its institutions are also practicing a politics of recognition. The only difference is that they are better placed to 'set the terms' under which any exchange of recognition takes place (Markell 2003: 6). Indeed, the mere fact that the state is not ordinarily understood to be engaged in the politics of recognition only serves to underline the institutional advantage it enjoys relative to the marginalised groups whose claims it is entrusted to adjudicate as an independent authority. The surest index of its superior position lies in its capacity to make its own demands for recognition disappear into the background as part of the already given nature of things. In the present context that capacity translates into a presumption on the part of the Australian state to exercise exclusive sovereignty over the territory and peoples of Australia. If there is a political lesson that must be drawn from Coe's case, therefore, it is that Indigenous people need to step outside the procedures of adjudication made available by the state in order to force it to acknowledge certain truths about itself.

Arguably, one of the most historically significant and symbolically evocative attempts to do precisely this took place on 26 January 1972 when four Aboriginal activists (Michael Anderson, Bertie Williams, Billie Cragie and Gary Williams) pitched a beach umbrella on the lawns of Parliament House in the national capital, Canberra, and named it the 'Aboriginal Embassy'. The initial impetus for the protest was a statement issued by Prime Minister McMahon on the previous day in which demands for Aboriginal land rights were rejected in favour of a much weaker (conditional and revocable) form of title called 'general purpose leases'. As Embassy activist Gary Foley (2001: 15) recalls, McMahon's rejection of land rights effectively relegated Aboriginal people to the status of 'aliens in our own land' and so 'as aliens we would have an embassy of our own'. From these humble beginnings the Aboriginal Embassy protest swelled into one of the largest and most significant demonstrations in Australia's history (see Peters-Little 1992; Robinson 1994; Foley 2001; Lothian 2007). As the movement gathered momentum, tents were erected in place of the original umbrella, the recently designed Aboriginal flag was flown, an office tent was established and a letterbox was installed which began receiving international mail. Although the Tent Ambassadors did not initially characterise the protest as a claim for sovereignty, the symbolism of the Embassy clearly implied a right of self-government and this gradually became the understanding of both the government and the protestors alike (Schaap 2009: 212).

If the act of taking political shelter under an umbrella revealed a refined comic sensibility, the naming of the protest as the Aboriginal Embassy also spoke to the tragic failure of the nation-building project in its existing form. Seen simply as the condition into which those best placed to call the country home had been delivered by colonisation (*Ab-origine* meaning literally, from the origin), the title 'alien' might have done little more than invite mournful reflection upon the themes of belonging and disinheritance. As the presentation of the Embassy as a political protest underscored, however, alien was also a symbolically enacted subject position, a conscious act of political self-identification, which served as a disavowal of the 'identity' of the Australian 'people'. When it is understood in this way, the Aboriginal Embassy becomes irreducible to a theatre of victimhood. By electing to describe themselves as aliens, the Ambassadors were not just lamenting their dispossession, but refusing to grant the state the recognition implicit in *its* characterisation of them as citizens. Making symbolic capital out of the oxymoron 'indigenous aliens', they conjoined a primordial right to belong with a political refusal to belong in order to rupture the assumed unity of the people and mark out a dissensus.

Officials at the time were inclined to interpret this refusal of identification as a demand for a separate state and this has been a consistent reflex of state authorities whenever the question of Aboriginal sovereignty is raised (see Schaap 2009: 212–213). The 'break-up' of Australia motif is, however, suspiciously ideological (itself one of the identity-making tools of the state) and frequently wholly insensitive to the actual demands being made by Indigenous people. No doubt the protest movement meant many different things to the Ambassadors and



their supporters and it is not our intention (or place) to prescribe a single meaning. Yet, one can justifiably read the symbolism of the Tent Embassy, not as a refusal of inclusion *per se*, but as a refusal to be included in the kind of Australia that disavows its reliance upon the recognition of Indigenous people. For Aboriginal Ambassador Kevin Gilbert, this was one of the most important points to emerge from the struggle for Aboriginal rights. As he would later write, the Australian state 'cannot acquire a legal, valid title except by entering into a legal, binding TREATY of international status with Aboriginal People of this our country' (Gilbert 1995: 52). Understood in these terms, the Tent Embassy protest was not a secessionist movement, but an invitation to the Australian state to acknowledge the contingency of its own identity. By refusing their pre-assigned status as citizens, the Ambassadors were encouraging the Australian state to acknowledge the failure of its desire for sovereign unity and to begin from a different legal and political premise (see Muldoon and Schaap forthcoming).

