

Postcolonial Liberalism

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6 The postcolonial state

What is at stake then is this: How can the growth of capabilities be disconnected from the intensification of power relations?¹

James Tully has argued that there are two crucial 'hinge propositions' that structure debates over Aboriginal rights in contemporary liberal democracies, and that limit our thinking about them.² First, that the jurisdiction exercised over indigenous peoples by the state is not only effective but legitimate. And second, that there is no alternative. Either the state exercises *exclusive* jurisdiction or the indigenous nation does — there is no in-between, no shared or co-ordinate form of sovereignty possible. To find a successful way of dealing with the issues we have been discussing, however, our thinking must change.

Consider the first proposition. To evaluate whether or not the burdens and costs involved in securing Aboriginal peoples' interests are reasonable, there is a prior question of the legitimacy of the institutions within which those distributions are located. If the sovereignty the state claims to exercise over indigenous peoples and their territories is illegitimate, the question about to what indigenous peoples are or are not entitled within that state presupposes precisely what is at issue.³ Their claims for self-government and for the lands taken from them, or for compensation for dispossession, are legitimate in so far as they were and continue to be self-determining peoples forcibly and unjustly incorporated into European settler states. This is a powerful challenge. In fact, I think it is decisive in many ways. But as I have been arguing, it is important to see the complex strands of this claim. It does not rest exclusively on a claim of prior occupancy of lands, or the fact of exercising prior sovereignty, or the persistence of indigenous cultures. What I shall call *the normative thesis* underlying Aboriginal rights draws on each of these arguments, but goes beyond them as well. The normative thesis claims that Aboriginal rights are justified with reference not only to the self-understandings, laws, practices and particular historical circumstances

of indigenous peoples, but also to more general principles of equality, freedom and well-being. Relying exclusively on historical arguments renders them vulnerable to counter-claims that take advantage of their inherent incompleteness.⁴ As I argued in Chapters 4 and 5, the point is not that the normative argument trumps the historical argument (or vice versa), but grasping how these temporal and normative strands are intertwined.

The ideal postcolonial liberalism embraces in order to flesh out the normative thesis is *complex mutual coexistence*, since although indigenous peoples conceive of themselves as peoples or nations, they tend to seek rights of self-government that fall short of statehood. But what does this mean in terms of the normative shape of a liberal postcolonial order? If we disagree about justice and yet assume that relations of power are ubiquitous, how can we craft collective decisions that not only acknowledge reasonable disagreement about these matters, but also address the serious challenges faced by indigenous peoples today? These are the central questions I want to address in this chapter. The gist of my argument has been that we should focus on the conditions of the struggles of citizens for both recognition and particular forms of distribution (the two are necessarily linked),⁵ rather than on identifying a theory that aims to settle these kinds of claims in advance. The matter is complicated, however, because in focusing on the struggles themselves rather than on their endpoints, we must still say something about what is required to ensure they can be played freely, and say something about what we mean by 'freely'. In spelling out what these conditions are, we touch on substantive questions of justice, among other things. Simply agreeing to disagree is not an option because the kind of disagreement in question is one that concerns the terms on which people interact. So to be clear, and as I have argued in earlier chapters, the postcolonial state is one committed to treating its citizens with equal respect; with minimizing domination and promoting freedom; and to providing the conditions in which people can construct and pursue meaningful lives.⁶

Defending such a vision runs up quickly against a number of powerful philosophical objections, which I will consider in detail below. But there is more than just philosophical issues at stake here. The kinds of objections that philosophers have been making against cultural rights in recent years have been echoed in public debates about Aboriginal rights in Australia, Canada and elsewhere. In fact, there is clearly a backlash occurring against Aboriginal peoples' claims, in part due to the vicissitudes of changing political climates, but also due to a sense of deep misgiving and apprehension about the language of 'special measures', self-determination and cultural autonomy. When Bill Jonas, the Australian Aboriginal Social Justice Commissioner, argued in a newspaper

interview recently that equal treatment did not always entail identical treatment, the letters flowed in. One writer commented: 'So the Aboriginal Social Justice Commissioner ... wants Aboriginal people treated differently from other Australians. Well in terms of money spent on Aboriginal welfare, land rights etc., they clearly already are ...'. Another wrote: 'Your distinction between treating people equally and treating them the same is a point which escapes me, and I suggest also escapes most other citizens in this country. Different treatment for any particular racial group strikes me as a sure-fire formula to intensify/foment ongoing social discord'.⁷

It is tempting and not surprising that defenders of Aboriginal rights, at this point, often respond to these objections by pointing to the fact that Australia is a signatory to an international convention or treaty that upholds the legitimacy of using tools like special measures to combat racial inequality. Or that this more complex idea is already at work in many other aspects of public life that most people accept and even cherish. Pointing out that people cannot reject a principle or norm for others that they accept for themselves, on pain of self-contradiction, is an effective but ultimately limited argumentative strategy. Logical consistency is a virtue (and one philosophers are keen to praise), but it has limited political purchase, to say the least. It has to be applied to claims with propositional content. So the substantive normative arguments have to be made and re-made in light of changing social and political circumstances. For it is not just the middle classes that need convincing, but also the families struggling on average weekly earnings, or the unemployed suburban fringe-dwellers coping with poor housing, lousy public infrastructure and 'work for the dole'. It is no easy task. And it gets more difficult when economic circumstances deteriorate and political parties search for divisive, 'push-button', racially sensitive issues to distinguish themselves from their opponents. Media commentators, columnists, and talkback-radio pundits, among others, join in to press upon and pull at people's insecurities and fears about cultural and social difference and change.

In this chapter I want to outline the normative character of what I shall call a postcolonial political order. It is an attempt to try to put the defence of Aboriginal rights into a wider context than is often attempted, beyond the legal doctrines and arguments that tend to dominate academic discussions of these questions. And I will try to answer some of the questions that have been raised in the previous chapters about exactly how a commitment to liberal equality can be translated into support for Aboriginal rights. In the first half of the chapter I outline two different ways of conceiving of equal respect, and then link this discussion to a powerful *egalitarian* objection against recognizing any

special claims for Aboriginal people beyond basic liberal rights. I consider this objection, reject it, and then go on in the second half of the chapter to develop the normative argument more positively. In Chapter 7, I shall try to show how these arguments might actually guide our thinking about some difficult practical issues that arise when different normative orders collide within the same state. This is an important task, since many of people's fears and insecurities about Aboriginal rights have to do with uncertainty over what it actually entails on the ground.

But first: what do I mean by the state?

The state

Minimally, the state is whatever actually and effectively monopolizes the legitimate use of violence.⁸ The modern state, however, has a range of functions that vary over time and space. It is considered legitimate, as we have seen, in both a functional sense and when it is seen to possess the appropriate moral standing. Thus a state offers protection when it secures you against the grave disadvantages of an unregulated free-for-all. The rule of law provides security, but this can only be secured in turn by an effective sovereign. A Lockean variation on this story would be that the state and its institutions are justified when all those subject to them consent to their establishment as a means of securing not only their basic interests in security, but also their moral interests in being a member of a mutually advantageous cooperative scheme. Kant takes this one step further. The justification of the state must rest on moral grounds because the innate freedom of every person entails an obligation on each to recognize the freedom of every one else. Thus each person should choose to live in a condition that can institutionalize the peaceful exercise of freedom by everyone – i.e. the juridical condition established by the idea of the social contract. The state literally makes freedom possible through the provision of the rule of law, without which there would be the lawless and violent (hence non-freedom conducive) conditions of the state of nature. In these instances the state is both protective and enabling.

These prudential and moral justifications of the state are only part of the story, however, since it is clear the state did not emerge, nor does it operate, according to the instructions laid out by normative political theorists. Moreover, an exclusively normative approach to the state risks missing the way power circulates in contemporary circumstances, a crucial issue for our discussion of indigenous peoples' claims. What I am

referring to is what Michel Foucault called the 'governmentalisation of the state' – namely, locating the state and its agencies in a much wider process of the proliferation of forms of government in a variety of contexts, which we touched on in earlier chapters. Foucault's approach to the state, and to power in general, is also useful for putting the claims about the nature of the state into context given the forces of globalization. David Held defines these as 'a set of processes which shift the spatial form of human organization and activity to transcontinental or interregional patterns of activity, interaction and exercises of power'.⁹ In general, globalization puts each of the basic elements of the modern state under pressure. The state is increasingly enmeshed in global economic and political processes which displace and qualify its sovereignty. It is also challenged by deepening multiculturalism, in part due to the increasing global movement of peoples, as well as the aspirations of stateless nations and other groups for forms of self-determination. The ability of democratic states to maintain singular, coherent and inclusive national cultures is made more complex and difficult these days. Moreover *both* governmental and democratic practices have been dispersed via globalization. Keeping with Foucault's broad ranging sense of 'government', it is clear that there are governmental practices that cut across and constrain the sovereignty of nation states, but equally, there are attempts at resisting or modifying (and in some cases democratizing) those very practices of government as well, and which also cut across national boundaries.¹⁰ These developments can be overstated – the state is hardly withering away – but they are significant nonetheless.

This particular situation creates challenges and opportunities for Aboriginal peoples. The challenges, to say the least, are considerable. They involve contesting the legitimacy of the state and the various normative conceptions of equality, justice and freedom said to underpin that legitimacy. But they also involve struggles against the broader forms of governmental power mentioned above, including those symbolic and affective dimensions of social existence that inform norms of interaction, reciprocity and sociability. These include the historical reference points informing and shaping public discourse, as well as the psychic and social boundaries of ways of life and cultural practices said to be tolerable in a 'civilized' society. Finally, the globalization of neo-liberal economic policies has placed tremendous pressure on the capacity of states to use discretionary spending in socially directed ways, to properly manage the development of natural resources, and to effectively regulate the operations of large multinational corporations.

