Balancing Civil Rights and Indigenous Rights: Is There a Problem?

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Introduction

What happens when an Indigenous community decides to ban the consumption of alcohol in its community? Is it legal for the community to do so, or does this breach the *Racial Discrimination Act 1975* (Cth) (RDA)? Should Indigenous communities be able to forfeit the payment of unemployment benefits to members of their communities in exchange for involvement in Community Development Employment Projects (CDEP) schemes? And where payments under the CDEP amount to less than the standard unemployment rate, does or should this constitute actionable racial discrimination? Where Indigenous people breach a State law, but are exempt from punishment because they are acting in accord with native title rights, does this challenge the legitimacy of the State law? These are questions that are increasingly occupying public policy makers and theorists in Australia, and they are the subject of this article.

When Australia enacted the RDA in 1975 it announced finally to the world that it was putting into law the principle of non-discrimination that had underwritten virtually every international instrument for thirty years (Nettheim 1998: 199): from the *Charter of the United Nations 1945* and the *Universal Declaration of Human Rights 1948* to the *International Convention on the Elimination of All Forms of Racial Discrimination 1965*, on which the RDA is based, the *International Covenant on Economic, Social and Cultural Rights 1966*, and the *International Covenant on Civil and Political Rights 1966*.

The principle of non-discrimination, as it has been applied in Australia, provides recourse to members of racial groups against only a very limited range of actions that constitute statutory racial discrimination. The fact, for example, that an Indigenous community suffers much greater health problems, and has to travel much further to receive the medical assistance many urban communities take for granted, is not something that has even the potential to be alleviated by recourse to the *RDA*.

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But with that significant qualification, it is fair to argue that the non-discrimination principle has become an integral incident of the rule of law in Australia (the rule of law being the jurisprudential concept that the law applies equally to all people). It is now unthinkable that a law could be passed by an Australian legislature that, for example, prevented members of a minority racial group from having access to public housing. Yet now, barely twenty-five years after the passage of the RDA, the increasing recognition of Indigenous rights in Australian and international law raises complex questions about the future viability of the principle of non-discrimination.

Some who voice concerns about the future of the principle of non-discrimination do so disingenuously, and might be classed collectively as opponents of Aboriginal rights and interests. The most obvious figure here is Pauline Hanson, whose regular call for 'equal rights' is a thinly veiled attack on racial difference and any programs that support the expression of racial difference. In her political party's policy statement on reconciliation, dated April 2001, Hanson (One Nation 2001) states that 'equality is true reconciliation', and asks: 'Why should an Aboriginal born the same day and time as I, have any more rights to this beautiful country and all it has to offer because of race'? But Hanson is not alone in her politically charged usage of 'equal rights'. Prime Minister John Howard and numbers of conservative commentators are also regular advocates of this politically loaded concept of 'equal rights', which has enabled them, without necessarily saying so, to identify themselves as being hostile to Indigenous rights.

To take one illustrative example, in May 2000 the Council for Aboriginal Reconciliation released a document entitled 'Australian Declaration Towards Reconciliation'. That document contained the statement 'We [the peoples of Australia] desire a future where all Australians enjoy *their rights*, accept their responsibilities, and have the opportunity to achieve their full potential' (my emphasis). On the same day, however, the Prime Minister (Howard 2001) released his own version of the declaration, one 'to which the government would have given its full support'. That version stated that: 'We [the peoples of Australia] desire a future where all Australians enjoy *equal rights*, live under the same laws and share opportunities and responsibilities according to their aspirations' (my emphasis). This usage of the 'equal rights' language that characterised important civil rights struggles of earlier years of course carries a different message from that conveyed decades ago by civil rights activists. The argument of Ms Hanson, Mr Howard and others is not that an oppressed minority should be given equal protection by the law, but that a previously oppressed minority is benefiting too much from special legal privileges (when one looks at health, education, employment and housing statistics, one realises the absurdity of this argument, but that is a different story).