Perhaps the most marked distinction between the Embassy and the various High Court challenges to the idea of 'acquisition by settlement' lies in its strategic relocation of the source of confusion over identity. As we have already seen, the difficulty faced by Coe in the High Court was that his identity as a claimant was pre-determined by the institutional setting. Put bluntly, the upshot of Gibbs's judgment in *Coe v Commonwealth* (1979) was that 'you' – meaning Paul Coe specifically and Indigenous Australians generally – do not understand who you are. You imagine yourself a member of an Aboriginal nation, but as a claimant in the High Court you are actually a citizen of the Commonwealth. In the case of the Tent Embassy, by contrast, the identity of the claimant does not prefigure the claim, but arises with it. By operating outside the procedural forms of adjudication available through the institutions of the Australian state, the Ambassadors were able to create their own terms of recognition. Theirs is not a plea *for* sovereignty, but a performative assumption *of* sovereignty. Viewed from the new perspective made available by the Tent Embassy, in other words, it is not Aboriginal people, but the colonists who do not understand who they are. The message of the Embassy is twofold: not only have you misnamed 'us' as citizens but that you have misnamed yourselves as sovereigns. Critically these two acts of misrecognition are intimately related: in effect, the Embassy says to the colonist, you do not recognise us *because* you do not recognise yourselves.

## **Conclusion**

The point of this analysis is not to privilege the pursuit of sovereignty over the pursuit of reconciliation as a more 'real' or more 'authentic' expression of Aboriginal politics (as if the struggle against injustice could not be waged on different fronts and in different ways). It is rather to provide a clearer understanding of the possibilities and limits of each as a mode of political contestation. Contrary to those who are inclined to dismiss reconciliation as the latest phase in the colonial project, our analysis acknowledges it as an important mechanism of recognition. The apology to the Stolen Generations, justifiably regarded as the

high point of the reconciliation process in Australia, simultaneously recognised Indigenous people as civic equals *in their difference* and undertook to build a new, more inclusive, political community. At no point, however, did the promise of a new beginning allow for critical questioning of the project of identity-making. Despite its self-presentation as an exceptional event, the assertion of sovereign power in the mode of contrition, the apology did not fulfil its ethical potential by identifying the desire for national unity as the source of misrecognition. By attributing the mistreatment of Indigenous people to outdated prejudices, the sovereign avoided implicating its own pursuit of sovereignty in the tragedy of the Stolen Generations and deflected critical scrutiny of the role of the apology in the continuation of that pursuit.

Our analysis follows Markell in assuming that the ‘root of injustice is not identity, but the effort to make identity’ (Markell 2003: 23). The value we ascribe to the struggle for Aboriginal sovereignty in this chapter derives from the fact that it allows the effort the colonial state makes in the name of identity – establishing it, preserving it, defending it – more clearly visible. Confronted by claims of Aboriginal sovereignty, the colonial state can no longer present its own identity as a given, as something which sits outside the contingency of intersubjective relations. On these occasions it discloses itself (albeit inadvertently and unwillingly) as an active participant in the struggle for recognition, at once dependent upon others for the security of its identity and deeply hostile to the admission of such dependence. The political implications of this are far from insignificant. To learn that the colonial state does not simply hear demands for recognition, but also makes them is to begin to appreciate that it has a strategic interest in misrecognition. Far from being simply the product of outdated belief systems, the misrecognition of others (and all the harms that result from them) is one of the forms taken by the identity-making practices of the state. That some Aboriginal activists chose to resurrect the Aboriginal Embassy in 1992 in protest against the substitution of the Treaty Proposal for Aboriginal Reconciliation speaks volumes about the limited forms of recognition such processes afford. By renewing the claim for sovereignty, these activists helped to expose the interests at stake in treating Indigenous people simply as mistreated citizens.

## Notes

- 1 Rancière (1999: 115–116) writes, ‘Consensus thinking conveniently represents what it calls ‘exclusion’ as the simple relationship between an inside and an outside. But what is at stake under the name of exclusion is not being-outside. It is the mode of division to which an inside and an outside can be joined. The ‘exclusion’ talked about today is a most determined form of such a partition. It is the very invisibility of the partition, the effacing of any marks that might allow the relationship between community and non-community to be argued about within some political mechanism of subjectification.’

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