Chapter 6

Whose Sovereignty?

Competing Sovereignties and the Tactical Return to Rights

> To speak of Aboriginal rights is to be switched off from, yawned at, to have the subject changed to that of a more 'deserving victims' agenda
>
> —Irene Watson 2007, 21

In the 1950s and 1960s, colonised peoples around the globe pushed for independence from European colonial powers. Some of these movements involved armed struggle, while others achieved peaceful transition via negotiations with colonisers or international organisations. This period of decolonisation saw countries with a majority indigenous population ruled by a European minority transitioning to become new sovereign nations, such as Laos, Chad and Algeria. However, decolonisation in settler-colonial contexts, such as Australia, New Zealand and Canada, presented significant hurdles. The most difficult obstacle has been the refusal of the majority colonial population to relinquish power to, or share it with, a minority indigenous population. Undeterred, Indigenous activists in Australia persisted in resisting settler-colonial rule through a variety of creative avenues (Foley 2012). Although some concessions were made, such as granting indigenous populations civil rights, settler-colonial states took the question of 'sovereignty off the table' (Johnson 2016, 10). Yet, throughout the twentieth and into the twenty-first century, Indigenous activists have 'insisted on their sovereignty and demanded recognition of their land and historical treaty rights' (Johnson 2016, 1).

Indigenous declarations of sovereignty and rights have crucial implications for thinking about food politics and the creation of a just food system in Australia. This is especially the case if food sovereignty discourses are going to be adopted. Food sovereignty demands for control over the food system

and access to land have the potential conceptually and practically to clash with the political struggles of Aboriginal and Torres Strait Islander peoples. With the preceding chapters on food sovereignty politics in mind, this chapter primarily focuses on Aboriginal and Torres Strait Islander peoples' political struggle for sovereignty and rights. I do this in order to highlight that *how* food sovereignty claims are to be made in Australia must be *through* the broader question of Indigenous sovereignty, not apart from it.

The idea of 'Indigenous sovereignty' or 'Aboriginal sovereignty' is used in Australia to intervene in constitutional debates, to assert self-governance and to destabilize historical narratives of the settler-colonial state. Although there are a variety of conceptions of Indigenous sovereignty, the phrase 'never ceded' has become something of a unifying declaration among Indigenous activists. Paul Muldoon and Andrew Schaap regard this claim as representing 'both an assertion to the right to self-determination and a refusal to recognize the legitimacy of the settler-colonial state that has incorporated them as citizens' (2012, 535). Entwined with declarations of sovereignty are claims for distinct rights. For the first half of the twentieth century, Aboriginal activists campaigned for the right to vote, desegregation of public spaces and an end to the White Australia policy (Foley 2012). The focus in this period was on achieving equality with the rest of the white Australian population. However, there were also calls for distinctive rights for Aboriginal and Torres Strait Islander peoples. These calls focused primarily on land rights, but there were also demands for the right to practice Aboriginal Customary Law and its recognition in the Australian legal system. The shift from civil rights to distinctive rights initiated a transition in Aboriginal politics from assimilation to self-determination.

The political history of Aboriginal activisms and fight for self-determination is vast. The purpose of this chapter is not to provide a detailed overview of this history, but to think about how Indigenous sovereignty declarations and rights claims should set the conditions for how food politics is thought about and practiced in Australia. Importantly, the declaration of Indigenous sovereignty and distinct rights claims is not only directed at the state, but also the majority nonindigenous population. That is, it is not only a juridical or political statement calling for changes to the constitution, but it is also a declaration of moral significance for the Australian population. Megan Davis, a Cobble Cobble woman from Queensland and professor of law at the University of New South Wales, has argued that the recent call for sovereignty and treaty in the Uluru Statement from the Heart is a 'moral challenge to all Australians: hear our voices, and pause to listen and understand' (Davis 2017, 142). As such, the declaration of Indigenous sovereignty and claim of distinct rights have implications for thinking about food politics in Australia, especially the idea of food sovereignty.

This chapter examines Indigenous sovereignty and rights claims and their implications for food sovereignty politics. As argued in previous chapters, food sovereignty makes demands for land and involves practices that historically have been associated with the dispossession and exclusion of Aboriginal and Torres Strait Islander peoples. I argue that in instances where there is a clash, priority needs to be given to Indigenous sovereignty. Although both have a legitimate case against oppression and exploitation from dominant social, political and economic powers, the Indigenous claim has ontological priority to land. Furthermore, food sovereignty and alternative food claims are problematic in Australia not simply because Indigenous people, ontologies and practices are not represented, but as argued throughout, the ideas of agrarian–settlement are European and were involved in the colonial injustices visited on the Aboriginal and Torres Strait Islander peoples. Brigg and Murphy argue that we need to 'consider the origins and implications of ideas', even if the speakers are well-intentioned (Brigg and Murphy 2011, 18). Using Foucault's genealogical approach, this book has been trying to show that agriculture is not neutral, but like medicine and science, it is involved in the racialised oppression of settler-colonial history (Rigney 2001). Considering the potential for these discourses to compete and create antagonisms among these different claimants, I contend that it is imperative that attempts to import and apply food sovereignty to the Australian context, well intentioned or not, need to respect the priority of Indigenous sovereignty politics. Failure to do so risks repeating colonial logics and undermining the ideal of food justice.

Leaving aside the relationship between Indigenous and food sovereignty claims for a moment, it is worth pausing to note that these movements are markedly curious, for at least two reasons. First, in recent years a diverse array of political theorists and scholars have questioned the contemporary relevance of sovereignty due to the rise of globalisation and its perceived association with outdated notions of the nation–state (Moyn 2014; Negri 2008; Benhabib 2011). In a global world where products, bodies, objects and populations flow across borders, and new multinational organisations and trade agreements govern social and economic life, some question the usefulness of sovereignty. According to Danielle Celermajer, scholars and activists increasingly consider the sovereign state 'as a superfluous impediment to the exercise of rights best protected by cosmopolitan or global laws and institutions' (2014, 137). The second reason why the claims by these minority groups are curious is that if one *does* hold to older notions of sovereignty and the nation–state, then it is unlikely that these claims will gain much traction. That is, these grassroots sovereignty declarations are made by peoples and collectives that are among the lowest of the low; they are made by those who have been disposed of their lands, by those who are

statistically irrelevant in general elections, by those who may not even be allowed to participate in the political sphere. In the words of Gayatri Spivak, these declarations and claims are made by the subaltern.

Yet, there is something curious and potentially powerful about these sovereignty declarations and rights claims from below. Specifically, I am interested in examining the political force of these declarations and claims. What can they do? How are they established? What are the points of conflict, and where do they overlap? To do this, I return to an explicit analysis of Foucault. Specifically, I draw on Foucault's critical analyses of sovereignty-based politics and recent scholarship on a Foucauldian conception of rights. Although Foucault is commonly counted among theorists critical of sovereignty and rights-based politics due to its association with a humanist subject and political liberalism, I contend that a closer reading of the *Society Must Be Defended* and *Security, Territory, Population* lectures suggests an alternate reading that leaves open the possibility of the critical deployment of sovereignty declarations and a tactical use of rights. Some scholars have argued that Foucault's late discussions of human rights represent a confused turn to a form of liberalism and break with his earlier critiques of the subject (Fraser 1983; Dews 1989); others suggest that there is a continuity and a tactical and strategic use of rights as a political instrument (Golder 2015; Patton 2004; Whyte 2012). I suggest sovereignty declarations can also be deployed in a tactical manner. This is not an attempt to revitalise an idea of sovereignty as a central source of power or legitimacy, but to explore the critical possibility of sovereignty declarations and rights claims from below, at the periphery of things, as a means of destabilising the sovereignty of the state and its historical claims to political legitimacy. That is, what effects do Indigenous sovereignty declarations have on the State as well as on the population? Can these declarations open new possibilities to reconceive sovereignty and new forms of engagement between Indigenous and settler populations?