But it is not just conservatives who are debating the way different sets of rights can co-exist. Another group of people, who have legal and political theory concerns rather than a political barrow to push, is also debating the manner in which Indigenous rights sit with the rights that all Australians possess, rights that I am calling civil rights.[1] In particular, the theorists are considering the impact on civil rights of the two most frequently articulated kinds of Indigenous rights in Australia - the rights to self-determination and native title. In this article I shall assess the challenges presented to the principle of non-discrimination, and thus to the rule of law, in Australia by the limited recognition of Indigenous rights in both of these areas.

Native title

The most immediate apparent challenge to the principle of non-discrimination has its origins in the High Court's decision in *Mabo v Queensland (No. 2)* in 1992, and concerns the manner in which the principle of non-discrimination sits with the existence of native title.

The right recognised in *Mabo No. 2* was that 'the Crown's ownership of lands in the Murray Islands after their annexation to Queensland was qualified and reduced by a communal native title of the Murray Islanders to the land of the Islands which was preserved and protected by the common law' (per Deane and Gaudron JJ at 119).

One can recall the reaction of some commentators to the recognition of native title. Geoffrey Blainey (1993, see also McGuinness 1993) termed the decision 'a judgment of profound importance to Australia [that] seems to rest partly on prejudice and misguided research', with Justices Deane and Gaudron guilty of 'expounding a crude form of racial prejudice against early white settlers'.

Following the recognition of native title as a common law right, the Commonwealth parliament legislated in 1993 to regulate the ability of Indigenous communities to claim native title. The *Native Title Act 1993* (Cth) (NTA) established the National Native Title Tribunal and, among other things, set up a claims process for the hearing of native title claims. According to the National Native Title Tribunal (2002) by May 2002 there had been a total of 30 determinations (involving litigation or consent determinations) where native title had been found to continue to exist, with 589 claims still being processed.

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1 See, for example, Brennan 1993; Dodds 1998; Peterson and Sanders 1998; Havemann 1999a; Chesterman and Galligan 2000. For leading international viewpoints see Young 1989; Kymlicka 1995.

In examining the manner in which native title sits with the principle of non-discrimination it must always be borne in mind that native title would never have been recognised in the *Mabo* decision had the RDA not been in place. Were it not for the RDA, the Queensland government would have succeeded in its attempt to extinguish all native title on some islands off that State's coast. This legislative manoeuvre was attempted during the Mabo case, but the legislation was disallowed (*Mabo No. 1*) because it contravened the Commonwealth anti-discrimination legislation.[2]

One example of the apparent challenge posed by native title to the principle of non-discrimination came in a 1999 High Court case. In the *Yanner* decision a majority of the Court found that parts of a State Act, which ostensibly applied to all people in that State, did not apply to a native title holder. In this case a native title holder, Murrandoo Yanner, had killed crocodiles in apparent contravention of the Queensland *Fauna Conservation Act 1974*, which required permits to be obtained in such situations. But the High Court ruled that the NTA, which gave native title holders a limited exemption from Commonwealth and State legislation when exercising certain native title rights, was inconsistent with the Queensland Act. The Queensland Act, therefore, in the words of Gleeson CJ, Gaudron, Kirby and Hayne JJ (*Yanner* at 270), 'did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs'. The State Act did not apply to native title holders in the same way that it applied to others.

I shall return to this case later, in a fuller discussion of native title, but before I do that I want to discuss the potential challenge to the principle of non-discrimination posed by a range of scenarios that can collectively be classed under the heading of the emergent right of Indigenous people to self-determination.

Self-determination

The right of Indigenous peoples to self-determination is an accepted principle of international law. Articles 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* contain the following statement:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

2 See further Nettheim 1998: 199.

development.

...

3. The States Parties to the present Covenant ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[3]

The International Labour Organisation's *Indigenous and Tribal Populations Convention 1957*, which Australia has never ratified, provided for the limited recognition of customary laws and ownership of traditional lands. This convention was revised in 1989, though it is still yet to be ratified by Australia, and its provisions now strongly advocate respect for the right of Indigenous peoples 'to decide their own priorities' (article 7) and 'to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights' (article 8). The Convention also requires nations (article 9) to respect customary laws where these are 'compatible with the national legal system and internationally recognised human rights', and the Convention urges (article 14) the recognition of the 'ownership and possession' rights of Indigenous people to their traditional lands.[4]

An international Declaration on the Rights of Indigenous Peoples has been in preparation, in one form or another, since the late 1970s, but in 1994 (Nettheim 1998: 203; Steiner and Alston 1996: 1008-9) a well-advanced draft went before the United Nations Commission on Human Rights. This draft, which is still under consideration, contained the following clauses (Steiner and Alston 1996: 1011-12):

Article 3
Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

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3 See further Pritchard 1998 and An-Na'im 1992: 427-33. The first clause also appeared in the United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960*, article 2.