Keeping both the practical and normative dimensions of the postcolonial state in view simultaneously is crucial to the contextual spirit of postcolonial liberalism. As I emphasized in the Introduction, the

Aboriginal peoples of North America and Australasia have been treated as less than equal citizens, however equal citizenship is defined. But they have also often experienced injustice at the hands of apparently well-intentioned policies and programs justified *in the name of* equal treatment and non-discrimination.¹¹ Ideals of equal citizenship, for example, have been used to justify forms of coercive assimilation.¹² This is a function of the way political and legal institutions charged with implementing and enforcing social and political norms are simultaneously cultural institutions, and thus how general norms of non-discrimination and equal rights can be interpreted in a variety of particular, and often conflicting, ways. The fact that principles and norms are mediated through various concrete social contexts does not mean that the principles or norms are therefore a sham, or that different cultural orders are necessarily incommensurable. Relativism does not follow the fact of social and cultural mediation. But what does follow, as Joseph Carens has argued, is that we need to see if there are alternative forms of mediation that are less distorting and alienating for those subject to them.¹³ One important reason for doing so is that we want people – at least ideally – to be able to freely endorse the norms to which they are subject and not merely put up with them, or worse, see them as a mere alien imposition.

Having set out some of the basic elements of our understanding of the state, and some of the practical constraints it faces today, let us now turn to sketching the normative dimensions of the postcolonial state.

Equality

Egalitarianism involves a cluster of ethical commitments. It involves not only a commitment to the equal distribution of stuff – of resources or welfare – but also to *civic* equality, to the idea that every single person is worthy of equal respect and equal standing.

To treat someone with equal respect is to treat them, first of all, as someone of equal worth. No person is less worthy than another on the basis of their cultural or religious beliefs, ethnicity, sex or race. As Charles Larmore has argued, to treat someone with equal respect is to be 'obligated to treat another as he is treating us – to use his having a perspective on the world as a reason for discussing the merits of action rationally with him'.¹⁴ What does this actually mean? There are (at least) two ways of grasping the meaning of 'equal respect'.¹⁵ We can show respect towards someone when we defer to their beliefs or worldview, or when no one party is allowed to dictate or set the terms of their inter-

actions unilaterally. It follows then that a state may be said to treat its citizens equally when it simply defers to their judgments about their best interests and the life they want to lead. Or, when it ensures that no one group or person is able to unilaterally set the terms in which others must live and go about their lives. As Arthur Ripstein has argued, in this latter conception of equal respect the emphasis is on *equal* respect; to simply defer to the beliefs of individuals is to risk allowing that party to veto whatever standards he does not like, standards that might be necessary to ensure that others are treated equally. This means we need to hold people to a common standard, 'one that protects them equally from each other', or more positively, that requires persons to interact on terms that 'are acceptable to persons who respect each other'.¹⁶ Here, equal respect is linked to practices of mutual justification, which we argued in the Introduction is central to much of contemporary egalitarian liberalism.

What happens if I reject the premises of the justification made for coercing or regulating my behaviour? If we are committed to the principle of equal respect based on 'reciprocity' rather than 'deference' then we think that coercion is justified, in some cases, even if the party at whom it is directed rejects the basic reasons for doing so. For some critics, this means liberalism is trapped; it claims to be inclusive and offer reasons for the exercise of political power that almost everyone (save for the fundamentalist or extremist) can accept, but it cannot, so in the end it is simply one sectarian doctrine on all fours with others, and liberals should admit it.¹⁷

We should expect disagreement and contentiousness about this idea of equal respect as reciprocity. But liberalism is not therefore trapped in appealing to either; all the critic has shown is that you cannot appeal to premises and conclusions that do any work and not be – in some instances for some people – controversial. Liberalism is not neutral about how the world should be organized and the norms that should govern social and political interactions. The crucial question is: what set of norms and values are most likely to be able to reach across and live amongst the diversity characteristic of our political societies? Democratic negotiation seems to be the only possible way of preserving both the practice and ideal of equal respect, along with recognition of disagreement over and contestation of the ideal itself. As both Habermas and Rawls have recently emphasized, there is a double character to the relation between democracy and the rule of law; the public autonomy associated with participation in law-making is co-dependent on the private autonomy secured by the rule of law.¹⁸

Hence, as I have been arguing, we should focus first on the conditions in which citizens struggle and argue over particular modes of recogni-

tion and distribution, as opposed to trying immediately to articulate a complete theory of justice that might be capable of adjudicating between all the conflicting claims. But in order to ensure that any provisional settlement that emerges out of this process is not simply arbitrary, or the product of relations of domination, we need to appeal to some substantive claims, and especially to do with equality. Thus, the kind of equal respect the postcolonial state should promote is one grounded in a norm of *reciprocity*: equal respect entails that the terms of engagement between citizens should not be dictated unilaterally by any one party. The next step, however, is to say some more about the stuff of equality being appealed to: *what* should we be aiming at when we talk of making people more equal, and *whom* are we discussing when comparing the situation of people with regard to these targets.

Critics of liberal political theory often focus, as we have seen, on the apparent abstractness and formality of liberal notions of freedom and equality. In much of the postcolonial theory literature, for example, liberal notions of equality are often criticized for either not extending equality to people who somehow do not fit the norm against which judgments of equality are made, or for not adequately theorizing how recognizing social and cultural difference (both philosophically and institutionally) can be a means of treating people equally. In other words, liberal equality is often taken to mean identical treatment or 'difference-blind' treatment. It is undoubtedly true that many liberals do take this line. Indeed there is something of a backlash occurring against various liberal attempts to reconcile multiculturalism with liberal equality, and a strong reassertion of a difference-blind or impartial norm of non-discrimination.¹⁹

I shall argue that both the postcolonial criticisms and the liberal backlash are overstated. In the first case, recent work on liberal equality shows that many of the concerns of postcolonial critics are actually shared by some liberal egalitarians. This is true, for example, of those liberals concerned with ensuring that people have the right kind of resources as well as *capacities* in order to pursue whatever conception of the good they have. Hence these theorists are concerned with what people are actually able to *do* and *be* as much as they are with what they have, and with the effect that circumstances beyond their control – such as structural features of society to do with the economy, family, legal and educational institutions – have on their basic capacities.²⁰ In other words, they accept that human capacities are socially and historically constituted and shaped, and are concerned to account for these facts in their arguments about distributive justice. The consequences of this important (and quite radical) claim are often not fully developed in

these discussions, but this invites further exploration rather than wholesale rejection. If being committed to postcolonialism means rejecting equality as either impossible or as a mere Western construct, then so much the worse for postcolonialism. We need to rethink how a commitment to equality can be squared with the claims of Aboriginal peoples, not abandon it.

On the other hand, it seems clear that the particular circumstances of Aboriginal peoples pushes liberal notions of equality in places liberals often fear to tread. More specifically, indigenous claims are distinct from those of other ethnic, cultural or racial groups in that their equal treatment is not entirely captured through special affirmative action programs, or additional mechanisms for 'voice' in legislative institutions. These are sophisticated variations on difference-blind equality arguments, meant to address the persistence of inequality and social subordination despite the entrenchment of formal equality.²¹ But the kind of structural and constitutional protection of difference sought by indigenous groups is not tied exclusively to the amelioration of social and economic disadvantage, as important as that is. It presses directly against the ideal of difference-blind equality itself, since it calls for an accommodation of more permanent forms of differentiated citizenship.

But first, what does liberal equality actually entail – i.e. equality of *what*?²² An influential conception of equality in recent liberal political theory, and especially with regard to multiculturalism, has been the idea of equality of *resources*. A resourcist approach to equality and justice says that what should be distributed equally are those resources and capabilities required for anyone (in the specified set) to pursue whatever conception of the good they want to (consistent with the rights of others to do likewise). Equality of welfare, on the other hand, aims at the distribution of equal welfare or desire-satisfaction.²³ 'Welfare' can be interpreted either in terms of what the agent herself thinks of as valuable, or in terms of what is deemed to be objectively valuable or worthwhile for people to value.

The intuition underlying resourcist arguments for equality is that each individual should enjoy not only an extensive set of rights and liberties but also a certain distribution of resources. The preeminent versions of this argument are provided by John Rawls and Ronald Dworkin. A key aspect of these discussions for us is that both Rawls and Dworkin accept that the distribution of talents and capacities we begin with – as much as the wealth and income we begin with – is morally arbitrary.²⁴ That is, we can hardly claim to *deserve* our place in the natural and social distribution of talents and wealth. This presents a key theme for our discussion of postcolonial liberalism. The claim seems to commit Rawls and Dworkin to a thesis about the *socialization* of our

capacities – of our ambitions, tastes, preferences, powers and opportunities. And yet ultimately, both pull back from embracing the full consequences of such a claim.

For Rawls, individuals are treated equally and justly when they are guaranteed an equal distribution of a bundle of primary goods. These 'social primary goods' include not only income and wealth,²⁵ but also the basic liberties, freedom of movement, choice of occupation and the 'social bases of self-respect'.²⁶ Despite reasonable pluralism about the good, Rawls argues, citizens should be able to agree on a set of resources that should be distributed equally to everyone in order to enable them to pursue whatever conception of the good they want to pursue, consistent with the rights of others to do likewise.²⁷

Dworkin agrees that resources are relevant to distributive justice and include not only external resources, such as material goods, but basic capacities as well.²⁸ A distribution is equal when the value of each bundle measured in terms of the opportunity cost it imposes on others is the same. Dworkin's discussion is complex, but the basic idea is that we should start off with not only equal purchasing power (the thought experiment involves resources being put up for auction and then bid to an equilibrium), but also with equal 'assets and endowments'. These assets and endowments include not only the capital or goods one begins with, but also the 'internal' capacities and talents one has. Dworkin's claim is that although we can not completely equalize these circumstances, we can try to compensate people for their unequal starting points, the process of which he demonstrates through a complex hypothetical insurance process that underwrites a progressive taxation system. In other words, those who end up disadvantaged due to circumstances beyond their control should be compensated by those who have been advantaged by circumstances beyond their control. Physically or mentally disabled people should be subsidized in order to equalize their life chances in relation to those who suffer no such disability, and so on. Note that the focus is on equalising resources; the responsibility for maximizing welfare is left up to individuals. Whether or not the resources in question actually *do* increase individual levels of welfare is not Dworkin's primary concern.