Whereas previous chapters outlined *returns of knowledge* regarding colonial dispossession of Indigenous lands in the establishment of the settler-colonial state, this chapter examines how this return of knowledges make 'local critique possible' (Foucault 2004, 7). Through the assertion of sovereignty and performance of self-governance, these activist movements point to the hidden instability of the dominant settler-colonial claims of sovereignty and the violence of attempts to enfold Indigenous populations into the colonial-settler State. This chapter examines whether these sovereignty declarations from below and rights claims may serve to influence the emergence of a critical social and political formation of the present that gives greater space and possibilities for the interests of Indigenous activists, as well as those of food activists, to be realised.

SOVEREIGNTY AND RIGHTS FROM BELOW

Subaltern sovereignty has a nice alliteration, and perhaps I could be accused of simply using a trendy, yet meaningless, phrase. Spivak is wary of such uses, stating, '*subaltern* is not just a classy word for "oppressed", for Other, for somebody who's not getting a piece of the pie' (1992, 45). The working classes and women in the West are oppressed, but they are not subaltern. Rather, it is a postcolonial concept referring to 'everything that has limited or no access to the cultural imperialism' (Spivak and De Kock 1992, 45). For Spivak it is the silencing of Indigenous and colonised peoples – whereby their voices, ideas, concepts and ways of being are not recognised and not heard as they do not fit within Western or Eurocentric epistemologies and ontologies. Despite repeated efforts to speak in the public sphere and through political channels, no one listens.

In her essay 'Can the Subaltern Speak?', Spivak argues that the subaltern cannot be heard due to the foreclosure and manipulation of agency by the 'violence of imperialist epistemic, social and disciplinary inscription' (1988, 80), all of which is reinforced by industrial capital, law and the education system. In short, the answer to her question is 'no', the 'subaltern cannot speak' (Spivak 1988, 104). According to Spivak, someone needs to speak for the subaltern. Yet, the problem of representing the other is acute in the post-colonial context. This is due largely to the long history of colonial representations of Indigenous peoples, knowledges and practices as negative, limited and inferior. In a conversation between Deleuze and Foucault that drew sharp criticism from Spivak, they state that their objective is 'to create conditions that permit the prisoners themselves to speak' (Foucault and Deleuze 1977, 206). This ideal of helping the silenced other to speak has strong resonance among scholars and activists engaged in antiracist and decolonising work. Yet, it is on this point that Spivak critiques Foucault and Deleuze for assuming that the subaltern can speak for herself. According to Simone Bignall and Paul Patton, the challenge of Spivak's critique is that it 'is not enough for Western intellectuals to resist the imperial temptation to "speak for" the colonised other' (2010, 5). To refuse to 'speak for' carries the 'danger that the other will remain inarticulate, having already been silenced within colonial history' (Bignall and Patton 2010, 5). Although the intellectual may find it uncomfortable to *speak for* the subaltern, those controlling the political and juridical institutions find it difficult to *hear* the voice of the subaltern. To do so would require the acknowledgement and acceptance of a significant political and ethical obligation. Furthermore, the 'West has a vested interest in remaining "deaf" to the alternative worlds "spoken" by postcolonial subjects' (Bignall and Patton 2010, 6). To truly hear and respond to the testimonies of those who continue to suffer the effects of settler-colonial violence and

dispossession would fundamentally alter the fabric of settler-colonial society (just as colonisation did to Indigenous societies). As a result of this inability or unwillingness to hear, the colonised draw on the language of the coloniser in order to have their voice legitimized.

In an attempt to be heard, the concepts of the European coloniser are deployed: rights, sovereignty, self-determination, autonomy and so on. This move has not gone unquestioned among Indigenous scholars and activists. Taiaiake Alfred, for example, argues that sovereignty is an 'inappropriate concept' for Native leaders in Canada and the United States as it endorses a hierarchical mode of authority that is foreign to traditional indigenous governance (2009, 79–94). However, there is also recognition that Indigenous peoples 'walk in two worlds' and are primarily governed according to the logics of European notions of sovereignty, citizenship and rights. It is, therefore, strategically and practically important to use these concepts when the State will only listen in its own language (Rigney 2011). Speaking and listening are two key practices that need to be developed in postcolonial societies. The following chapter explores the importance of developing 'alternative forms of "listening"' in order for the voice of the subaltern to 'be adequately heard and properly acknowledged on its own terms' (Bignall and Patton 2010, 5). Notwithstanding the concerns of postcolonial and Indigenous scholars, this chapter seeks to examine subaltern uses of the colonisers' language – namely sovereignty and rights – and the extent to which this 'speech' can be heard and has effects in the sociopolitical sphere.

Although it may seem at odds with both Spivak and Foucault to suggest that declarations of sovereignty and rights claims by the subaltern can have political effects, the use of these discourses among the peasant farmers of La Via Campesina and Indigenous peoples have disrupted the sociopolitical landscape. Despite their subaltern status as people who have endured the violence of colonial dispossession, capitalist accumulation and biopolitical control and disallowance of life, their voice has at times, if briefly, produced effects. Chapter 3 outlined aspects of the global food sovereignty movement. Before revisiting that discussion, it is necessary to take a closer look at Indigenous sovereignty: What is it? How are such declarations put forward? What do or can these declarations do?

Indigenous or Aboriginal sovereignty declarations have been used in a variety of ways in Australia, not all of which can be canvassed here. For the sake of convenience, but at the risk of over simplification, I suggest that Indigenous sovereignty has been declared in three main ways: as a declaration of independence from the State (state-sovereignty), as a declaration of special inclusion into the nation–state (coexisting sovereignties) and as a declaration of unique belonging that unsettles the colonial order (embodied sovereignty). The means and objectives of these three sovereignty declarations overlap

and are entangled. However, I suggest that dividing Indigenous sovereignty declarations in this way can help us to see some of the distinctive ways this concept is used.

Sovereignty is most commonly thought of in relation to the authority and power of the state or monarch. State-sovereignty is conceived as 'supreme authority within a territory' and associated with the Peace of Westphalia (1648) and political philosophers such as Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679) (Philpott 2014). In this sense, sovereignty is absolute and indivisible. It cannot be shared. Recently a number of Indigenous groups have declared independence from Australia: the Murrawarri Republic, the Euahlayi Nation and the Yidindji Nation, for example. In doing so, they implicitly appeal to the idea of state-sovereignty and declare their authority within a particular territory and simultaneously deny the authority of the Commonwealth of Australia. At present, this is a minority position, and these declarations have not been recognised by the Australian government or international law. Yet, this form of sovereignty has a wide influence over the popular imagination of what Indigenous sovereignty would look like – that is, a series of distinct Indigenous nation–states with territorial integrity and control. These declarations of sovereignty provoke the anxieties of conservative commentators such as Keith Windshuttle, who contends that the constitutional recognition movement harbours a secret separatist agenda that aims to break up Australia and create a series of Indigenous nation–states (2016). However, not just white conservatives are dismissive of these ideas. Marcia Langton rejects Aboriginal sovereignty as 'a slogan, one that points to a vaporous dream of self-determination but one that does not require any actual activity in the waking world to materialise it' (2013). Both Langton and Windshuttle, intentionally or otherwise, conflate the more radical declarations of state-sovereignty made by a minority of Indigenous activists with a more pluralistic conception of sovereignty that has been put forward as part of the Referendum Council's Uluru Statement from the Heart (Morris 2017, 232ff). Whether or not these declarations for sovereign nations have merit, and I certainly do not think they should be merely dismissed as naive or extreme, they represent a minority position on Indigenous sovereignty.

The conception of sovereignty used in current discourses surrounding constitutional reform in Australia seeks to develop a model of sovereignty that allows for coexistence of the state-sovereignty and Indigenous sovereignty. The Uluru Statement proposes such a definition. The Statement asserts Indigenous peoples as 'the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs' (Referendum Council 2017, i). This sovereignty 'has never been ceded or extinguished, and co-exists with the sovereignty of the Crown' (Referendum

Council 2017, i). The idea of shared or pluralistic sovereignty runs counter to the common understanding of sovereignty as absolute power inherited from Hobbes et al. However, there is precedence: for example, the domestic dependent nations in the United States or the shared sovereignty between Australian state and federal governments (Patton 1996, 164–66; Reynolds 1996, 6).