4 See also Brennan 1995: 155.

The effect that the application of these principles would have on domestic minority groups, like Indigenous Australians, has been a constant source of international debate for decades. The meaning of self-determination in international law is relatively clear in the context of countries which have fought for, or are seeking, independence from their colonial rulers. But it is less clear what the principle of self-determination means for dependent minority groups such as Indigenous Australians.

But, judging from the aspirations of Indigenous people as expressed through representative bodies such as land councils and the Aboriginal and Torres Strait Islander Commission, Indigenous Australians are seeking the freedom to pursue what might be labelled a degree of sub-national economic and cultural independence (see Brennan 1993: 256-62). Few Indigenous people have expressed the desire for total independence from the Australian state. Representatives of Torres Strait Islanders, the group whose geographical and cultural distinctiveness would give rise to the strongest case for separate nationhood, are seeking only territorial status as an ultimate (and admittedly long-term) political aim.

So within Australia self-determination means a great deal less than the breakaway to separate nationhood. A useful definition of self-determination in this context was provided a decade ago in the report of the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991: 508-9). Recognising that the concept was an evolving one, the commission considered a number of interpretations and settled on two principles which are central to the term: that Aboriginal people are responsible for the decisions that are made that affect their political, economic and cultural affairs, and the ways those decisions are reached; and that Aboriginal people have significant control over their communities' finances.

The kind of self-determination goals currently being sought by the Aboriginal and Torres Strait Islander Commission certainly do not amount to a claim for nation status, and instead constitute a claim for a degree of subnational autonomy within Australia's federal structure. A September 2000 report for ATSIC (Australia Institute 2000: iv) suggested that the goal of self-determination might be implemented through the creation of:

> [A] new order of Indigenous governance rather than Indigenous governments. Within the federal structure of Australia there are many forms of governance, and even within each State and Territory different arrangements have evolved and are evolving ... Indigenous governance could be conceived as another 'order' of governance within Australian federalism, rather than as just part of the local government tier.

Thus 'self-determination', in the Australian context, falls short of being synonymous with 'independence'.[5] But the question I want to address here is, when will the desire of Indigenous Australians to be self-determining conflict with the general rules and laws that govern other Australians?

Customary law

One of the practical instances of self-determination that, in the eyes of some, seems most directly to challenge the rule of law is the recognition of customary law.

In a recent example, in May 2001 (Toohey 2001) a Northern Territory Supreme Court judge took a payback spearing into account when sentencing an Indigenous man over the death of another Indigenous man. The deceased had been struck on the head and later died after refusing medical treatment. The man who hit him, in a later meeting of the families, was twice speared in the leg and was beaten on the head several times as a customary law response to what he had done. Though not condoning the 'payback', the judge took it into account in her decision to sentence the man to eighteen months' imprisonment for the killing, saying that the customary law 'resolution has proved to be important in avoiding further conflict'.

The arguable threat to the rule of law here is that the law is not being applied equally to all people. In addition, this scenario raises difficult legal and policy questions. At what stage would a customary law punishment be seen as so serious a denial of the punished person's rights that intervention by the state would be justified? Or, to put it more generally, when do civil rights yield to Indigenous rights and vice versa?[6]

In another customary law case, that took place in 1998, the well-known head of the Northern Land Council, Galarrwuy Yunupingu, was charged (Howell 1998) with wilful damage and assault. Yunupingu had grabbed a camera and exposed the film after a photographer in Nhulunbuy had breached Yolngu law in taking pictures of two naked children. The Magistrate dismissed the charges, stating that:

> I am satisfied that the defendant acted honestly, reasonably and within the discretion of Yolngu law and that he had an honest belief that he was entitled to do what he did.