Dworkin's particular scheme has been extensively discussed.²⁹ One serious problem with it is how we measure in the real world just what people's relative advantages and disadvantages are. If we accept that some capacities are socially and historically constituted, and yet we also expect people to take responsibility for their choices in light of their capacities, then what force does the distinction between choice and circumstance actually have? How can equalizing resources give people genuine equality of opportunity? How can we draw the line between

what is within our control and what is not? And if we cannot, what happens to Dworkin's distinction between choice and circumstance? How can we be held responsible for our choices, but not for our circumstances, if the choices we think we have are, in fact, a product of social, cultural, economic, and political circumstances beyond our exclusive control?

Rawls tries to modify the potentially unsettling consequences of these worries by arguing that tastes and ambitions are actually something people *do* have control over, hence can be held responsible for. But this is a deeply unsatisfactory move. How can we distinguish between preferences and capacities so easily, given that the ambitions and talents we have must surely be linked to the capacities and powers we begin with and are able to develop (or not)? Dworkin makes a similar move when he tries to distinguish between 'tastes and ambitions' and our 'physical and mental powers', even after accepting that the distribution of 'physical and mental powers' is arbitrary and hence legitimate objects for a theory of distributive justice.³⁰ But the doubts we had about the plausibility of Rawls's move apply equally to Dworkin's as well. How can we determine which beliefs and preferences we have, and thus which choices we make, are genuinely ours and can be held responsible for, and which are not? And if the distinction collapses, then how can we talk about people being genuinely autonomous or self-governing?³¹

One response to these difficulties is to shift the focus away from resources *per se* to what Amartya Sen calls 'capabilities' and 'functionings'. The intuitive idea here is that Dworkin and Rawls miss how a person may have adequate resources, such as a set of basic freedoms or income, but still lack the *capability* to make use of them in the way she wants, or according to an established benchmark of human flourishing or well-being.³² Capabilities are conceived by Sen as 'real freedoms' to do or be. The actual 'doings and beings' which people choose to achieve are what he refers to as human *functionings*. To achieve any set of human functionings one needs the capabilities required to do so. The advantage of this approach, argues Sen, is that in evaluating people's circumstances, it makes sense to focus on the good they derive from a resource rather than on simply the amount of the resource they have, or the subjective satisfaction they get from consuming it. Thus it is a critique of both standard resourcist and welfarist approaches to equality (although it remains generally within the resourcist camp). The capabilities approach is sceptical of focusing mainly upon peoples' extant preferences, because it thinks these can be 'adaptive', hence potentially distorted by relations of power. Moreover, it emphasizes that capabilities must be guaranteed *for each and every person*, and thus is opposed to

utilitarian strategies of aggregating across persons in order to measure overall welfare satisfaction.

However there is a tension in justice as capabilities between the insistence that capabilities be the focus of a theory of justice, and that there is a unique set of human functionings central to any decent human life. The argument seems perfectionist in inclination; we treat people equally when we ensure an equal distribution of capabilities, or real freedoms, that enable people to lead good lives. A theory of the good helps us pick out which capacities are valuable and need to be equalised. The obvious question is, just how thick is this theory of the good? Is it compatible with the reasonable pluralism of contemporary liberal democracies? Sen might have provided an answer to a problem inherent to resourcist conceptions of equality – how do we actually measure people's relative advantages and disadvantages – but at what price?

This question has been addressed recently by Martha Nussbaum. The crucial move she adds to the capabilities approach is to embrace Rawls's strategy in *Political Liberalism* with regard to valuable human functionings.³³ For Nussbaum, there is no single best set of human functionings. Instead, the aim of justice as capabilities is to provide a threshold of basic capabilities for each and every person that are necessary for any kind of decent human life. There is still a conception of the good being appealed to, but it is 'thick and vague' rather than thin and specific. Moreover, it is political rather than metaphysical; that is, the basic social minimum is tied to specifically political goals rather than any comprehensive doctrine of the good; Millians, Aristotelians, Rawlsians, Deleuzians and Kantians should all be able to pursue their own valued functionings once they and others are guaranteed their basic capabilities.

The threshold itself, Nussbaum argues, should be set as per the procedures and norms of local democratic institutions, which are best suited for taking into account the particular historical and cultural features of that polity. How can we tell if a local interpretation of a basic capability is legitimate or not? On the one hand, universal norms underlying the list of basic capabilities can become embodied in international instruments such as treaties and international law, which provides a benchmark against which to judge local departures from the threshold. On the other hand, these universal norms can not simply be imposed (except *in extremis*). Nor can they determine what is acceptable or unacceptable in every instance; local specifications and interpretations will have to take over in many instances. Thus, for Nussbaum, as distinct from Sen, we should aim to equalise *capabilities* rather than *functionings*.³⁴ The point is not to impose particular functioning on people, but rather to empower them with the capacities they need to live a decent

life, given reasonable pluralism about what constitutes a good life in the first place.

Aboriginal rights and equality of resources

As we can see, liberal arguments for equality are thus much more sensitive to context, circumstances and structural inequalities than some postcolonial critics lead us to think. The formalism and abstractness of the notion of equality is as much a concern for many liberals as it is for their critics. And the importance of taking into consideration the socially constructed nature of both internal and external capacities is also at the heart of recent liberal discussions of equality. In fact, when we turn to the most influential liberal discussions of Aboriginal rights, some variation of the resourcist argument is usually being appealed to.

The classic resourcist defence of Aboriginal rights is provided by Will Kymlicka, whom I discussed in Chapter 2. Kymlicka adapts Dworkin's argument for the task of justifying collective rights for Aboriginal peoples, including to land and self-government. Recall that his claim is that collective rights enable indigenous people to secure access to their societal culture, which in turn secures important goods for individuals. Cultures provide a 'context for choice', and provide people not only with options to choose from, but beliefs about value that make those options meaningful and valuable in the first place. Hence to lack secure access to a culture is to be disadvantaged in a way relevant to considerations of distributive justice. In other words, where the lack of access to a societal culture is not a product of one's *choices* but rather of one's *circumstances*, and thus something that should be equalized.

How do particular cultures get into such trouble? Sometimes they are simply oppressed and dominated by the state. In other instances, a lack of significant influence over policy decisions and resources that affect their well-being means that members' capacity to sustain their culture, and hence the meaningful options it provides, is undermined. Basic democratic procedures and equal citizenship rights do not provide enough protection, so the argument goes, since members of the majority culture can out-manoeuvre or out-vote minorities regularly on matters that affect the use of resources central to minority cultural practices.³⁵

There are a number of problems with this influential argument, as we explored in Chapter 2. For one thing, the link between freedom and access to a secure societal culture is problematic. If I am a member of a culture that is in the process of being assimilated to another, say larger,

culture then it is not clear I am going without beliefs about value, but rather that they are *changing*.³⁶ How is that a threat to my freedom? Where the process of assimilation is so coercive and oppressive that the result is the outright elimination of the culture, then it clearly can be freedom-constraining in the worst possible sense. Destroy the culture, destroy the people, at least in some circumstances.³⁷ But applied to the justification of Aboriginal rights, this argument makes it too dependent on the fact of suffering; to have suffered great harm in the past is surely one important consideration in evaluating a claim for collective rights, but it is not the only one. Moreover on its own, this argument leads only to remedial rights, not more permanent or structural ones, and this seems to miss crucial aspects of the normative thesis underlying Aboriginal rights.

Another version of the resourcist argument is to tie the lack of a secure cultural structure to the literal *incapacity* of members of the group to cope with the wider society within which they live. According to this argument, minority language groups, for example, may be granted language rights if, because of their particular circumstances, it was unlikely that members of that culture would be able to master the language of the majority, and thus unable to pursue a range of important human activities without some provision being made for the survival of their cultural structure.³⁸ Applied to indigenous peoples, the argument would be that the nature of indigenous difference is such that without the preservation of their culture, they are left at a severe disadvantage in terms of coping with Western institutions and practices.³⁹

The main problem with exclusively culturalist defences of Aboriginal rights, I shall argue, is that they are incomplete. The justification of Aboriginal rights, in other words, is tied too narrowly to the preservation of culture, as opposed to a bundle of claims to do with not only culture, but with interests related to land and self-government. Another danger of cleaving too closely to a culturalist defence of Aboriginal rights is that it leaves it open to various manifestations of the 'expensive tastes' objection, which we shall now consider.⁴⁰

Are Aboriginal rights akin to expensive tastes?

If we are committed to some version of equality of *welfare*, then we are committed to subsidizing people for the tastes and preferences they have, even if those tastes or lifestyles are very expensive to maintain. How can someone committed to egalitarianism be committed to using scarce resources to subsidize people's expensive tastes? Why should a

beer lover be forced to subsidize the tastes of a wine snob? Equality of resources arguments are meant to block this objection by focusing on the equal distribution of *basic* resources, such as rights, income, and opportunities, as opposed to the equal satisfaction of preferences, whatever those happen to be. In stretching the language of resources to include culture, the worry is that something like the expensive tastes objection re-emerges.

In order to avoid this objection, Kymlicka has to show that minority collective rights can be defended as a response to unequal circumstances, as opposed to shared choices.⁴¹ But deep problems bedevil such a move. Consider: If societal cultures are valuable because they provide meaningful beliefs about value, as well as options corresponding to those beliefs, then if a culture is in decline because its members are taking up another set of cultural practices (with corresponding options), then – as we have seen – no one is going without beliefs in value. If it is in decline because the options it provides are costly or expensive to maintain, then the expensive tastes objection may apply. Why should others subsidize the maintenance of those options if everyone has relatively equal access to meaningful beliefs about value?

We can respond to the expensive tastes objection in at least three ways. First, we can simply reject the distinction that Rawls, Dworkin and Kymlicka make between choices and circumstances. In other words, embrace the socialization of capacities thesis much more fully than most egalitarian liberals do. But does this mean abandoning liberalism? I shall return to this point below.