Megan Davis argues that Aboriginal sovereignty proposed by the Uluru Statement would not conflict with sovereignty of the Australian parliament (2017, 120) but would function to give Aboriginal and Torres Strait Islander peoples 'the right to participate in decision-making in matters that impact upon their lives' (2017, 120). In this sense, Indigenous sovereignty would give Indigenous Australians a voice in parliament specifically to monitor Parliament's use of Section 51 (xxvi) and Section 122 of the Australian Constitution. These sections allow the federal government to create laws that single out Aboriginal people. A prominent example is the Northern Territory Emergency Response Intervention (2007–2022). Following a 2007 report about the neglect of children in remote Indigenous communities, the federal government deployed the military, federal police and a variety of health workers to 'stabilise, normalise, and exit' these communities (Colvin 2007). In doing so, the government introduced interventions that only applied to Aboriginals living in the Northern Territory communities, including but not limited to removing the permit system for access to Aboriginal land, restricting the sale of alcohol and pornography, eliminating customary law considerations from within criminal proceedings, quarantining welfare payments, suspension of the *Racial Discrimination Act* (1977) and requiring Aboriginal children to undergo mandatory health checks without consulting their parents (Altman and Hinkson 2007). The Intervention has been hugely controversial and attracted criticism from the United Nations (Anaya 2010). Davis argues that the purpose of the Indigenous 'voice to parliament' is not to monitor all laws, but to monitor specific legislation that targets Aboriginal people, such as the Northern Territory Intervention (Davis 2017, 128). Similarly, Noel Pearson argues that the coexisting sovereignty proposed by the Referendum Council would 'ensure that Indigenous people can take more responsibility for our own lives *within the democratic institutions already established*' (2017, 108) (italics in the original). For Pearson, sovereignty is not about 'separatism' but 'inclusion on a fair basis . . . We want our voices to be heard in political decisions made about us' (2017, 108).

These declarations of sovereignty seek to include Aboriginal and Torres Strait Islander peoples in the nation–state, yet also secure a distinct position that is institutionally guaranteed and has distinct rights. Johnson writes that in the wake of civil rights movements, Indigenous activists argued that they 'were entitled to the same benefits as other citizens *and* to additional rights that protect their collective identities as distinct nations' (2016, 16).

These claims placed a limit on the sovereignty of the state and sought to establish political-legal guarantees for the self-determination of Indigenous peoples, particularly by 'recognising land rights as core to their collective identity' (Johnson 2016, 25). The claim for distinct rights can be thought as illiberal and undemocratic as they appear to run counter to the ideals of individualism, egalitarianism and universalism (Patton 2016, 14). However, a number of political theorists argue that distinct rights are compatible with political liberalism (Ivison 2002; Kymlicka 1999; Pettit 2000). Will Kymlicka, for example, argues that a liberal-democratic system 'can and should' protect the distinct rights of Indigenous minorities in order to 'promote fairness between groups' (1995, 37). That is, without distinct rights, Indigenous minorities are vulnerable to external economic and political decisions made by the majority. For Kymlicka, this vulnerability leads to unequal and unfair circumstances that compounded across time. By providing some protections for minority Indigenous groups from external decisions, minorities gain control over central aspects of group life (e.g., land use, ceremonies, customary laws) in a manner that does not impede the rights of all citizens (Kymlicka 1995).

Seeking to achieve sovereignty and distinct rights via arrangements within the nation–state is also seen as the best way to provide a legitimate foundation for the State, albeit in a post-hoc fashion. Duncan Ivison, Paul Patton and Will Sanders examine the difficulties of political liberalism to respond to colonial history and Indigenous dispossession. In attempting to establish a legitimate political order, the state and the Australian people need to deal with the history of theft and illegitimate dispossession of Aboriginal and Torres Strait Islander peoples. A key feature of this problem is how the state can be '"morally rehabilitated", even if it began in an illegitimate fashion' (2000, 3). Johnson writes that the recognition of Indigenous sovereignty and distinct rights may serve to 'redeem the state and establish it in new terms' (2016, 9). The most substantial answer to the question of morally rehabilitating the State is by recognising a form of Indigenous sovereignty and working towards treaty or treaties with First Nations peoples (Patton 1996; Ivison 2015, 2002; Davis and Langton 2016; Brigg and Maddison 2011).

Declarations of sovereignty and calls for distinct rights may legitimise the state and give Indigenous peoples a place in the legislature and political processes (Kymlicka 1995, 132ff). This is particularly pertinent when Indigenous groups are an extreme minority. A significant reason why the Referendum Council's Uluru Statement argued for Indigenous sovereignty in the form of a voice in Parliament was due to the electoral insignificance of the Indigenous population. Noel Pearson argues that the 'extreme minority status' of the Indigenous population 'is a defining feature of our condition' (2017, 64). Making up approximately 3 percent of the population means that Aboriginal and Torres Strait Islander peoples are 'effectively shut out of the

Australian democracy' as their concerns or interests rarely influence political debate or policies aimed at the majority (Pearson 2017, 64). Likewise, political philosopher Philip Petitt argues that the rights and interests of minorities have little chance of succeeding in democracies oriented towards 'popular electoral control of government' (2000, 199). Although Petitt, Kymlicka and others believe that it is possible for democracies to recognise group-specific rights, a dominant focus on electoral victory means that the interests of the majority invariably will overshadow those of the minority.

Without the numbers to influence electoral politics or protections via distinct rights, more often than not a minority population has to have faith that certain individual politicians or political parties will deal sincerely and justly with them. However, as Ivison acknowledges, 'the history of liberal colonialism demonstrates how that promise [of constitutional recognition and justice more generally] is, more often than not, experienced . . . as colossal bad faith' (2015, 17). Indigenous sovereignty seeks to remove or minimise this element of faith, bad or otherwise, by giving Indigenous people their own voice within the mechanisms of the nation–state. For Pearson and Davis, the current liberal political arrangement is the best opportunity to secure Indigenous sovereignty, as well as to begin repairing the violent and unjust foundations of the settler-colonial state. This has involved a gradualist or reformist agenda that regards the nation–state and its institutions as the best avenues to pursue claims to sovereignty and self-determination. On this view, events such as the 1967 referendum, *Mabo v Queensland* (1992), *Native Title Act* (1993), *Wik Peoples v Queensland* (1996) and the possibility of constitutional recognition in a future referendum are regarded as the surest avenues through which to secure sovereignty.

After the Mabo decision, Paul Patton (and others) argued that 'indigenous sovereignty need not be construed as implying the formation of an independent state, nor as incompatible with the sovereignty that inheres in the postcolonial state' (1996, 166). Yet almost thirty years later, it seems that the political class will not entertain the idea of alternate forms of sovereignty or agree to a pathway towards meaningful self-determination. Pursuing sovereignty and distinct rights via avenues within the nation–state can result in the reinforcement of the sovereignty of the State. Writing from the experience of Native Canadian politics, Alfred argues that indigenous sovereignty failed to challenge the ignorance and racism of state sovereignty that 'exclude the indigenous voice' and instead 'serve to perpetuate them' (Alfred 2009, 83). Likewise, Irene Watson argues that Native Title legislation and government-endorsed Aboriginal councils 'are essential to the colonial regime' and 'pose no challenge to Australian real property law, nor to the governance of the state' (2007, 25).

In dealing with the nation–state, Spivak's claim that the subaltern is not heard is validated most clearly by the historical record. There has been a long history of Aboriginal and Torres Strait Islander peoples declaring sovereignty and seeking self-determination. These almost always have been denied, or willfully misheard. Most recently Prime Minister Malcolm Turnbull demonstrated this mishearing in his response on national television to a question about the Uluru Statement. When asked by Teela Reid, a Wiradjuri and Wailwan woman and lawyer who was part of the constitutional dialogue process, why he rejected the Uluru Statement and recommendations from Referendum Council, Turnbull responded that the proposal would create a 'third chamber in parliament' that would undermine parliamentary sovereignty and give Indigenous members 'the right, if it so chose, to examine every piece of legislation' (Davidson 2017). Similar to Windshuttle and other conservative commentators, Turnbull mischaracterised the declarations in terms of state-sovereignty, thereby positioning the 'voice to parliament' as an irreconcilable challenge to the indivisible authority of the nation–state. In doing so, Turnbull stoked old anxieties among the majority population about Indigenous legal claims over people's backyards (Bachelard 1997).