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5 On this issue see: Reynolds 1996: 180-6 and 1998: 214; Peterson 1998: 110; and Havemann 1999c: 474-5.

6 Canada's Royal Commission on Aboriginal Peoples considered the issue in the context of the relationship between the *Canadian Charter of Rights and Freedoms* and the principle of Aboriginal 'self-government': Royal Commission on Aboriginal Peoples 1996: 165-9, 199-213, 226-34.

Following the case, the then Chief Minister of the Northern Territory, Shane Stone, described (Howell 1998) as 'gibberish and nonsense' the proposition that customary law could co-exist with Australian law.

Alcohol

Another context where this balancing act between civil rights and self-determination has been negotiated has concerned certain programs designed to benefit Aboriginal communities, but which actually give rise to situations where Indigenous people, far from receiving special privileges, are actually (at least arguably) being treated less favourably than non-Indigenous people. (As such the programs do not fall neatly into the 'differential treatment' or 'special measures' (affirmative action) saving provision of anti-discrimination legislation.) In this category one finds attempts by Aboriginal communities, for instance, to prevent or ration the sale of alcohol to their members. This causes difficulties with anti-discrimination legislation because such acts of prohibition are arguably racially discriminatory since they impact almost exclusively on members of one racial group. In addition they do not constitute standard 'special measures' because they are not an additional right that is given to Aboriginal people. Such attempts thus seem to be at once an exercise in self-determination and an example of racial discrimination. Aboriginal people in these communities are being denied a choice — to consume or not to consume alcohol — that other adult Australians are free to exercise. The difference, of course, between this kind of prohibition and the prohibition of earlier years concerns the issue of legitimacy, in that this time the decision is largely being made by Indigenous people.

These issues were discussed by Alexis Wright in *Grog War* (1997: 247-51), an account of the battle between 1994 and 1996 by the Julalikari Council to restrict the sale of alcohol to Aboriginal people in Tennant Creek. The Council, which had asked the Northern Territory Liquor Commission to impose wide-ranging restrictions on the sale of alcohol, viewed the involvement of the Northern Territory Anti-Discrimination Commission as a diversion from what they viewed as a health, rather than a racial, problem. But some publicans revealed a new-found interest in human rights and had become concerned that Aboriginal people should have the same right to consume alcohol as non-Aboriginal people. The proposals were not in the nature of direct discrimination: that Aboriginal people should not be served alcohol. Rather, they sought to restrict the volume and occasions on which alcohol was sold, with the clear intention of limiting the alcohol consumption of Aboriginal people. In attempting to get around the racially discriminatory nature of the proposal, the Anti-Discrimination Commission representative sought to impose the restrictions on all hotels, even though the Julalikari Council was specifically opposed to this proposal. The Council gained something of a victory when the Liquor Commission opted in

1996 for limited restrictions over both the volume and occasions on which alcohol could be sold in Tennant Creek.[7]

These restrictions (Northern Territory Liquor Commission 1999) had the effect of reducing average alcohol consumption in Tennant Creek. Per capita consumption of alcohol dropped in the year after the restrictions were imposed, and dropped further the following year. In 1998 the Commission decided to continue the restrictions. While a report of October 2000 (d'Abbs et al: 4, 17, 23, 31) shows that the decline in alcohol consumption has now stopped, it also concludes that the restrictions have helped reduce interpersonal violence, and the Julalikari Council has continued to seek a tightening of the restrictions.

Exactly what constitutes the best way to reduce alcohol dependence in Tennant Creek, and elsewhere in Australia, remains a matter of debate.[8] Liquor commissions, hotel industry groups, and community groups continue to debate the fairest and most practical ways of reducing alcohol consumption. But the question, to which I shall return later, is whether these restrictions cause any problem to the operation of the principle of non-discrimination.