Second, we can reject the analogy between expensive tastes or preferences and one's cultural beliefs, and argue that it is not as clearcut as it seems. One need not claim that cultural beliefs are literally akin to physical handicaps to think that, at least in some circumstances, they are burdensome for people in such a way so as to raise a legitimate question of fairness and justice. Fairness considerations enter into the picture because it is clear that indigenous people often face being pulled in different directions by alternative sources of authoritative legal, social and political norms. In so far as this dilemma is a genuine one, some aspects of the particular content of citizenship may place an undue burden on indigenous people, that is, significantly constrain them from living their lives according to their own customs and practices.⁴² *Prima facie*, this should be a concern for any liberal 'fully committed' to the freedom of association,⁴³ or like Rawls in *Political Liberalism*, to ensuring that citizens can adopt the political conception of justice from *within* their own 'comprehensive view'. Of course, determining what will count as sufficiently burdensome, and what kind of remedy is required, if any, will inevitably depend on what else is at stake.⁴⁴ (I will tackle this issue

in more detail in the next chapter.) Much will depend on the costs – material, social and psychological and so forth – that members of a minority group face if they cannot live according to their cultural or religious beliefs, or that the rest of society would have to bear if they do.

It is not impossible, of course, that indigenous people could, over time, choose to assimilate to Western institutions and practices, if they wanted to. And one could imagine a scenario in which various forms of transition assistance could be provided by the state to ease such a process. (In fact, this supposedly 'benign assimilation' scenario has been recently re-floated in Australia by various critics of Aboriginal rights.⁴⁵) But as I understand it, most indigenous people continue to want to protect their lands and ways of life as much as possible. They do not accept that the choice is between assimilation or separatism. Moreover, we know the terrible consequences of the long history of attempts by the state at eradicating their ways of life, such that to classify their desire to preserve them as a form of 'expensive taste' is arguably deeply misconstrued.

We need not oversimplify what we mean by assimilation. No culture or people is immune from contact or influence from outside itself, because all cultures and peoples are internally differentiated and thus always open to reshaping and reorientation from the both the inside and outside. In a world in which social, cultural, political and economic processes are increasingly transnational, the ability to immunize oneself from any kind of social, cultural or political influence from the outside is very difficult, if not impossible. But that does not mean we can presume that assimilation, *in every instance*, is inevitable, or benign, or desirable. People value their cultural practices enough to want to preserve them, even when the obstacles to integration with other cultures are relatively small.⁴⁶

This leads to my final point concerning the expensive taste objection. If we accept, as I have been arguing, that Aboriginal rights do not rest *solely* on culturalist arguments, then the expensive tastes analogy fades. For the right to self-government is not only about the freedom to engage in various cultural practices threatened by assimilation, but also the freedom to exercise various forms of governmental authority. This raises jurisdictional claims about the constitutional and institutional structure of the state as a whole, and challenges the distribution of legislative authority between different orders of government and the administration of justice. These kinds of jurisdictional and institutional claims are not fully captured by the language of liberal culturalism. Understood properly, they pre-empt charges of 'expensive tastes' because they challenge the very premises upon which the analogy is based. Namely, that the claims of indigenous groups are commensurable with or identical to

the claims of other minority groups within the political community. Thus it is important to see that we cannot engage in these kinds of judgments about cultural beliefs and expensive tastes independent of the particular circumstances of the groups making the claims. Not all peoples claiming self-government rights are claiming the same thing for the same reasons. Quebecois nationalism cannot be reduced to Aboriginal nationalism, for example, however much they both appeal to normative claims about the value of self-determination and self-rule. Hence there will be different forms of accommodation and institutional arrangements required to meet these different claims.

The capabilities approach and Aboriginal rights

At this point, someone with generally liberal egalitarian intuitions might be willing to grant that Aboriginal rights are not necessarily akin to expensive tastes, but that what is not clear is whether or not they are compatible with the kind of outcomes egalitarian liberals generally seek.

As we saw above, the dominant approach to equality in the Rawlsian tradition is resourcist: people should start with a roughly equal bundle of primary goods or resources and then be free to use them as they see fit. A general criticism of this approach is that it focuses too much on *access* to basic social goods, and not enough on the attainment of actual outcomes. One tack is to suggest that the resourcist approach, on the whole, underestimates the effect of the structural features of social, political and economic life. These structural features shape distributive patterns in the first place, and thus cannot be addressed by theories of distributive justice that take these patterns for granted. This point has significant importance for indigenous peoples since, as we have argued, the basic institutions within which the distribution of primary goods take place can be such so as to severely disadvantage them. What counts as a primary good, the legitimacy of the basic distributive institutions, and what constitutes an acceptable move in the public conversation of justice, all have important consequences for consideration of their claims. Power, both direct and indirect, always shapes distributive justice, however much it is supposed to work the other way round.

These problems can be exacerbated by focusing upon only a narrow range of primary goods for the purposes of interpersonal comparison. How do these resources relate to the relative well-being of people in terms of what they are actually able to do and be?⁴⁷ The worry is, as Martha Nussbaum has put it, that the resourcist approach does not go 'deep enough to diagnose obstacles that can be present even when

resources seem to be adequately spread around'. In order 'to do justice to A's struggles', argues Nussbaum, 'we must see them in their social context, aware of the obstacles that the context offers to the struggle for liberty, opportunity, and material well-being.'⁴⁸ These struggles include physiological or biological factors (the different kind of needs associated with being pregnant, for example), but also the effects of pervasive social norms on the ability of people to achieve various kinds of freedoms. What we require is both generality and particularity; detailed knowledge of the context and circumstances in which the agent acts and yet at the same time, a less subjective and more comprehensive account of her basic needs and capabilities. A focus on capabilities as opposed to primary goods is said to provide this. A person's 'capability set' indicates the alternative combinations of possible functionings, or modes of living, actually available to them.⁴⁹ Thus it is concerned with what people are actually able to achieve with their freedoms, whilst at the same time, accepting reasonable pluralism about the good.⁵⁰

The capabilities approach has its own problems, of course. The first is to do with its perfectionist and paternalistic tendencies.⁵¹ Despite embracing political liberalism, there is still a general question as to whether or not it actually takes reasonable pluralism seriously enough, although the pluralist challenge presents problems for any standard of interpersonal comparison. The second set of problems is to do with the abstractness of any general list of basic capacities; Nussbaum provides very little guidance as to the priority rules or ordering principles that should apply to the various components, save to say that they should be guaranteed for each and every individual. Both are serious concerns for the postcolonial liberal. And as we shall see, the ordering problem is a particularly serious one. But set them aside for the moment. The attraction of the capabilities approach is the aforementioned combination of particularity and generality. It provides a framework for developing critical cross-cultural judgments about the central capabilities of persons, and yet also seems to leave room for particular interpretations of those capabilities attuned to local circumstances. It seems to provide a framework, in other words, for elaborating what it might mean for liberal equality to 'go local'. Consider five features of this approach which lend themselves to the normative heart of postcolonial liberalism – the ideal of complex mutual coexistence:

1. *The idea of a basic but contestable threshold.* A threshold is less than a complete theory of justice, but it identifies those basic human capabilities central to living a life that is recognizably human, in the broadest possible sense. Focusing on a threshold of central capabilities provides some critical grip for cross-cultural interpersonal comparisons with regard to equality, without necessarily claiming to

embed them within a fully worked out theory of justice.⁵² Any such list is controversial. The crucial question is the extent to which such a list is compatible with the normative thesis underlying the justification of Aboriginal rights. And the answer to this question can only be discovered through actual deliberations between indigenous and non-indigenous people.

2. *Multiple realizability and normative flexibility.* Although the central capabilities denote the relevant space for interpersonal comparison between all citizens, the approach allows for the 'multiple realizability' of those capabilities according to local beliefs and circumstances.⁵³ This follows from the central importance given to freedom, and especially capabilities for action, in the capabilities approach. Human beings are conceived of as agents, not just passive bearers of preferences. The conception of practical reason underlying this approach is thus focused directly on principles of action first, and only then in relation to a variety of functionings the agent may have reason to value.⁵⁴ Thus, except in the most egregious circumstances, implementation of the basic capabilities is left, for the most part, to local institutions.⁵⁵ The approach acknowledges that the threshold level of each capability will always need more precise determination as it is worked out for political purposes between different local, national and international actors over what constitutes the appropriate standard or threshold, and who is best able to deliver them. Thus the process of political justification always remains incomplete. This places a premium on democratic discussions occurring within and between nations (and thus on the presence of certain basic liberties and opportunities available to those subject to those governments; see 3 below). Nussbaum cashes out this interpretive and justificatory flexibility in the Rawlsian language of reflective equilibrium and overlapping consensus.⁵⁶ But we can also appeal to the argument made in Chapter 4, which replaced the aim of achieving an overlapping consensus with that of a discursive *modus vivendi*.
3. *A norm-suffused and contextual account of rights.* The language of capabilities arguably gets more directly than rights-talk does at the conditions required for the *effective exercise* of the kinds of capacities and interests rights are often thought to promote, whether political or economic.⁵⁷ Since people disagree about both the right and the good, any argument about the merits of one particular set of rights over another ultimately rests on controversial moral beliefs. Rights are thus derivative from these beliefs, not foundational. They also require some mechanism for their effective realization and enforce-

ment, without which they are vacuous. The capabilities approach is no less vulnerable to the fact of reasonable pluralism than rights – discourse is, and needs a story about how its basic capabilities can be actualized no less than rights-discourse does. But it arguably comes at these issues more directly.⁵⁸ For one thing, the approach openly ties its list of human capabilities to a conception of the good, albeit one that admits of potentially enough variability and local specification so as to be amenable to many different cultures and contexts. Furthermore, in focusing on human capabilities, it is focused on the potential for specific kinds of (valued) human action, and also upon the social bases of these forms of human action. Thus it is able to distinguish between someone having a nominal right to political participation, for example, without really having the capability for it. Different kinds of positive governmental or social action may be required to ensure that I am able to act on my basic capability to participate meaningfully in the political system of which I am citizen.