This is the active silencing that the subaltern suffers. Davis describes this mishearing, or failure to hear, through Jill Stauffer's work on ethical loneliness. Ethical loneliness, according to Stauffer is the compounding of abandonment with silence – alone and not heard. Davis argues that Stauffer's analysis resonates with the ways in which the Uluru Statement has been rejected by politicians and commentators (Morris 2017, 232ff). Davis quotes Stauffer:

> Ethical loneliness is the isolation one feels when one, as a violated person or as one member of a persecuted group, has been abandoned by humanity, or by those who have power over one's life's possibilities. It is a condition undergone by persons who have been unjustly treated and dehumanized by human beings and political structures, who emerge from that injustice only to find that the surrounding world will not listen to or cannot properly hear their testimony – their claims about what they suffered and about what is now owed them – on their own terms. (Davis 2017, 140–41; Stauffer 2015, 1)

The unwillingness for the nation–state to hear Aboriginal and Torres Strait Islander voices has led some activists to turn to international avenues for support, notably the UN Declaration on the Rights of Indigenous Peoples (Falk and Martin 2007, 43). Johnson describes how international agencies and campaigning can be used strategically by indigenous peoples who 'might be minorities in their own homelands, but they could win wider sympathy for their causes and exert strong moral pressure on governments to change their

policies about indigenous rights' (2016, 33). It is also argued that because sovereignty is nonjusticiable in Australian courts (i.e., an Australia court cannot rule on its own legitimacy), international law is the only place that can rule on the legality of sovereignty in Australia. However, Aboriginal leaders such as Pearson contend that the international route is not a practical solution, for 'Indigenous self-determination is a domestic democratic question' (2017, 77). Although Pearson may be correct, the domestic political environment has shown great hostility to any proposals that are more than symbolic gestures.

There is a third form of sovereignty declaration that I have yet to address. In addition to these separatist and state-centric avenues is an argument of ontological and historical belonging to the land and country. This form of sovereignty can be characterised as spiritual or embodied sovereignty. As argued in the previous chapter, Aboriginal and Torres Strait Islander peoples have distinctive claims to the land that are historical and ontological. Moreton-Robinson writes, 'our sovereignty is carried by the body' (2007, 2). This sovereignty is not something that can be given or taken away by the State. It is not a form of citizenship but indicative of indigenous belonging to a place over time. 'Our sovereignty', Moreton-Robinson continues, 'is embodied, it is ontological (our being) and epistemological (our way of knowing), and it is grounded within complex relations derived from the intersubstantiation of ancestral beings, humans and land' (2007, 2). This idea of sovereignty does not fit neatly within political liberalism and has failed to convince the institutions of the State when it has been used. For example, in *Milirrpum v Nabalco Pty. Ltd. and the Commonwealth of Australia* (1971) (known as the Gove land-rights case), the Yolngu people brought land-rights claims before the Commonwealth. The anthropologist W. E. H. Stanner was an expert witness and used the idea of spiritual sovereignty to describe the depth of Yolngu connection to the land and ancestors (Johnson 2016, 48). However, this resulted in some unintended interpretations. For instance, Johnson notes how Justice Blackburn's ruling against the Yolngu land claim interpreted their 'spiritual attachment to land' as not corresponding to a 'coeval status as modern political actors with economic and social rights' (2016, 55). The focus on spiritual sovereignty did not translate into legal rights or recognition. Although such ontological declarations may be dismissed on legal grounds, they have a moral and political force that continues to remind white Australia of its non-belonging. The continuation of Indigenous peoples and their calls for land rights unsettle white Australia's sense of belonging and point out the hypocrisy of the application of political liberalism in Australia and the pretence of governing through principles of justice and fairness.

Whereas some of the radical or separatist declarations of sovereignty use a statist conception, and the Uluru Statement seeks a coexisting conception, Indigenous theorists such as Irene Watson, Aileen Moreton-Robinson and

Wendy Brady seek an unsettling conception of sovereignty that does not necessarily serve to *morally rehabilitate* the colonial state. This is not the sovereignty of Leviathan or sovereignty as a single locus of absolute power over a territory. Watson argues that attempts to secure sovereignty through Native Title legislation and inclusion of Indigenous people in the constitution of the nation–state serve to contain Aboriginal and Torres Strait Islander peoples in some prehistoric space that is safely neutered of political power. Watson asks, 'who am I when I stand outside native title recognition – the untitled native? Do I remain the unsettled native, left to unsettle the settled spaces of empire?' (2007, 15). Watson writes that even if Aboriginal sovereignty could establish itself in the model of the nation–state, this would not correspond to Aboriginal social organisation and structure. She writes,

> for there is not just one sovereign state body but hundreds of different sovereign Aboriginal peoples. Aboriginal sovereignty is different from state sovereignty because it embraces diversity, and focuses on inclusivity . . . Aboriginal sovereignty poses a solution to white supremacy in its deflation of power. (2007, 20)

Watson's version of sovereignty is one that maintains difference. The state or the nation does not need to become Aboriginal, but nor do the Aboriginal and Torres Strait Islander peoples need to become undifferentiated citizens. For this to occur, Watson contends that the dominant Western conception of sovereignty (and its political implications) needs to be 'deflated' from its totalising and absolute conception to allow for difference, heterogeneity and, importantly, for Indigenous peoples to govern themselves and their lands. Similarly, Wendy Brady argues that Indigenous sovereignty is distinct from the hierarchical Western notion and is formed through ancestral and communal relations. Brady writes:

> Unlike the sovereign of the European nation, authority does not reside in one figurehead and is not exercised downwards through layers of ever-declining levels of power. In the Indigenous nation, each individual is part of the fabric of both authority and power that is interdependent on the other. (2007, 142)

If coexisting sovereignty seeks to work with and maintain the setup of the nation–state, albeit in a new form, what does the declaration of embodied and spiritual sovereignty do? First, as argued by Watson this conception seeks to deflate the all-consuming notion of state-sovereignty. This is not cutting off the king's head, as per Foucault, but deflating the power of the sovereign by allowing multiple others to exercise a reduced form of sovereign power. Second, the declarations contest the status of Indigenous peoples as the subjects of the settler-colonial state. They give an alternate basis for political identity other than the overly determined juridical subject or citizen. Finally,

these declarations are a provocation from Indigenous peoples that 'their *prior* and *continuing* occupation of and belonging to the land' challenges 'white settlers' self-conception of rightful belonging' (Johnson 2016, 5–6). These embodied declarations may not lead to constitutional reform, but, as Muldoon and Schaap contend, 'Aboriginal sovereignty fundamentally contests the basis of the constitutional order' (2012, 536). It is a repurposing of the colonisers' language that can force 'the state to recognize major inconsistencies between its own principles and its treatment of Native people' (Alfred 2009, 79). It is a reminder that the settler-state does not have the consent, recognition or acceptance of the first peoples.

For many Indigenous and non-Indigenous peoples, the moral stain of colonialism is a long way from being adequately addressed. As should be clear from the above and previous chapters, Indigenous sovereignty declarations and rights claims hold a significance place in the Australian political landscape. These declarations and claims are often met with volatile resistance from politicians and commentators, as well as mining and agricultural industries, who wish to ignore these voices entirely or offer symbolic gestures. Considering this, the recent entrance of food sovereignty discourses into the Australian political landscape raises questions about how food sovereignty and Indigenous sovereignty relate to one another. As discussed in chapter 3, food sovereignty is associated with La Via Campesina, a subaltern movement of peasant and indigenous farmers. These movements and the objective of decolonisation share many potential points of overlap (Grey and Patel 2015). As Moreton-Robinson observes, '[g]lobalisation has made it possible for Indigenous groups to enhance their capacity to organise and distribute Indigenous perspectives' (2007, 11). However, great care is needed to avoid conflating food sovereignty in Australia with food sovereignty in India, Mali or Ecuador.