Community Development Employment Projects

The problems presented by the attempts to limit the sale of alcohol to Aboriginal people are symptomatic of the contradictions that arise when self-determination appears to conflict with the principle of non-discrimination. A 1997 report by the then Race Discrimination Commissioner (RDC), Zita Antonios, pointed to possible inconsistencies between the principle of non-discrimination and the approaches of Aboriginal communities in attempting to redress other problems that have confronted them, such as unemployment. Antonios had to address criticisms that Indigenous people employed under the main Indigenous employment program, the Community Development Employment Projects scheme (CDEP), suffer some degree of racial discrimination by their involvement in the scheme. The CDEP (Sanders 1997: 7-8; Sanders 1998; ATSIC 2000: 48) enables Indigenous communities — over 260 organisations, involving over 30,000 participants, at last count — to receive the unemployment benefits payable to the individuals who they then employ to work on community projects.

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7 Wright's book, which contains a considerable element of personal narrative, is semi-fictional. But it is fair to regard her account of the debate between the Council, the Liquor Commission and the Anti-Discrimination Commission as factual. See also Northern Territory Liquor Commission 1999; d'Abbs et al 2000; Edgar 2001.

8 See, for example, the opinion of Noel Pearson in Pearson 2000.

The allegation of racial discrimination arises from the fact that for many years after the introduction of the CDEP, there was no equivalent non-Indigenous work for the dole scheme in place. Moreover, often participants in the scheme receive less income than do those Australians who are on unemployment benefits. The Commonwealth Ombudsman reported (RDC 1997: 40; see also Sanders 1997: 7-8) that in 1995 there were 300 Aboriginal people in Alice Springs who were employed under the scheme but whose taxable income was under $6,000. Some people involved in the scheme received as little as $40 per week when there was no work to be done.

The challenge here to the principle of non-discrimination, and to the rule of law, is that the CDEP is an instance of self-determination which may constitute less favourable treatment on the basis of race. It could thus be said to be racially discriminatory.

Balancing rights

The question I now want to address is, do the scenarios presented in this article present a significant challenge to the rule of law in Australia? My argument is that they do not, in the main because the principle of non-discrimination has developed considerably over the past half century.

The principle of non-discrimination

An initial point that needs to be made is that the principle of non-discrimination, despite the arguments of conservatives like Mr Howard and Ms Hanson, has never actually required identical treatment, something which has for many years worked to the detriment of Indigenous people. The limited number of scenarios that constitute statutory racial discrimination has played a part in restricting the ability of Indigenous people to challenge their position of relative inequality. Many seemingly obvious examples of racially based inequalities — such as the unequal access of remote Indigenous communities to the same standard of health care as that enjoyed by non-Indigenous people — do not breach the principle of non-discrimination as it applies in Australian law. Australia's foremost law that enshrines the policy of non-discrimination, the *RDA*, has never required that people of all races be treated equally. It has only required (section 9) that in certain strictly limited situations, racial grounds are not to be used as the basis for denying a person the enjoyment of a 'human right or fundamental freedom'.

At the same time, there are two broad concepts within the internationally recognised principle of non-discrimination that enable recognition of traditional rights, and that protect otherwise racially discriminatory programs that have been designed to improve the position of oppressed minorities.

The first is the international law concept of 'differential treatment'. This holds that some differing treatment of individuals based on racial grounds will not constitute illegal discrimination where that discriminatory treatment is not 'invidious'. The 'reasonable differentiation' principle holds that the treatment of one racial group will not necessarily be discriminatory just because that treatment is different from the treatment received by another racial group. In the Race Discrimination Commissioner's words (RDC 1997: 34): 'Equality does not mean identical treatment without regard to concrete circumstances'. And in the words of the Committee on the Elimination of Racial Discrimination, the body that oversees the operation of the racial discrimination convention (RDC 1997: 34): 'a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.

The second concept is the special measures exemption, according to which positive acts of discrimination are allowable where the purpose is intended to raise the status of an oppressed group. The RDA (section 8) enables certain acts of discrimination to take place where they constitute 'special measures'.

Bearing in mind this more complex definition of racial discrimination, I want here to look again at each of the categories described earlier.

Native title

Looking first at native title, how does the existence of the common law right of native title sit with the principle of non-discrimination? Does native title law contravene the principle of non-discrimination? Does it come within the principle by constituting a 'special measures' exemption to the principle? Does it come within the principle by amounting to differential treatment? These are complex questions with which Australia's highest court has wrestled for over fifteen years.