4. *Socialization of capabilities.* As we saw above, Rawls and other egalitarian liberals try to neutralize the consequences of the socialization of capacities thesis by drawing a distinction between choice and circumstance. But it is very hard to reel in the effects of the powerful Rawlsian claim that differences in natural abilities and contingencies of upbringing are morally arbitrary factors that should not determine the rewards (or punishments) people receive. If the distinction between what a person can be genuinely held responsible for and what she cannot is unstable – and I have suggested it is – then this is a potentially intractable problem for deciding when and how various forms of egalitarian interventions are justified. Another option, however, is to embrace the socialization thesis. Again, the capabilities approach is helpful in this regard. In distinguishing between 'basic', 'internal' and 'combined' capabilities, Nussbaum shows how difficult it is to maintain a strict line between choice and circumstance. Consider how the three kinds of capability are related. *Basic* capabilities refer to what is essentially the 'innate equipment' of individuals – for example their sense of hearing, or capacity for seeing – but at a very rudimentary level. *Internal* capabilities are those developed states of the person that are 'sufficient conditions for the exercise of the requisite functions'. *Combined* capabilities, finally, are internal capabilities combined with suitable external conditions for the exercise of the functioning.⁵⁹ What is important is how these different kinds of capabilities interact. Many internal capabilities require favourable external conditions, and

their exercise can be thwarted not only by changing material and social circumstances, but often distorted and reshaped by them as well. Most of the capabilities on Nussbaum's list of 'Central Human Functional Capabilities' are combined capabilities, and thus most of those we associate with basic human rights are too. Does embracing the socialization thesis undermine liberal intuitions about the importance of self-government and self-ownership? Well, in some ways it does. But both self-government and self-ownership are radically indeterminate notions open to a variety of often conflicting interpretations. Neither can be taken as, alone, *the* central value of liberalism. The virtue of embracing the socialization thesis is that it provides the conceptual tools to pick out, or at least remain alert to, potentially arbitrary arrangements hiding under apparently natural conditions. Instead of being focused mainly on questions about the legitimacy of various kinds of entitlements to what is produced, for example, our attention shifts to 'pursuing justice in the power relations surrounding production'.⁶⁰ This can be generalized for the evaluation of a range of other institutional arrangements as well. 'Constructive social power' is unavoidable and ubiquitous in modern societies.⁶¹ It is, in part, a consequence of people being able to act freely in the first place. We cannot help acting on others as we are acted on by them, whether in asserting or dissenting from our practical identities, or participating in various social practices into which we are born and/or continue to uphold. We can never step wholly outside of these relations, but we can try to evaluate the consequences of the various particular distributions of social power we encounter, and try to address the asymmetries that inevitably arise and affect citizens' freedom and equality.

- 5 *A practice-dependent conception of freedom.* The focus on what people are actually able to do and be leads to a distinctive account of freedom. On the capabilities approach, securing negative freedom – the removal of external hindrances to doing what one pleases – is an important but only partial aspect of human freedom. To have the capability to do *x* is to be free from external hindrances to do *x*, but also to have the material and institutional resources to do *x* effectively – to have the 'effective power to achieve chosen results'.⁶² Thus freedom is tied closely to principles of *action*, and especially to the material, institutional and social conditions required to act freely, both individually and collectively, since these two modes of freedom are interdependent.⁶³ To act freely is therefore not only to have the material and institutional means to convert opportunities into achievements, but also the capability to contest and question

those norms of recognition and distribution that govern access to those various means.

Putting these five features of the capabilities approach together provides a way of conceptualizing the shape of the kind of political order postcolonial liberalism aims to promote. A postcolonial liberal order should aim to secure those capabilities required to participate effectively in collective practices of public reason that affect one's fundamental interests. What counts as a fundamental interest includes not only those very basic physiological and psychological needs that human beings everywhere share, but is also shaped by the particular forms of constructive social power – or constellation of discourses – circulating in the public sphere. The way capabilities are picked out and described is therefore crucial. Thus any proposed list or threshold of central capabilities has to be adequately deliberated and subject to contestation. That is, it has to emerge from a process in which the reasons that become authoritative in shaping governmental or social action in a particular domain can be shared by those subject to them. The focus then is not only on trying to identify those central capabilities that are required for being a 'normally cooperating member of society',⁶⁴ but also the conditions under which agreements about these descriptions are said to be legitimacy-conferring. Note that there is a dynamic relationship between these two demands. People need the capabilities and opportunities required to engage in these practices of freedom, but these practices in turn reshape and reconfigure what counts as a central capability or valued functioning in the first place.

So Aboriginal people, like all people, need those basic capabilities required for bodily and psychological well-being, such as freedom from premature mortality, from persistent violence, from preventable morbidity, and from inadequate nourishment.⁶⁵ They need those capabilities associated with engaging in practical reasoning, both public and non-public; not only the ability to imagine, think and reason in ways informed by an adequate education, but also to form and pursue conceptions of the good and be able to reflect critically upon them. They require some form of mutual recognition from others, and thus having access to the 'social bases of self-respect' and non-humiliation.⁶⁶ They need to be able to pursue their interests responsibly, that is, with regard to the interests of others, and to be able to comprehend the kinds of constraints that imposes upon their actions. If people are to have the capabilities required to choose between any number of possible functionings in modern, market-based liberal democratic societies, then they will also need some set of 'saleable skills and capacities', given prevailing economic circumstances, that will allow them to participate in the real economy of their society in some way.⁶⁷ To blame people for being a net

drain on society's resources without giving them the capabilities or genuine opportunities to contribute to that society, or provide for themselves, is deeply confused. (We shall return to this issue with specific reference to debates over Aboriginal people and 'welfare dependency' in the next chapter.)⁶⁸

But note immediately that much more complex elaboration is required. For example, what do I mean by *adequate* levels of nourishment or education? What *kind* of mutual recognition is required to secure the social bases of self-respect? *Which set* of 'saleable skills' exactly, prevents people from being excluded from the economy and enables them to take responsibility for themselves? And which capabilities should take priority in what kind of circumstances? This kind of elaboration can only occur at the level where those most affected by these descriptions have the opportunity to contribute to their formulation. But in order to make such a contribution, certain basic capabilities must already be secured. In other words, there is no escaping the fact that capability sets must be discursively constructed and legitimated, but one must also secure the conditions in which such processes of discursive construction and legitimation are accessible to all those affected by the authoritative reasons that emerge from them.

Second, the capabilities here are all, by and large, 'combined capabilities' in Nussbaum's sense of the term. Their realization requires a combination of internal and external factors. Achieving reasonable health, educational, and employment levels requires more than simply negative rights of non-interference. Evaluating whether or not someone has the requisite capabilities – or real freedoms – for functioning will require more than the presence of a range of permissible options from which to choose. It will also require an analysis of the kinds of constraints and incentives that exist, and which lead some people to take up some options but not others, including ones that, in principle, they could freely take.⁶⁹ This means looking at the relationship between extant social, legal and political norms and practices and people's ability to convert resources into valuable functionings. Are there pervasive norms of social discouragement, for example, that affect young women's ability to achieve some level of economic independence? Are there material, social or cultural factors that interfere with the delivery of better healthcare, for example, which result in grossly unequal outcomes for different groups in society? A society cannot will or guarantee good health or self-respect, but it can provide the social bases of these goods by promoting the capabilities required for people to be both physically and psychologically healthy.

How does all of this relate to Aboriginal rights? As we saw earlier, these rights originate from the prior presence of Aboriginal peoples and

their distinctive laws and practices, as well as through the complex inter-societal negotiations between them and European settler nations. What I want to argue is that we see these rights, normatively speaking, as securing a particular kind of capability set in relation to Aboriginal peoples' interests in land, culture and self-government. These capabilities enable indigenous people to pursue their conceptions of the good and ways of life equally, since they promote a distribution of formal and constructive social power that takes into account the distinctive historical and social facts of their situation, both in the past and today. Securing Aboriginal peoples' interests to land recognizes their pre-existing territorial rights and protects their property interests, just as the law protects those of non-Aboriginal people. Securing their cultural interests enables Aboriginal people access to equal resources to maintain, adapt and reproduce their cultural identities, given the challenges they face in doing so. Securing their sovereign interests acknowledges Aboriginal nations as equal partners at the time of European contact,⁷⁰ and contributes to their capacity to improve the substantive material and social inequalities their communities face today. Moreover, indigenous peoples have good prudential reasons for being sceptical of giving up their sovereign interests, however limited, given the costs of incorporation and inclusion that have been imposed upon them over the years by liberal states.⁷¹ Thus a postcolonial liberal order tries to ensure that the spillover effects of interactions between indigenous and liberal normative orders are, as much as is possible, mutually acceptable.⁷² In so doing, it helps secure the equality of 'effective social freedom' for indigenous peoples, and thus the equal capability for 'adequate public functioning'; that is, effective use of the political opportunities and liberties required to make their concerns known and initiate public debate about them.⁷³

So what are the advantages of using the capabilities approach for justifying Aboriginal rights?⁷⁴ They stem from the five features outlined above. The approach ties generally liberal notions of equality and freedom to a much richer set of social, material and cultural considerations concerning what is actually required for people to achieve effective social freedom, whilst accepting the pluralist challenge to ideals of human flourishing.⁷⁵ Note also that it leaves open the precise calibration required between individual and collective rights. Some kinds of capabilities will best be promoted by securing the capacities of groups to act in various ways; in other instances, only by empowering individuals. In the case of indigenous peoples, it will always be a matter of struggling to get the mix right, for it is clear that an exclusively individual-rights or group-rights approach will be inadequate, given the complex circumstances they face. Thus the capabilities approach, applied to the

circumstance of indigenous peoples, offers a break from 'difference-blind' liberal equality – since it takes the social, cultural and political differences people face in achieving real freedom very seriously – without breaking with equality completely.⁷⁶ What it does is encourage a more pragmatic approach to getting the calibration between individual and collective rights correct, albeit always a value-infused kind of pragmatism.