Food sovereignty in Australia is deployed by small-scale agrarian farmers who inherit the benefits of dispossession and seek access to land. Much of the alternative food discourse in Australia implicitly assumes the legitimacy of the settler-colonial state and the rightfulness of their attempts to own and cultivate the land. This presents a potential clash with Indigenous sovereignty. Although many of these small-scale farmers and growers do face economic hardships, they cannot be described as subaltern in any meaningful sense. Whereas peasant farmers of La Via Campesina and Indigenous activists rarely have access to cultural imperialism, small-scale farmers in Australia are predominantly white and have connections with media, economic, educational and political institutions. As to be explored in the final chapter, this presents an important opportunity to *speak with*, if not *for*, Indigenous activists. The point here, however, is that it is important to take care in speaking and declaring nonindigenous forms of sovereignty,

and even greater care in listening to Indigenous voices making declarations and claims.

FOUCAULT AND THE RIGHTS OF THE GOVERNED

In terms of almost all meaningful markers, the grassroots groups making Indigenous sovereignty and food sovereignty declarations are powerless. This is not the sovereignty of Rousseau, the people as sovereign who determine the general will. It is not 'we the people'. These people tend to be excluded from popular and state sovereignty. They are the landless, the dispossessed and the statistically insignificant. Yet, they are declaring sovereignty and claiming distinct rights over territory and cultural practices, and control over particular political processes. It is here that Foucault is useful for understanding these political gestures. Admittedly, he is a curious choice. Foucault wanted to 'get around the problem of sovereignty – which is central to the theory of right' and instead 'to reveal the problem of domination and subjugation' (2004, 27). By domination Foucault does not mean the 'domination of the one over the many', but 'the multiple forms of domination that can be exercised in society' (2004, 27). In thinking of domination and subjugation as multiple, Foucault decentres the sovereignty of the king to expose the polymorphous relations of power. It is in these polymorphous relations that resistance and critique occur.

In addition to getting away from the problem of sovereignty, Foucault is often considered to be among those who led the turn away from political thought tied to conceptions of rights. Foucault rejected the idea that there was a stable and essential human subject of rights. Famously he wrote, 'man is an invention of recent date. And one perhaps nearing its end' (1973, 387). Foucault goes on to conclude *The Order of Things* with the evocative image of man being erased 'like a face drawn in the sand at the edge of the sea' (1973, 387). Foucault's antihumanism and constructivist approach to subjectivity have long been considered to preclude the possibility of human rights entering his thought. Furthermore, Foucault's analysis of power relations attempts to move away from the sovereign model of power and the presupposition of 'the individual as a subject of natural rights or original powers' (2000e, 59). He sees political theory as 'obsessed by the person of the sovereign' (1980, 121). Instead of considering power as possessed by a central sovereign who represses, dominates or grants rights to a subject, Foucault reconceives of power as relational, diffuse and productive. Yet, as he says in *The Will to Knowledge* and *Society Must Be Defended*, we have yet to decapitate the king. The persistence of political thinking in terms of sovereignty is not only evident in the rule of nation–states but in countermovements. It could be argued that Indigenous and food activists have also

followed the obsession with the sovereign and rights discourses. Perhaps they have. However, in some of Foucault's late interviews and lectures, he seemingly takes up the language of rights, albeit in an idiosyncratic way. I suggest that engaging with some of the recent debates regarding Foucault and rights is useful for examining the sovereignty and rights discourses of Indigenous politics in Australia.

Foucault's discussion of rights is by no means exhaustive and is mainly limited to a few brief observations in the context of interviews about specific events at the time, such as gay rights (2000d), the right to the 'means of health' (2000c) and the right of asylum for political refugees, which he claims 'goes back to a time beyond memory' (2000b). I will not address all of the instances where Foucault uses rights discourse in an apparently affirmative way. Instead, I will briefly outline three texts that I consider to be the most politically interesting and relevant to the present discussion: 'Confronting Governments', 'Interview with Jean François and John De Wit', and the '14 January 1976 lecture' in *Society Must Be Defended*. I contend that in these texts Foucault is deploying rights in a nonnormative manner, yet these tactical deployments have normative implications. That is, Foucault's approach to rights exposes the hypocrisy of power (Kelly 2018, 149), and in that way it may open a door or an exit, so to speak. However, he does not say whether we should walk through it.

Despite Spivak's accusation, Foucault did speak for others and in the broad context of a colonial struggle. In a short text, *Confronting Governments: Human Rights*, Foucault speaks on behalf of Vietnamese boat people fleeing Vietnam after the fall of Saigon. He says, 'Who appointed us, then? No one. And that is precisely what constitutes our right' (2000a, 474). Foucault claims it is the 'rights of the governed' that permit private individuals to speak against sovereign governments. He bases it on three principles: first, as individual members of the international community who are 'obliged to show mutual solidarity' and 'speak out against every abuse of power' (2000a, 474). Second, governments claim to be concerned with the welfare of their citizens; therefore, when they fail to do this, it is the duty of the 'international citizenship to always bring the testimony of people's suffering to the eyes and ears of governments' (2000a, 474). The suffering of people at the hands of their governments 'grounds an absolute right to stand up and speak to those who hold power' (2000a, 475). Third, Foucault also points to the activity of nongovernment organisations such as Amnesty International as initiating a 'new right – that of private individuals to effectively intervene in the sphere of international policy and strategy' (2000a, 475). They are private individuals appointed by no one and therefore independent from state-sovereignty. These principles ground the 'rights of the

governed' to intervene in the sovereignty of other states in order to protect those suffering under the abuse of power.

Unlike Foucault's criticism that the right of the sovereign operates as a mask of domination, Jessica Whyte observes that in this text, 'right no longer appears as an instrument or mask of domination but, rather, as that which enables "the will of individuals" to wrench from governments the monopolisation of the power to effectively intervene' (2012, 13). It is important to note that this right emerges in the context of liberal governmentality, the right of the governed, and is not attached to and dependent from the right of the sovereign. Patton observes that the 'mutually accepted relationship between governors and governed', whereby the former is concerned with the welfare of the latter, 'is one of the conditions that enables governments to be held responsible for the suffering of citizens and allows the emergence of a duty on the part of the international citizenry to speak out against abuses or derelictions of power' (2005, 280). It is a new right that obliges the governed to point out the hypocrisies and inconsistencies of specific governmental rationalities. However, it is important to note that this right draws on and reuses the ideals of social welfare and representative democracy found in liberal governmentality. That is, if a government does not accept the premise that it is responsible for the care and protection of its citizens, then the rights of the governed to intervene will have little effect.[1]

The second text is a 1981 interview with Jean François and John De Wit in which Foucault is directly asked, 'Do you reject any engagement in the name of human rights on the grounds of the death of man?' and 'if it is possible to reconcile the movement in favour of human rights and what you have said against the humanist subject' (2014, 264–65). In response, Foucault first contextualises his critique of humanism by joking that in the 1950s and 1960s everyone from Camus to Stalin was a humanist – 'there was not a single discourse with a moral or political philosophical pretension that did not feel obliged to place itself under the sign of humanism' (2014, 265). Foucault states that he was trying to think outside of humanist categories, to ask, 'Is there not a historicity to the subject?' It is in this intellectual milieu that Foucault 'tried to consider human rights in their historical reality while not admitting there is a human nature' (2014, 266). This move, however, does not lead him to completely abandon human rights. He states:

> Human rights were acquired in the process of a struggle, a political struggle that posed a certain number of limits on governments and that attempted to define general principles that no government should break. It is very important to have clearly defined frontiers against governments – no matter which governments – that incite indignation, revolt, and permit struggle when they are crossed. So as

> a historical fact and as a political instrument, human rights appear to me to be something important. (2014, 266)

Foucault then reiterates that he does not associate rights with human nature, the essence of the human being, or with any form of government. For Foucault, governments do not have to respect human rights. Rather, foreshadowing his comments on the Vietnamese refugee situation, he says, 'human rights are the rights of the governed', which set a limit on and define the frontiers of government (2014, 266).

The François-De Wit interview is noteworthy for Foucault's comments on personal experience and history in the context of political struggle. In regard to experience, Foucault talks about the importance of his experiences in psychiatric hospitals, with the police and in relation to sexuality that led him into political struggles. These are political and subjective: 'I am fighting for such and such an issue', he says, because 'it is important to me in my subjectivity' (2014, 266). It is not out of a 'general theory of man' or that he understands himself as a 'universal combatant for a humanity suffering in all of its different forms and aspects' (2014, 266). Foucault insists, 'I also remain free with regard to the struggles with which I have associated myself' (2014, 266). Thus, Foucault's engagement in political struggles broadly, and his use of rights more narrowly, emerges out of experiences of institutions, knowledges and relations of power that seek to dominate and subjugate in specific ways at specific times.