Seven years prior to the High Court's recognition that native title was a common law right, the High Court, in *Gerhardy v Brown*, ruled that land rights legislation in South Australia was valid only because it constituted a special measure and not because it amounted to differential treatment. Justice Deane, for instance, concluded (at 153) that the State land rights Act 'should be accepted as constituting part of the "special measures" of the kind referred to in Art. 1 (4) of the Convention and as therefore enjoying the protection of s. 8 (1) of the Commonwealth Act'.[9]

9 On this point, see also RDC 1995a: 64-8; Pritchard 1995: 195-9; Bartlett 1999: 411.

A different landscape, of course, emerged after the *Mabo* decision, when title to the lands in question was recognised as a common law, rather than statutory, right. But the question that was, and continues to be, debated is how legislation concerning native title sits with the principle of non-discrimination.

When the Keating government enacted the NTA in 1993 it hedged its bets in order to ensure the legislation's validity. The Act's preamble stated that 'the common law of Australia recognises a form of native title that reflects the entitlement of the Indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands', but went on to state that the Act 'is intended, for the purposes of ... the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders'.

In 1995 the High Court was more nuanced in determining the validity of the Commonwealth's NTA than it had been ten years earlier in *Gerhardy*. In *Western Australia v Commonwealth* six of the judges stated (at 483-4, see also Pritchard 1995: 240) that 'it is not easy to detect any inconsistency between the *Native Title Act* and the *Racial Discrimination Act*', but that:

> if there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* ... or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of [Racial] Discrimination.

The argument that the Act was a special measure has been rejected by many people, most articulately by Michael Dodson, when he was the Aboriginal and Torres Strait Islander Social Justice Commissioner. He argued (quoted in Nettheim 1998: 200-201) that native title was a common law right and that the NTA was different from previous land rights legislation in South Australia and the Northern Territory in that 'it regulates rather than confers rights'.

Most commentators agree with Dodson and reject the argument that native title, or legislation that regulates it, is a 'special measure'. This is obviously more than a semantic point. Special measures are essentially affirmative action programs, which are designed to be temporary efforts to remove an inequality that has been brought about by racial discrimination. Indigenous holders of native title rights do not, and nor should they, see their rights as temporary.[10]

10 See Nettheim 1995; Nettheim 1998: 200-201; Triggs 1999: 379.

But if native title itself, and legislation that seeks to regulate it (such as the NTA), do not constitute racial discrimination, do attempts by legislatures to limit, rather than regulate, the scope of native title constitute racial discrimination? Do they breach the principle of non-discrimination?

Two attempts by State legislatures to expunge native title have been ruled invalid on the grounds that they conflicted with Commonwealth anti-discrimination legislation. Queensland's attempt in 1985 to cut short the *Mabo* case by extinguishing native title on some islands off Queensland's coast failed (*Mabo No. 1*) on the basis that it was in conflict with the RDA, and Western Australia's attempt in 1993 to circumvent the NTA and set up its own statutory land claim scheme failed (*Western Australia v Commonwealth*) on the basis that it contravened the RDA.

A more difficult question to answer is how legislative attempts by the Commonwealth, as opposed to the States, to limit native title sit with the principle of non-discrimination. As I wrote earlier, in 1995 the High Court (in *Western Australia v Commonwealth* at 483) argued that it was hard to see 'any inconsistency between the *Native Title Act* and the *Racial Discrimination Act*'. However, it also said (at 484) that section 7 (1) of the *Native Title Act* — which stated that 'Nothing in this Act affects the operation of the *Racial Discrimination Act*' — 'provides no basis for interpreting the *Native Title Act* as subject to the *Racial Discrimination Act*'. That is, the Commonwealth Act, though it purported to keep the non-discrimination principle in place, was not subject to it. And in fact the validation, by the native title legislation, of uncertain past acts (such as the typically inadvertent overriding of native title by post-1975 governmental actions which theoretically breached the anti-discrimination legislation) could not have been subject to the anti-discrimination legislation were they to have effect. This was made clear in the NTA by section 7 (2), which stated that 'Subsection (1) does not affect the validation of past acts by or in accordance with this Act'.[11]

The legal reality of the 1993 Act was, however, overshadowed by the political acceptance of the legislation by key Indigenous groups, which viewed the legislation in general terms to have been of benefit to Indigenous people. Thus, in general terms, the legislation was thought to have kept the non-discrimination principle in place, even if the principle was suspended in relation to the validation of some grants of land which had become of questionable legality following the recognition of native title.