Aboriginal rights, by and large, have usually been conceived of as involving collective rights – to property, to the means for preserving cultural practices, and to self-government as self-determining peoples. But since Aboriginal people are also citizens of the wider state (assuming, for the moment, that their sovereign interests do not preclude them from being so), they also enjoy certain basic individual rights too. Translating Aboriginal rights into effective public policy involves, as Tim Rowse has argued, a persistent interplay between the 'individuating and communalising' modalities of liberal government and law'.⁷⁷ A policy of self-determination does not merely acknowledge the communal character of indigenous interests and practices, for example, but actively solicits the formation of specific kinds of groups – regional associations, land councils, corporations – with whom the state can deal. As Rowse points out, '[t]he phrase "self-determination" poses the question: what self or selves?'⁷⁸ The statutory and institutional requirements attached to the formation of these bodies, although intended to allow for the continued expression of indigenous interests via their customs and practices, are also intended to translate those collective interests into forms recognisable to established practices of government. The spillover effect of these translations can involve the reshaping of both public and private space by liberal norms.⁷⁹

Here we encounter a deep challenge faced by Aboriginal peoples in contemporary liberal democracies raised in earlier chapters and above. Aboriginal rights are particularly vulnerable to co-option, or as John Borrows puts it, to 'domestication' under the guise of legitimate recognition. This is frequently commented on by Aboriginal activists and theorists.⁸⁰ It falls somewhere between exclusion and assimilation. As Borrows argues: 'Aboriginal peoples can now legitimately question the injustice of colonial encounters and thereby lay claim to pre-existing rights in the nation states in which they live ... Nevertheless, it is becoming increasingly clear that these same states can extensively modify, infringe, or extinguish indigenous rights'.⁸¹ Aboriginal claims are taken up within the framework of public reason, but the nature of the uptake becomes problematic. Crucial premises are not so much lost in translation as filtered through a different set of legal, political and moral traditions with often serious consequences, as Borrows and others point out. Engaging in public reasoning requires an openness to one's worldviews

and claims being tested and re-translated back to you; there is no escaping mediation and thus cultural change. But the ideal of mutual justification places a premium on each and every person subject to the coercive power of the state being able to contest those norms and rules which affect their fundamental interests. And here the problem is that by domesticating their claims, by 'continuing to enfold Aboriginal peoples tightly within the existing federal fabric ... without changing that weave to accommodate them significantly', those capacities for contestation and for the equal pursuit of their ways of life are considerably weakened.⁸²

Since power is ubiquitous there is no way of completely insulating any set of norms or practices from the kinds of distortions that Borrows and others identify. But the point here has been to emphasize the potential for a *critical* use of the capabilities approach, as applied to the justification of Aboriginal rights in liberal democratic societies. The emphasis on the contestable and deliberative nature of the basic threshold it identifies for human well-being, the multiple realizability of basic capabilities as opposed to mandated functionings, and a practice-oriented account of human freedom, all place an emphasis on the continual contestability of the means used to make interpersonal comparisons for the purpose of equality. At the very least, the capabilities approach asks the right kinds of questions about the institutional arrangements and policies in place: How do they actually enable people to realize their valued functionings? What kinds of conflicts might emerge between securing one kind of capability as opposed to another? How has the authoritative description of the capabilities to be promoted and secured been arrived at in the first place? Finally, it leaves open the possibility – something postcolonial liberalism expects and welcomes – of the creative adaptation by indigenous and non-indigenous institutions in meeting the demands of both 'cultural appropriateness' and fairness and equity. If Aboriginal cultural and political life is internally differentiated and dynamic rather than static, then we should expect to see some *reverse domestication* occurring as well. Liberal modalities of government can be turned around and used to protect or promote valued forms of indigenous functioning. Thus different forms of negotiated coexistence between liberal and indigenous norms and social orders may emerge in unexpected ways.

Conclusion

A sympathetic reader might, at this point, be willing to grant something along these lines: Aboriginal rights promote the central capabilities of

Aboriginal people by helping to secure their important and distinctive interests in relation to land, culture and self-government, interests they have in addition to those associated with basic citizenship rights. Securing these interests helps to secure and promote the equality of effective social freedom. The capabilities approach, suitably adapted, directs us to the right kinds of question here: what can people actually achieve with the resources they have? How do current land rights regimes actually help secure their interests in property? How does enabling Aboriginal groups to reproduce their cultural practices over time protect and promote the basic interests and capabilities of their members? How do self-governing institutions actually improve Aboriginal peoples' material and social conditions? However, the reader might continue, since (as we have claimed) power is ubiquitous and the presence of arbitrary and unjustified arrangements inevitable, the same reasons which lead us to see the reasonableness of Aboriginal rights should lead us to seek reasonable cross-cultural norms for evaluating and correcting such asymmetries between and *within* these different normative orders as well. Does not a reliance upon the capabilities approach warrant intrusive and imperial interference in the affairs of Aboriginal self-governing societies on the grounds of securing the central capabilities of all of its members? And if it does not, how will the interests and capabilities of the most vulnerable be protected?

These kinds of questions are difficult to answer in the abstract, because a suitable answer requires as much attention to context – to historical, social, cultural and political contexts – as it does to fundamental normative issues. Neither liberal nor Aboriginal practices are inherently unjust, but neither are they immune from injustice either. The ideal of complex mutual coexistence is intended to acknowledge the ways in which people are subject to multiple cultural, social and political allegiances often simultaneously, and the need for negotiated ways of managing the conflicts that can emerge in relation to them. But what about the conflicts that inevitably emerge between the different values and interests being deliberated and balanced in these processes, including between the powerful and the more vulnerable members of the different communities?⁸³ How should conflicts between Aboriginal rights and liberal rights be resolved? I have offered some general principles above and in previous chapters; we should seek discursively legitimated *modus vivendi* agreements on constitutional essentials that secure and promote people's basic capabilities (where what counts as a basic capability is itself subject to processes of discursive legitimation). But how would this actually work on the ground? How does it address the fears of the Aboriginal reader, that her interests are always subject to

certain pre-established liberal conditions she cannot question but which 'modify, infringe or extinguish' her distinctive rights? And how does it address the fears of the liberal reader, that what the localization or customization of liberalism ultimately amounts to is a relativization of it, and thus to endorsing rather than challenging illiberal relations of power?

- ing future', Christine Korsgaard, *Creating the Kingdom of Ends* (New York, Cambridge University Press, 1996), p. 373.
- 27 Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo', *Sydney Law Review*, 17 (1995), p. 11; see also Gerald Postema 'On the Moral Presence of our Past', *McGill Law Journal*, 36 (1991), 1178–1180; 'Collective Evils, Harms and the Law', *Ethics*, 97 (1987), 414–440.
- 28 Yael Tamir, *Liberal Nationalism* (Princeton, Princeton University Press, 1993), pp. 95–116, 134–139.
- 29 Postema, 'Collective Evils, Harms and the Law', pp. 426–427.
- 30 The phrase is from Alasdair MacIntyre, *After Virtue* (London, Duckworth, 1981), p. 207. For an interesting development of this theme see Jeremy Webber, *Reimagining Canada* (Montreal, McGill-Queens Press, 1994).
- 31 People usually have a much more acute sense of what is unjust than of what is just in politics; see the discussion in Ian Shapiro, *Democratic Justice* (New Haven, Yale University Press, 1999) pp. 19–20. See also Stuart Hampshire, *Justice is Conflict* (London, Duckworth, 1999).
- 32 Samuel Scheffler, 'Relationships and Responsibilities', *Philosophy and Public Affairs*, 26 (1998), 191–192, 202.
- 33 Thomas Hurka, 'The Justification of National Partiality', in McKim and McMahan (eds), *The Morality of Nationalism*, p. 151.
- 34 There is a crucial ambiguity here in talking about 'political membership'. Do we mean all citizens or all residents? Do refugees or landed immigrants, for example, who do not have a right to vote or even to various social services, have these responsibilities as well? On the face of it, no.
- 35 See the discussion in Tamir, *Liberal Nationalism*, pp. 101–102; William E. Connolly, *The Ethos of Pluralization* (Minneapolis, University of Minnesota Press, 1995) pp. 41–74. An interesting example of this dilemma is discussed by David Dyzenhaus, *Judging the Judges: Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, Hart Publishing, 1998).
- 36 There is considerable debate as to whether special obligations, if they are merely derivative of general obligations of fairness or impartiality, are all that special after all. On the other hand, 'associative obligations' are often implicitly appealed to anyway by liberals, given the need to explain why we owe the bulk of our duties of justice to our fellow citizens as opposed to anyone else. My point is that the tension between these two views is built into any plausible account of political obligation, and cannot be easily dissolved. See Yael Tamir, *Liberal Nationalism* (Princeton, Princeton University Press, 1993), pp. 95–116; and Samuel Scheffler, 'Liberalism, Nationalism and Egalitarianism', in McKim and McMahan (eds), *The Morality of Nationalism*, pp. 204–205.
- 37 These two goods are discussed in Tully, *Strange Multiplicity*, pp. 31–2.
- 38 See Jeremy Webber, 'Beyond Regret: Mabo's Implications for Australian Constitutionalism', in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge, Cambridge University Press, 2000), pp. 60–88.
- 39 For a defence of the epistemic gains of an inclusive theory of public deliberation which is contrasted with a 'juridical' model (i.e., Rawls's), see

- Melissa Williams, 'Justice towards Groups: Political not Juridical', *Political Theory*, 23 (1995), 80–81.
- 40 Compare Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca, Cornell University Press, 1993). But it does mean being suspicious of attempts to impose solutions from above, or to achieve desirable outcomes without attention to local contexts and circumstances.
- 41 Margaret Levi, 'Death and taxes: extractive equality and the development of democratic institutions', in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Value* (Cambridge, Cambridge University Press, 1999), p. 124.
- 42 Compare Arthur Ripstein, 'Context, Continuity, and Fairness', in McKim and McMahan (eds), *The Morality of Nationalism*, pp. 217–223.
- 43 John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2000), pp. 76–77.