The role of history is clearly significant in Foucault's work as well as in his political engagements. In the François-De Wit interview, he states that what his historical analyses 'seek is a permanent opening of possibilities . . . which I hope have a political meaning' (2014, 267). This political meaning and opening is achieved by tracing the contingencies and means by which the present has been constituted. Foucault states that he is trying to reach 'back *up* as far as possible to grasp all of the contingencies, events, tactics, and strategies that have brought forth a certain situation' (2014, 267). Foucault contends that by showing how a certain situation was constituted, it 'can be unconstituted' (2014, 267). This is the political gesture of his genealogical analyses – 'Yes, it is the movement of reaching back historically, with a projection on the space of political possibilities: this is the move I am making' (2014, 267).

The François-De Wit interview is important for the ongoing debates surrounding Foucault's use of rights as he explicitly addresses questions on the relationship between his thought on rights and his antihumanism and critique of the subject in *The Order of Things.* This interview furthers the understanding that Foucault is primarily interested in the rights of the governed, which partly come from personal experience of the multiple forms of domination that led him to engage in political struggles to unconstitute the order of things in the present.

The third and final text is from the *Society Must Be Defended* lectures. Foucault has been talking about how discourses of discipline draw on scientific and medical knowledge to colonise procedures of law and normalise society. Faced with these power/knowledge effects, Foucault asks, 'what do we do in concrete terms? What do we do in real life?' (2004, 39). The answer: 'We obviously invoke right, the famous old formal, bourgeois right. And it is in reality the right of sovereignty' (2004, 39). Foucault goes on to suggest that this is a failed strategy as sovereignty is unable to limit the effects of discipline. 'Truth to tell', continues Foucault, 'if we are to struggle against disciplines . . . we should not be turning to the old right of sovereignty; we should be looking for a new right that is both anti-disciplinary and emancipated from the principle of sovereignty' (2004, 40). But what is this new anti-disciplinary and non-sovereign right?

This passage has provoked mixed responses. Roger Mourad, for example, reads Foucault normatively, suggesting that we in the West *need* to develop a 'new theory of right' freed from discipline and sovereignty. However, Mourad notes that Foucault was unable or uninterested in doing this work (2003). Patton argues that Foucault's comments are a mix of descriptive analysis and normative gestures. That is, when faced with the effects of disciplinary mechanisms, modern society invariably appeals to the rights of the sovereign. Yet, according to Foucault, this strategy has historically led to an impasse. Therefore, if one is to continue to play the rights game, one should look for, or *head towards* according to Patton's translation, a new form of right. Patton suggests that the admonishment for a new right is both descriptive – seek out 'other forms of right that already operate in our present' – and normative – such a form of right 'should provide effective counterarguments to the techniques, justifications and goals of disciplinary power' (2005, 283). Mark Kelly, however, contends that Foucault's statement is 'strictly hypothetical' (2018, 158). More generally, Kelly dismisses the idea that a normative conception of rights can be found in Foucault (2018, 154ff). According to Kelly, the 'invocations of rights by Foucault is a call for rights only qua limitations on power' (2018, 156).

From these three texts we can see that Foucault considers human rights important political instruments, insofar as they are understood as having developed via contingent historical political struggles. That is, rights are not based on the external legitimacy of the sovereign or internal essences of a universal human subject. Foucault's approach is to trace how subjects and circumstances have been constituted and to seek critically to unthread and unconstitute those effects. This is seen in the 'rights of the governed' to intervene into the strategies of governments in order to protect those suffering under the abuse of power. The right of the governed is not attached to and independent from the right of the sovereign. It emerges in the context of

liberal governmentality and is a new right that obliges the governed to point out the hypocrisies and inconsistencies of specific governmental rationalities. It is the rights of the governed, which partly come from personal experience of the multiple forms of domination, that led him to engage in political struggles to unconstitute the order of things in the present.

Although these theoretical sketches provide grist for the scholar's mill, the question remains: How does this help us understand the contemporary political struggles of Indigenous and food activists?

COUNTER-CONDUCT AND THE TACTICS OF RIGHTS CLAIMS

Ben Golder's *Foucault and the Politics of Rights* is one of the most detailed analyses of Foucault's use of rights discourse. In bringing the insights from the three texts just discussed into conversation with Golder's work, I suggest that we can enrich our understanding of Aboriginal and Torres Strait Islander activists critical deployment of rights claims and sovereignty declarations and start to think about how food activists and non-Indigenous Australians should respond. Building on Golder's analysis, I contend that the deployment of sovereignty and rights discourses can open new possibilities for individuals and communities to engage with each other, the land and food systems in ways that elide and resist the current dominant modes of governance. Golder argues for a Foucauldian politics of rights without suggesting that Foucault reneges on his earlier critiques of the universal human subject and sovereign models of power. Golder exegetes Foucault's lectures and late interviews as a continuation of his previous work, leading to what he calls 'Foucault's curious deployment of rights' (2015, 13). Golder suggests that Foucault's appeal to rights is not a late embrace of the liberal subject of inalienable rights derived from their humanness but a 'critical counter-conduct of rights' (2015, 23). There are three dimensions to this use of rights: contingent ground of rights, ambivalent nature of rights (both liberatory and subjectifying) and tactical and strategic possibilities of rights as political instruments (2015, 23).

Drawing on the *Security, Territory, Population* lectures, Golder understands Foucault's deployment of rights in the late 1970s and early 1980s as akin to the counter-conduct tactics used in the lead-up to the Reformation. According to Foucault, the activity of conducting others as well as being conducted 'is doubtless one of the fundamental elements introduced into Western society by the Christian pastorate' (2007, 193). As discussed in chapter 2, Foucault contends that the Christian pastor marks the threshold of the modern state and the birth of government of the life of the population.

The figure of the minister – both religious and governmental – is a reminder of this legacy. The pastorate would conduct the behaviour, thoughts and activities of the community. By establishing a division between clergy and laity, creating the doctrine of purgatory, hearing confession, issuing penance, withholding the Eucharist and a range of other tactics, the pastorate would conduct the conduct of the community. They would lead the community away from heresy, insubordination and sin and towards conformity to certain ecclesial norms.

In addition to tracing the historical development of the techniques used to conduct and govern the life of the church, Foucault was interested in the critical and tactical responses. Counter-conduct is the active 'struggle against the processes implemented for conducting others' (2007, 201). Foucault examines the historical manifestation of counter-conduct that contributed to the Reformation. To resist these pastoral relations, they need to be countered with practices and strategies that 'redistribute, reverse, nullify, and partially or totally discredit pastoral power in the systems of salvation, obedience, and truth' (2007, 204). One such strategy was hyper-obedience – an 'exaggerated and exorbitant element' of obedience (2007, 208). This is not merely disobedience against an authority, but an intimate work of the self on the self that disrupts the pastor's authority. Foucault describes this strategy as 'a sort of close combat of the individual with himself in which the authority, presence, and gaze of someone else is, if not impossible, at least unnecessary' (2007, 205). In adopting the countering conduct of hyper-obedience, the individual or group 'stifles obedience through the excess of prescriptions and challenges that the individual addresses to himself' (2007, 275).

A second form of counter-conduct was the formation of Christian communities that decentred the pastor. The writings of John Wycliffe and Jan Hus, as well as the formation of different Christian communities, tactically repurposed the governmental instruments used by ecclesial authorities and opened the possibility for insurrection and resistance. By emphasising that the pastor shares in the congregations' sinful state, these communities remained true to scripture while deflating the pastor's 'sacramental power' to determine who can enter the community (baptism), whether their sins are forgiven (confession) or united to the body of Christ (Eucharist). According to Foucault, these communities led to an egalitarianism that overturned 'social relations and hierarchy' and implemented social relations where, quoting Matthew 20:16, the 'first really will be the last, but the last will also be the first' (2007, 212).