11 See further Brennan 1995: 103.

This compromise position changed, however, when amendments were made to the Act in 1998 by the Howard government (*Native Title Amendment Act 1998* (Cth)), which had campaigned on the need to limit native title rights. The relationship between the amended Act and the *RDA* became even more problematic. A new section 7 (inserted by schedule 1) stated that the Act was 'to be read and construed subject to the provisions of the *Racial Discrimination Act*', and that the provisions of this Act 'apply to the performance of functions and the exercise of powers conferred by or authorised by this Act'. In addition, the 1998 amendments stated that 'ambiguous terms should be construed consistently with the *Racial Discrimination Act* if that construction would remove the ambiguity'. However, these provisions (see further Triggs 1999: 378) again did not apply to the validation of certain governmental actions.

As had been the case in 1993, the 1998 amendments to the *Native Title Act* stated that the RDA did not hold sway, but this time the political compromise was not so readily accepted by Indigenous people, nor by international groups. The 1998 changes were termed the 'Wik amendments', because many of the amendments were generated as a political reaction to the 1996 recognition by the High Court (in *Wik*) that native title could co-exist with the grant of a pastoral lease. The 1998 amendments included the following changes: a tighter registration test before the right to negotiate over claimed land comes into existence; a diminution of the right to negotiate regarding certain kinds of mining; the provision for State and Territory bodies to be created to take over some of the roles of the National Native Title Tribunal; and the assurance that very broad 'primary production' activities are able to be undertaken by pastoral lease holders (which take precedence over native title interests on the same land) (*Native Title Amendment Act 1998* (Cth); National Native Title Tribunal 1998; Brennan 1998).

In 1999 the United Nations committee that was set up to monitor the *International Convention on the Elimination of All Forms of Racial Discrimination* condemned Australia for its 1998 amendments. Australia was criticised (CERD 1999) for making racially discriminatory amendments to the original Act. The criticism centred on the Howard government's actions in sponsoring legislation that limited more than regulated the common law right of native title. The Committee called for the urgent suspension of the amendments, stating that, contrary to the original Act, 'provisions that extinguished or impaired the exercise of indigenous title rights and interests pervaded the amended Act'.

In lay terms the debate about whether native title legislation retains or overrides the principle of non-discrimination can be set out as follows. The Howard government argument follows the line that native title is a right that belongs to one racial group,

and so there is always going to be some level of racial discrimination in any legislation regarding that right. It is of the view that wherever the Commonwealth has the power to legislate, it also has the power to restrict rights.[12]

Opponents however follow the argument that native title is simply one kind of property right, and to limit that right in ways that other property rights (such as freehold rights) would never be limited does breach the principle of non-discrimination. People in this group have largely accepted the need for some degree of statutory regulation of native title, and have even been prepared to accept some overriding of native title rights where this has involved validating grants of land made after 1975 whose effect was rendered uncertain by the common law recognition of native title. But this acceptance has been part of a compromise position in what has become a very complex legal area. People in this group do not accept that native title should be seen as an 'additional right' that belongs only to members of one racial group.

Thus the question is whether native title is a pre-existing right about which governments need to legislate in order to regulate claims, or whether it is a special interest that exists on racial grounds. The implications of these differing ways of viewing native title are quite significant. As opinion polling shows (Newspoll 2000: para 4.6), Australians are generally very reluctant to endorse the idea that Indigenous people should have 'special rights'. Thus the manner in which native title is categorised — whether it is seen as a pre-existing right, or a special right — is crucial not only in determining how it sits with the principle of non-discrimination, but also in determining the level of support given by Australian people generally to the protection of Indigenous native title interests. Given the numerically small percentage of the population that Indigenous people comprise, the support of non-Indigenous Australians is crucial in this respect.