6 The postcolonial state

- 1 Michel Foucault, 'What is Enlightenment', in Paul Rabinow (ed.), *The Foucault Reader* (New York, Vintage, 1984).
- 2 James Tully, 'Struggles for and of freedom', in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge, Cambridge University Press, 2000), p. 58.
- 3 Taiaiake Alfred, *Peace, Power, Righteousness: an indigenous manifesto* (Don Mills, Oxford University Press, 1999); Tully, 'The Struggles of indigenous peoples for and of freedom'; Macklem, *Indigenous Difference*.
- 4 See the excellent discussion in Patrick Macklem, *Indigenous Difference and the Canadian Constitution* (Toronto, University of Toronto Press, 2001), Chapters 1–4.
- 5 James Tully, 'Struggles over Recognition and Distribution', *Constellations*, 7, 4 (2000), p. 469.
- 6 It should also be concerned with not undermining, at the very least, the basic interests and well-being of those people who are not citizens – whether refugees or asylum seekers arriving on its territories – and those suffering from severe deprivation and harm elsewhere in the world.
- 7 William Jonas and Margaret Donaldson, 'The Legitimacy of Special Measures' in Sam Garkaw, Loretta Kelly and Warwick Fisher (eds), *Indigenous Human Rights* (Sydney, Sydney Institute of Criminology, 2001), p. 11.
- 8 Max Weber, 'The Profession and Vocation of Politics' in Peter Lassman, Ronald Spiers (eds) *Weber: Political Writings* (Cambridge, Cambridge University Press, 1994), pp. 310–11.
- 9 D. Held, 'The transformation of political community', in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Edges* (New York, Cambridge University Press, 1999), p. 92.
- 10 David Held et al, *Global Transformations* (Cambridge, Polity Press, 1999); James Tully, 'Democracy and Globalization: A Defeasible Sketch', in Ronald Beiner and Wayne Norman (eds), *Canadian Political Philosophy* (Don Mills, Oxford University Press, 2001) pp. 36–62; William E. Connolly, *The Ethos of Pluralization* (Minneapolis, University of Minnesota

- Press, 1995). On the internationalization of the indigenous rights movement see James Anaya, *Indigenous Peoples in International Law* (Oxford, Oxford University Press, 1996).
- 11 One of the most notorious examples of this was the Canadian government's 1969 White Paper on Indian Policy, which proposed doing away with any special treatment for Aboriginal people, including abandoning treaty negotiations, on the grounds of it being 'antithetical to Canadian political traditions' and to protecting individual rights.
 - 12 M. Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto, University of Toronto Press, 1993).
 - 13 Joseph Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000), p. 190.
 - 14 Charles Larmore, *Patterns of Moral Complexity* (New York, Cambridge University Press, 1987) pp. 64–65.
 - 15 Arthur Ripstein, 'Coercion and Disagreement', in Beiner and Norman (eds), *Canadian Political Philosophy*, p. 352; see also Larmore, *Patterns of Moral Complexity*, pp. 62–66.
 - 16 Ripstein, 'Coercion and Disagreement', p. 354–355.
 - 17 Stanley Fish, 'Mutual Respect as a Device for Exclusion' in Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (New York, Oxford University Press, 1999).
 - 18 John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993); Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass., MIT Press, 1996).
 - 19 For example: Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press, 2001)
 - 20 Iris Marion Young, 'Equality of Whom? Social Groups and Judgements of Injustice', *Journal of Political Philosophy*, 9 (2001), 1–18; Elizabeth Anderson, 'What is the point of equality?' *Ethics* 109 (1999), 287–337.
 - 21 See Melissa Williams, *Voice, Trust, Memory: marginalised groups and the failings of liberal representation* (Princeton, Princeton University Press, 1998).
 - 22 For an excellent survey of these arguments, see M. Clayton and A. Williams 'Egalitarian Justice and Interpersonal Comparison', *European Journal of Political Research*, 35 (1999), 445–464.
 - 23 Ronald Dworkin, 'What is Equality? Part 2: equality of resources', *Philosophy and Public Affairs*, 10 (1981), 283–345; Richard Arneson, 'Equality' in Philip Pettit and Robert Goodin (eds), *A Companion to Contemporary Political Philosophy* (Oxford, Blackwell, 1995), pp. 489–507.
 - 24 John Rawls, *A Theory of Justice* (Cambridge, Mass., Harvard University Press, 1972) pp. 101–104.
 - 25 Crucially, Rawls thinks these are key indicators for determining who is worst off; see *A Theory of Justice*, p. 97; but also pp. 396–397.
 - 26 *A Theory of Justice*, p. 396; also pp. 178–179, 440–441; *Political Liberalism*, p. 181.
 - 27 *Political Liberalism*, pp. 178–190.
 - 28 Ronald Dworkin, 'What is Equality? Part 1: equality of welfare', *Philosophy and Public Affairs*, 10 (1981), 300–301.
 - 29 See Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, Clarendon Press, 1990), pp. 81–90 and references therein; also Arneson, 'Equality'

- 30 'Equality of Resources', pp. 311–313.
- 31 See the excellent discussion in Ian Shapiro, *Democratic Justice* (New Haven, Yale University Press, 1999), pp. 154–155.
- 32 Amartya Sen, *Inequality Reexamined* (Oxford, Oxford University Press, 1992), pp. 81–82.
- 33 *Women and Human Development: The Capabilities Approach* (Cambridge, Cambridge University Press, 2000). See also the helpful discussion of her and Sen's arguments in David A. Crocker, 'Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part 2' in Martha C. Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development* (Oxford, Oxford University Press, 1995), pp. 153–198; and the symposium on her work in *Ethics*, 111 (2000), 8–140.
- 34 Nussbaum admits there will be some instances where we might want to mandate certain functionings, for example in relation to the interests of children; see 'Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan', *Ethics*, 111 (2000), p. 131.
- 35 Will Kymlicka, *Liberalism, Community and Culture* (Oxford, Clarendon Press, 1989) p. 183.
- 36 For this point see James Nickel, 'The Value of Cultural Belonging: Expanding Kymlicka's Theory', *Dialogue* XXXIII (1994), 635–642; John Tomasi, 'Kymlicka, Liberalism and Respect for Cultural Minorities', *Ethics*, 105 (1995), 580–603; Alan Patten, 'Liberal Egalitarianism and the Case for Supporting National Cultures', *The Monist*, 82, 3 (1999), 387–410.
- 37 Nickel, 'The Value of Cultural Belonging', pp. 639–640.
- 38 For this argument see Alan Patten, 'Liberal Egalitarianism', pp. 404–405. See also the discussion in Barry, *Culture & Equality*, pp. 36–37.
- 39 Patten, 'Liberal Egalitarianism', p. 398.
- 40 This objection is elaborated in Dworkin, 'What is Equality? Part 1: Equality of Welfare', pp. 185–246.
- 41 *Liberalism, Community, Culture*, p. 187.
- 42 On the argument from burdensomeness Jeremy Waldron, 'The Logic of Cultural Accommodation', paper presented to the American Political Science Association, September 2001; and Anthony Simon Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca and London, Cornell University Press, 2001), pp. 173–180.
- 43 Barry, *Culture & Equality*, p. 150.
- 44 See the discussion in Laden, *Reasonably Radical*, pp. 175–178.
- 45 See for example P. P. McGuinness, 'Assimilation, Christians, and the Vicar of Bray', *Quadrant* (June 2000), 2–4; Roger Sandall, 'Romancing the Stone Age', *Sydney Morning Herald* (Spectrum), 12/13 May 2001, pp. 2ff.
- 46 Will Kymlicka, *Multicultural Citizenship* (Oxford, Oxford University Press, 1995), pp. 85–86.
- 47 Clayton and Williams, 'Egalitarian Justice and Interpersonal Comparison', p. 448. The relevant discussion in Rawls is at *Theory of Justice*, pp. 396–397, 440; *Political Liberalism*, pp. 179–190.
- 48 *Women and Human Development*, p. 68. See also Sen, 'Gender Inequality and Theories of Justice', pp. 264–266; and *Inequality Reexamined*, passim. Note that Rawls now accepts that his primary goods metric is incomplete and proposes a supplement to meet some of Sen's objections; *Political Liberalism*, pp. 178–190.

- 49 What is a capability? A capability is a kind of power to do or be something. It can be more or less developed and more or less feasible, in relation to both internal factors with regard to the agent and external factors to do with the context in which the agent acts. For a close discussion of the differences between Sen and Nussbaum on the notion of a capability see Crocker, 'Foundations', pp. 157–164.
- 50 Nussbaum, *Women and Human Development*, pp. 74–75; Sen is more circumspect about Rawls's recent reformulation; see 'Gender Inequality', p. 266.
- 51 These kinds of criticisms are developed in Arneson, 'Perfectionism and Politics', *Ethics*, 111 (2000), pp. 37–63; Crocker, 'Foundations', especially pp. 178–196; and Clayton and Williams, 'Egalitarian Justice', pp. 453–456.
- 52 The price of this indeterminacy, at this stage, is that we do not get a clear sense of the kinds of inequalities above the threshold that our theory would find problematic.
- 53 Nussbaum, *Women and Human Development*, p. 77.
- 54 See Onora O'Neill's 'Justice, Capabilities and Vulnerabilities' in Nussbaum, in Glover (ed.), *Women, Capabilities, Development*, pp. 140–152.
- 55 'Capabilities theory would be a prescription for tyranny if it bypassed the nation' (*Women and Human Development*, p. 104). This must apply within multinational states as much as it does between them.
- 56 *Women and Human Development*, pp. 101–102.
- 57 This is discussed by Nussbaum, *Women and Human Development*, pp. 96–101; see the critical discussion of rights by Raymond Guess, *History and Illusion in Politics* (Cambridge, Cambridge University Press) pp. 138–152.
- 58 Bernard Williams, 'The Standard of Living: Interests and Capabilities', cited by Nussbaum, *Women and Human Development*, p. 98.
- 59 *Women and Human Development*, pp. 84–85.
- 60 Shapiro, *Democratic Justice*, p. 160.
- 61 The phrase is from Laden, *Reasonably Radical*, pp. 152–158. I am indebted to his discussion in general here.
- 62 Amartya Sen, 'The moral standing of markets', *Social Philosophy and Policy*, 2 (1985), p. 208.
- 63 There are liberal, republican, Hegelian and poststructuralist variations of this practice-dependent conception of freedom; see for example Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986); Quentin Skinner, *Liberty before Liberalism* (Cambridge, Cambridge University Press, 1998); Frederick Neuhouser, *Foundations of Hegel's Social Theory; Actualizing Freedom* (Cambridge, Mass., Harvard University Press, 2000); Paul Patton, *Deleuze and the Political* (London, Routledge, 2000).
- 64 Rawls, *Political Liberalism*, p. 186; Shapiro, *Democratic Justice*, p. 85.
- 65 Notice how the capabilities approach provides significant critical bite for evaluating the real freedoms of contemporary indigenous peoples. In Australia, for example, the life expectancy of Aboriginal people is 20 years below that of non-Aborigines. Black death rates between the ages of 25 and 54 are five to eight times those of whites. Suicide rates among Aboriginal males in remote communities are almost five times higher than state-wide rates. Aboriginal women are 45 times more likely to experience violence than non-indigenous women, and ten times more likely to die as a result.