Foucault addresses three other forms of counter-conduct that I won't discuss here (mysticism, return to Scripture and eschatological beliefs). The point, however, is that these practices of resistance use the instruments, knowledges and relations of power used to conduct and redeploys them in ways that create new possibilities for individual and communal life. As Arnold I. Davidson

argues, 'counter-conduct . . . is an activity that *transforms* one's relation to oneself and to others; it is the active intervention of individuals and constellations of individuals in the domain of the ethical and political practices and forces that shape us' (2011, 32). The transformation of individuals and communities in the Middle Ages and Reformation drew on the instruments and forces that shaped and conducted to open up new and different ways of living. They did not go outside the Church or Christian communities but repurposed the tools used on them. As Jessica Whyte notes, 'the counter-conducts that contest governmentality rely on the same elements as this governmentality itself' (2012, 25). The elements of the economy, population, security, social welfare and freedom are used to govern and conduct but also to resist and counter-conduct (Foucault 2007, 354–55). These counter-conduct practices can be co-opted and redeployed, and as such, Foucault describes this relation as an ongoing and continuing struggle.

In conceiving rights as critical counter-conduct, Golder, like others, reads Foucault's practices of critique through his relation to Kant (Allen 2008; Cutrofello 1994). Foucault's use of Kant in his essays and lecture courses in the early 1980s enabled him to develop a critical ethos (Koopman 2013, 26ff; Butler 2004). Whereas the Kantian critical project sought universal structures of knowledge, Foucauldian critique is opened up via 'historical investigation into the events that have led us to constitute ourselves and to recognize ourselves as subject of what we are doing, thinking, saying' (Foucault 2000f, 315). Koopman argues that from Kant, Foucault develops an immanent critique, which enables an inquiry into the constitution of knowledge, power and ethics that opens up an understanding of 'who we are, where we have come from, and where we may go' (Koopman 2013, 29). Golder identifies the way narratives of human rights and associated events have formed a prominent story that we tell ourselves and in which we recognise ourselves as subjects. Golder suggests that a genealogical critique can reveal the contingent grounds of rights and expose areas vulnerable to contestation and reform. In this sense, Golder's conception of rights as critical counter-conduct is an affirmative move of redeploying rights to retell a story about ourselves and develop a critical ethos that can transform the present.

In the lecture 'What Is Critique?', Foucault further articulates the relationship between governmentality (conduct of conduct) and the development of a critical ethos that resists or counters conduct. He says, 'if governmentalization is indeed this movement through which individuals are subjugated', then 'critique will be the art of voluntary insubordination' (Foucault 1997, 32). Importantly, he sees this as an art, a practice of oneself, or an ethos, and not a universal principle or external rule to follow. The process of voluntary insubordination through counter-conduct and critique ensures 'the desubjugation of the subject in the context of what we could call . . . the politics of

truth' (Foucault 1997, 32). Critique as counter-conduct enables the subject to question norms of behaviour and being 'governed like that', opening up the possibility of desubjugation and allowing a transformation of the self. Like the proto-Reformers who used ecclesial tools to create openings to resist the pastorate, Golder suggest that rights, as a *practice* of critical counter-conduct, can resist governmental strategies that subjugate and govern too much. Likewise, Whyte argues that the interpretive key for understanding Foucault's 'new form of rights' is his late interest in 'the art of not being governed, or the art of not being governed like that and at that cost' (2012, 14; Foucault 1997, 29).

Ambivalence of Rights and the Native Title Act

Having established that Golder gives us a powerful way to view Foucault's contribution to the political use of rights, I will now turn to the Native Title Act to demonstrate the ambivalence of rights. This is not to concede that rights are a failed strategy, but it is important to be aware of their limitations and vigilant about their multiple uses. That is, a Foucauldian approach to rights cannot regard the attainment of rights as the end of a struggle. Rather it is a continuation of a struggle. In reading rights as a form of critical counter-conduct, Golder stresses the ambivalent nature of rights and the reversibility of power relations. That is, the use of rights as a political instrument or tool is always vulnerable to co-option by the governmental strategy – a moment of liberation can be transformed into another instance of containment and constriction. Foucault warns of these tactical reversals in the context of sexual politics in the 1970s. Foucault cautions that de-subjugated local knowledges can be recoded and recolonised by the 'unitary discourses which, having first disqualified them and having then ignored them when they reappeared, may now be ready to reannex them and include them in their own discourses' (Foucault 2004, 11).

Indigenous activists are fully aware of the ambivalence of rights. They have experienced and lived through the practical implications of the bad faith of liberal politics. This dynamic has been seen in the context of Indigenous land-rights struggles. The 1992 Mabo decision overturned the idea that prior to European settlement Australia belonged to no one (*terra nullius*) and led to the Native Title Act 1993 (NTA) that granted certain Indigenous groups rights to native lands. Although these legal events are celebrated as significant achievements in liberal politics and Indigenous struggles for rights, scholars have argued that rather than rehabilitating it has led to 'further dispossession through the disavowal of [the] indigeneity' of groups who failed to meet the criteria set by the courts (Brigg and Murphy 2011, 20). According to Gary Foley, '[m]any Indigenous political activists regard the Native Title Act as

a "sell-out" of sovereignty and a legislative failure' that resulted in the more substantial calls for treaty to be placed at the back of the national political agenda (2007, 118). Land rights for Foley were part of a strategy that sought to move away from and radically challenge the old formal rights that needed recognition from the sovereign. However, the path of land-rights politics led to the High Court of Australia and into Parliament, where the more radical claims were neutered.

The manifestation of land rights in the NTA instituted rigid criteria of what it meant to be a 'traditional owner', which 'required claimants to mount a high degree of proof in showing continuity of attachment to the land or waters under claim' (Johnson 2016, 106). It thereby perpetuated certain ideas about *authentic* indigeneity, ideas that excluded the majority of Aboriginals, especially those living in cities. Furthermore, historian Henry Reynolds argues that the Mabo decision may have 'demolished the concept of *terra nullius* in respect of property', but 'it preserved it in relation to sovereignty' (1996). That is, it perpetuated the idea that Aboriginal and Torres Strait Islander peoples did not have anything resembling a political or juridical order, and therefore British common law and the sovereignty of the Crown could be implemented seamlessly. Therefore, Native Title Law reinforced the sovereignty of the settler-colonial state and strengthened the legitimacy of the courts and legislature over Indigenous lands and culture.

A striking example of the dynamics of the state redeploying rights as well as submerged knowledges occurred in the failed Native Title claim of the Yorta Yorta people. In 2002, the High Court ruled against the Yorta Yorta by arguing that their 'traditional connection with the land had not been sufficiently maintained as to justify traditional title' (Yaxley 2002). As in the Mabo case, agriculture and food production were pivotal in the Yorta Yorta case, except with a very different result. A key piece of evidence used against the Yorta Yorta claim was a petition from 1881. Land for cultivation and self-sufficiency were asked for in a 'petition to the Governor of New South Wales signed in 1881 by 42 Aboriginals' (Yorta Yorta v Victoria 1999, 109). The signatories requested '*sufficient area of land granted* to us to cultivate and raise stock' as they were 'earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families' (Yorta Yorta v Victoria 1999, 109). The High Court considered this petition as evidence that the Yorta Yorta peoples had embraced farming and desired a settled life, and had therefore moved away from traditional Indigenous life, which the NTA required.

It is plausible that the signatories were sincere in their request. It is equally plausible that they were using the language strategically and ideas of the colonialists in a bid to secure their land and have some independence. Whatever the original intention, the petition was used as evidence that the Yorta Yorta had departed from traditional and customary life. The ruling against

the Yorta Yorta claim denied the possibility for Indigenous culture and practices to adapt or change in response to new circumstances. Moreton-Robison argues that the courts and legislature assumed 'the epistemological privilege of defining who Indigenous people are and that to which they are entitled' (2015, 85). The very 'attempts by the Yorta Yorta people to assert proprietary interests in their land' on the terms of colonialists meant that their Native Title had been extinguished.

Biopolitical Failure and the Right to Intervene

Although engaging with the old right of the sovereign in the form of the NTA resulted in a variety of negative consequences, there is another move that is made by those declaring sovereignty and claiming rights. This move is similar to that made by Foucault in 'Confronting Governments' and is arguably the call for new rights that do not come from the sovereign. The sovereignty declarations of La Via Campesina and Indigenous activists, by the subaltern who do not have influence of the courts or state-sovereignty, are responding to biopolitical failure of sovereign states to protect biological life of populations. For the proponents of food sovereignty, governments have failed to protect the environment, farm workers, public health and endangered the future survival of human and nonhuman life. Likewise, for Indigenous activists, the Australian government has failed repeatedly to protect the social, cultural and biological life of Aboriginal and Torres Strait Islander peoples. These failures justify the rejection of government control over life and search for new forms of governance in which activists have control and voice. Like Foucault's proclamation of the rights of the governed to intervene when governments do not protect the welfare of their citizens as they claim to, the subaltern sovereignty claims of the food sovereignty movement in particular, but also Indigenous sovereignty, are pointing out that sovereign states have failed to protect their biological life, culture and communities, and therefore they have lost the authority and justification to control their lives.

The rights of the governed and the rights of private citizens to intervene, however, are not without problematic consequences. Whereas Foucault saw the 'possibility of a new, non-sovereign right', Whyte argues that the right to intervene used by NGOs in the late 1970s was redeployed to justify military interventions on humanitarian grounds – most notably the invasion of Iraq in 2003 (2012, 27ff). This same right to intervene was partly invoked by the Australian government in the Northern Territory Intervention (NTI). Whyte warns that the 'attempt to mobilise the natural life of the population against the government and to ground a new form of right in suffering [or survival] has proved unable to offer a real challenge to the power of the state' (2012, 31). This move also creates 'a new basis for the legitimacy of the state

militarism, as well as a new foundation for sovereign power' (Whyte 2012, 31).

Whyte's analysis of the historical development and use of the right to intervene is compelling. However, it is also worth noting that in the case of Indigenous politics the struggle by the governed and those in solidarity with them continues. That is, the right to intervene does lead to strategies such as the NTI. However, the controversy and damage caused by the NTI have been used by Indigenous activists as further evidence of the government's failure to take care of the people (Davis 2017). The failure of the NTI and its discriminatory effects have been used to further justify the need for Indigenous sovereignty in the form of a Voice in Parliament. This is to say that the articulation of the biopolitical failures of the government and the right to intervene should not be abandoned, but it is crucial to use such discourses with caution and remain vigilant in looking for the 'domination masked by discourses of right' (Whyte 2012, 31).

These examples of the ambivalence of rights and sovereignty discourses demonstrate the way historical knowledges and rights-based arguments are open to reinterpretation. What can be an initial tactical manoeuvre that opens up new possibilities may soon turn into a constraint and blockage. Yet, in the case of the Yorta Yorta, Moreton-Robinson maintains that the 'Yorta Yorta sovereignty will continue to unsettle and challenge the possessive logic of patriarchal white sovereignty' (2015, 92). This is the flexibility and potential power of the embodied form of sovereignty that does not seek to replicate the sovereignty of the West but deflate and unsettle with an embodied presence.

CONCLUSION

It has been difficult for rights-based politics to find purchase in Australia. Even beyond Indigenous rights, Australia is unlike comparable liberal democracies as it 'has no Bill of Rights to protect human rights in a single document' (Commission 2006). This reluctance to embrace rights-based politics is partly due to the Benthamite legacy discussed in chapter 1. The Australian social and moral imaginary has had little time for 'nonsense on stilts' as Bentham (in)famously characterised rights. Collins argues that the deep influence of Benthamite utilitarianism in Australia has meant that the language of rights has been looked at with suspicion. Collins argues that men in the 1960s had no moral or legal language to respond to demands of conscription in the national interest. Likewise, in the 1980s, Collins points to the way women's rights and Aboriginal land rights 'offend the utilitarian tradition' by presenting demands that 'it can scarcely recognize, let alone make allowance for' (1985, 161). This incapacity for rights claims to be recognised is reflected in

Watson's lament that 'to speak of Aboriginal rights is to be switched off from' (Watson 2007, 21). Collins suggests that this is why both women's rights and Indigenous rights activists have 'appeals to international conventions that rest upon natural rights doctrines' (1985, 161). As discussed in chapter 3, food activists have had to look to organisations such as La Via Campesina or the Food and Agricultural Organization. Likewise, Aboriginal and Torres Strait Islander activists look to the UN as well as global connections and collaborations among First Nations Peoples. Collins concludes that despite the tenacity of Benthamite ideology, it 'has exhausted its capacity to cope with Australia's most serious political predicaments' (1985, 163). However, in the three decades since Collins's analysis, Benthamite politics has arguably stayed the course, and rights-based politics continues to occupy the margins.

Notwithstanding this legacy, Patton argued in the 1990s that Indigenous sovereignty declarations and rights claims may not only serve to further the interests of these groups, but 'might also be regarded as arguments for a reconceptualization of sovereignty itself' (1996, 150). The way Indigenous activists have told their history and positioned themselves in relation to the dominant colonial narrative is a counter-history of the present. According to Golder, the critical mobilization of rights 'is to seize hold of rights discourse, and, in a deliberately partial, particularized, and polemical way, to turn it against regimes of sovereignty in order to undo their claims to the universal' (2015, 95). These subaltern rights claims draw their authority from an alternate history or a genealogical critique of the present, rather than seeking rights or recognition from a sovereign as a direct challenge to the legitimacy of that sovereign. Patton observed the way this alternate history was instrumental in changing 'contemporary attitudes toward the past treatment of indigenous peoples' such that the judges in the Mabo case could 'express the view that the law should be altered to conform with current conceptions of justice' (1996, 159). In a similar way, Davis and others have argued, following the government's rejection of Uluru, that it is the people of Australia who need to respond, not simply the lawmakers and politicians.

My analysis of Foucault has shown the flexibility and potential power of the embodied form of sovereignty to deflate the settler-colonial state and that a critical ethos of rights can open new possibilities of engagement among the wider population. On this point, it is important to remember that for Foucault government is not equivalent to the State, but a multiplicity of relations of power emanating from a plurality of sources, such as schools, businesses, farmers' markets, intellectuals, public health, celebrities, churches, activists and so on. As such, it is not simply the role of the state to respond to a demand 'not to be governed *like that*, by that, in the name of those principles' (Foucault 1997, 28). Rather, all of us benefiting from settler-colonial dispossession need to respond. If the wider Australian

public embraces the Uluru Statement, it could lead to new forms of collaboration and negotiations among food and Indigenous activists. That is, private individuals and nongovernment organisations that no one appointed could start negotiations and dialogues among themselves. It could also sow the seeds for a shift in communal attitudes such that a constitutional referendum would change the strategy with which the game is played by giving a voice to Indigenous peoples and enable coexisting sovereignty. Of course, these strategies are all open to the dynamics of power relations, and an opening for freer relations may quickly close into a constraining knot. Yet, despite the examples of co-option, the struggle continues.

Whereas tactical and strategic uses of rights and sovereignty can continue the struggle, the nation–state is very resistant to negotiate the terms of its existence. Johnson observes that settler-colonial states, particularly Australia, are anxious that any creation of substantial treaty or title would legitimate Indigenous claims for autonomy and 'break apart the unitary notion of "perfect" sovereignty' (Johnson 2016, 9). As such, there is a need for the governed to mutually negotiate and develop new forms of self-governance that reject biopolitical violence and the failure of the state to protect, foster and care for life. Yet this has to be more than mere symbolism. Watson asks, 'Can we speak of justice that is justice from a black, or Aboriginal, perspective – one that lives beyond the assimilation of the native?' (2007, 27). What would food sovereignty and alternative food discourses look like if the starting point were with local Indigenous understandings of land and food? Rather than including or assimilating Indigenous perspectives to alternative food discourse post hoc, the final chapter looks to ways space can be created for Indigenous knowledge, conceptions and practices to set the terms and conditions of food politics in Australia.

NOTE

1. This is similar to Arendt's observation that if 'Gandhi's enormously powerful and successful strategy of nonviolent resistance had met with a different enemy – Stalin's Russia [or] Hitler's Germany . . . the outcome would not have been decolonization, but massacre and submission' (Arendt 1970, 53).

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