- Indigenous children in Queensland (between 1999–2000) were nearly six times more likely than non-indigenous children to be under protective orders (because of neglect, or physical, emotional and sexual abuse). Figures are from *Cape York Justice Study* (Advance copy, available from <http://www.premiers.qld.gov.au/about/community/studies.htm>), Volume 1, pp. 9, 19–20.
- 66 For Rawls, once a society instantiates the two principles of justice, that is, when the material and social guarantees provided by them are publicly affirmed as expressing each citizen's understanding of the just terms of cooperation and hence as publicly affirming the worth of each other, it has done most of what is necessary to ensure the appropriate distribution of the social bases of self-respect. See *A Theory of Justice*, pp. 179, 440–441.
- 67 Shapiro, *Democratic Justice*, pp. 87–89. Aboriginal people who live in remote locations will probably enjoy lesser opportunities for greater economic participation than those closer to economic centres (due to the lack of access to labour markets, vocational training etc.), and as a result, may be more reliant upon state-provided benefits. It does not follow that they should be penalized for this by the withdrawal of benefits. In Australia, for example, social security arrangements have been modified to address these particular circumstances through 'Community Development Employment Projects', where unemployment benefits are tied to participation in community-run development projects, for which participants are paid a wage. There are now over 300 of these schemes in operation, with over 30,000 participants. See Will Sanders, *Unemployment payments, the activity test and Indigenous Australian: understanding breach rates* (Canberra, CAEPR Research Monograph no. 15, 2000) Note that 26 per cent of indigenous people in Australia live in 'remote' or 'highly remote' areas. However both urban and remote indigenous people suffer from high rates of unemployment compared with the non-indigenous population: *Commonwealth Grants Commission: Report on Indigenous Funding vol. 1* (Canberra, CanPrint Communications, 2001) Chapter 2, p. 8.
- 68 The conception of freedom underlying this discussion is generally a compatibilist one, accepting as it does the socialization of capacities thesis. But as T.M. Scanlon argues, to attribute moral responsibility to someone in the sense of their being open to moral criticism for their actions, is not the same thing as holding them responsible in the 'substantive' sense, i.e. that they are not entitled to any assistance in dealing with the problems that contributed to their actions. In other words, we should not rush to infer liability from culpability (as conservatives tend to do), nor claim that individuals are never really blameworthy (as some liberals tend to do). If someone is unemployable in part because of generally horrible treatment as a child, and as a result is undisciplined and unreliable, he can be properly criticized for his actions and attitudes, but 'he cannot simply be left to bear the consequences, since he has not had adequate opportunity to avoid being subject to them'. See the discussion in T. M. Scanlon, *What We Owe To Each Other* (Cambridge, Mass., Harvard University Press, 1998), pp. 250–294.
- 69 Sen, 'Gender Inequality', p. 267; *Inequality Reexamined*, passim.
- 70 The main reason for denying their sovereign interests was that European nations considered Aboriginal peoples racially and culturally inferior. That

- justification no longer stands. If the claim is now that Aboriginal nations have been legitimately subsumed under the sovereignty of the existing nation state, then reasons have to be provided for this claim. An appeal to consent, as we have seen, is dubious. If the main justification is a pragmatic one – that acknowledging indigenous sovereignty undermines national unity or the territorial integrity of the state – then that claim is vulnerable to all kinds of normative and empirical rebuttals. For one thing, sovereignty itself is increasingly conceptualized (in both international law and political theory), in less absolutist terms and compatible with being distributed across multiple and discrete units of governance within a nation-state. See the lucid discussion in Macklem, *Indigenous Difference*, pp. 120–131, 288.
- 71 On the costs of inclusion more generally for non-state actors in liberal democracies, see the discussion in Dryzek, *Deliberative Democracy and Beyond*, pp. 81–114.
- 72 The phrase is from Tomasi, *Liberalism Beyond Justice* (Princeton, Princeton University Press, 2001), p. 33.
- 73 James Bohman, ‘Deliberative Democracy and Effective Social Freedom’, in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass., MIT Press, 1997), pp. 322–325.
- 74 Needless to say, there is no need for Aboriginal peoples to use this approach to justify their rights to themselves; they are justified according to their own self-understandings. But these internal reasons will have only limited purchase in practices of public reasoning with others. Hence the need for transitive arguments that link the distinctive historical and social bases of indigenous difference to normative claims in the public sphere that can become the object of collective will formation between both indigenous and non-indigenous peoples.
- 75 A valuable byproduct of this approach is that it minimizes the language of special measures, which tends to reinforce the sense of departures from a baseline of ‘equal treatment = identical treatment’ are in need of special justification.
- 76 Another way of putting this is to say it translates ‘difference-blindness’ into ‘diversity awareness’; for this argument see James Tully, *Strange Multiplicity: constitutionalism in an age of diversity* (Cambridge, Cambridge University Press, 1995). Cf. Amy Gutmann’s discussion of the relation between ‘color consciousness’ and a ‘color-blind’ principle of fairness in Amy Gutmann and K. Anthony Appiah, *Color Conscious: The Political Morality of Race* (Princeton, Princeton University Press, 1996), p. 174.
- 77 Tim Rowse, ‘Indigenous citizenship: the politics of communal capacities’, unpublished paper, p. 13.
- 78 Rowse, ‘Indigenous citizenship’, p. 14.
- 79 See Tim Rowse, ‘Culturally appropriate Indigenous accountability’, *American Behavioural Scientist*, 43 (2000), 1514–1532.
- 80 John Borrows, ‘Domesticating Doctrines: Aboriginal Peoples after the Royal Commission’, *McGill Law Journal*, 46, 3, (2001), 615–661; T. Alfred, *Peace, power, righteousness*; Menno Boldt and J. Anthony Long ‘Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians’, in Boldt and Long (eds), *The Quest for Justice: Aboriginal People and Aboriginal Rights* (Toronto, University of Toronto Press, 1985), p. 333; Sue Dodds and John Bern, ‘On the Plurality of Interests: Aboriginal

Self-Government and Land Rights’, in Ivison, Patton and Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*; Povinelli, ‘Settler Modernity’.

- 81 Borrows, ‘Domesticating Doctrines’, p. 618.
- 82 Borrows, ‘Domesticating Doctrines’, p. 660.
- 83 The problem of the comparative value of different capabilities and functionings afflicts the capabilities approach in general, as we shall see in Chapter 7.
- 7 Land, law and governance**
- 1 *Mabo v the State of Queensland (No. 2) (1992)*, ALJR 66, p. 416.
- 2 Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press, 2001), pp. 150–154.
- 3 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge, Cambridge University Press, 2001), pp. 5, 70–71, 86–87. I am indebted to Shachar’s valuable discussion here. A similar focus can also be found in the work of Joseph Carens, Patrick Macklem, James Tully and Anthony Laden.
- 4 See Jeremy Waldron, ‘The logic of Cultural Accommodation’, paper presented to the American Political Science Association Meeting, September 2001.
- 5 These refer to the arguments of Habermas, Laden, and Tully respectively.
- 6 See Shachar, *Multicultural Jurisdictions*: basic capabilities for her include: bodily integrity, access to education, vocational training, and control over some independent means of livelihood; see pp. 4–5, 20, 27–28, 112–130. The language of ‘nomos’ as applied to religious and cultural groups within the state has been made famous by Robert Cover, ‘The Supreme Court 1982 Term, Forward: Nomos and Narrative’, *Harvard Law Review*, 97 (1983), 4–68; I have made use of his work in ‘Decolonizing the rule of law: Mabo’s case and postcolonial constitutionalism’, *Oxford Journal of Legal Studies*, 17 (1997), pp. 253–279.
- 7 *Multicultural Jurisdictions*, p. 119.
- 8 *Multicultural Jurisdictions*, p. 121.
- 9 On the importance of ‘exit’ as a tool of institutional design see the classic discussion in A. O. Hirschmann, *Exit, Voice and Loyalty: responses to decline in firms, organizations and states* (Cambridge, Mass., Harvard University Press, 1970); also Susan Mellor-Okin, ‘Inequalities between the sexes in different cultural contexts’, in Martha C. Nussbaum, Jonathan Glover (eds), *Women, Culture and Development* (Oxford, Oxford University Press, 1995), pp. 286–291; Shachar, *Multicultural Jurisdictions*, pp. 122–123; Barry, *Culture & Equality*, pp. 150–154; Tim Rowse, ‘Culturally appropriate indigenous accountability’, *American Behavioural Scientist* 43 (2000), 1514–1532.
- 10 *Multicultural Jurisdictions*, p. 122. Note that this entails establishing clear ‘reversal points’ through negotiation between the state and the group as a precondition for establishing a legitimate joint governance regime in the first place (p. 124).