Despite the political rhetoric, as things stand at present native title clearly exists as a pre-existing right and not as a special interest, and native title legislation merely regulates that right. It does not create the right. This is certainly the view of the High

12 On a tangential point, the High Court in the *Kartinyeri* (Hindmarsh Island bridge) case considered the question of whether the races power (section 51 (26) of the Constitution) enabled the Commonwealth parliament to enact laws to the detriment of Aboriginal people as well as for their benefit. The Court decided that the Commonwealth did have this power, with one line of reasoning being that if the Commonwealth could pass laws (for the benefit of Indigenous people), it also had to have the power to abolish or amend those laws. The power to amend or abolish laws would not exist, however, if all laws had to be for the benefit of Indigenous people.

Court. This analysis would, however, change were a future Commonwealth parliament to decide to replace the common law right with a statutory one.

The more difficult question is whether legislation that limits native title breaches the RDA, the answer being in general that it does. Thus the challenge to the rule of law comes more through legislation that seeks to lessen native title rights, than through the existence of the common law right.

To put this in other words, the principal theoretical problem that exists when a native title claim is made is to ascertain whether, in individual cases, native title actually continues to exist. Although native title cases can be extraordinarily complex (for example the *Yorta Yorta* case) they come down to a simple question: does native title continue to exist in this particular case? As I shall consider in the next section, such a simple question cannot be posed in situations that concern the less clearly identifiable right of self-determination.

Returning to the *Yanner* case which I discussed earlier, the question there was simply whether the native title right existed, and the Court said it did. The defendant thus had a right, as regulated by the NTA, to enjoy that right, and where there was a conflict with the State Act, Commonwealth legislation prevailed. Despite the complexity of native title law, the case really did not challenge the rule of law anymore than does any other conflict between State and Commonwealth law. The challenge to the rule of law is, thus, posed not by the existence of the common law right of native title in situations like Yanner's, but by legislation that seeks to limit that right.

I shall now turn to consider how the examples of self-determination referred to earlier sit with the principle of non-discrimination.

Customary law

Will Kymlicka has provided the best general philosophical discussion of the questions raised by the recognition of customary law in his *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). He provides (1995: 164-5) a very useful distinction between 1) ascertaining whether a minority's rules are compatible with 'liberal principles' of societal organisation, and 2) choosing to compel that minority group to respect those 'liberal principles' (a term that may here be equated with civil rights). Thus a group may choose to deny some or all of its members certain civil rights, but that will not justify the state's intervention, any more than the existence of illiberal laws in other countries justifies invasion. Where the breach of civil rights reaches a certain level then intervention would be justified (as is invasion of another

country in certain circumstances) but, as Kymlicka points out (1995: 169), the 'exact point at which intervention in the internal affairs of a national minority is warranted is unclear, just as it is in the international context'. For Kymlicka (1995: 168), the fact that this allows breaches of civil rights by and within the minority group is something that 'the majority group have to learn to live with ... just as they must live with illiberal laws in other countries'.

The debate about the recognition of customary law in Australia has been best addressed in the groundbreaking and under-praised 1986 report of the Australian Law Reform Commission (ALRC). Finding (vol 1: 141) that 'the impact of human rights standards on proposals for the recognition of Aboriginal customary laws depends on the particular proposal and cannot be discussed in the abstract', the ALRC then considered a number of situations in which the human rights of Indigenous people would potentially be compromised by the recognition of Aboriginal customary law, and it is instructive to consider one (and probably the best known) example to see how the ALRC negotiated this difficulty.

The possibility that Australian law would respect an Aboriginal 'payback killing', or the intentional infliction of a serious injury (by spearing, for example) in keeping with Aboriginal customary law, suggests ways in which the most fundamental of human rights could be breached by the recognition of customary law. On this issue the ALRC report (vol 1: 140, 320, 322) balanced the competing interests in the following way. It refused to recommend toleration of any 'tribal killing or execution', and further recommended that 'a general customary law defence' not be available even for criminal cases that were lesser ones than homicide. The report did, however, find (vol 1: 323) that:

> A partial customary law defence should be created, similar to diminished responsibility, reducing murder to manslaughter. It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belonged required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.

Interestingly, the draft legislation in the ALRC report on customary law which proposed this level of recognition of customary law was itself justified (vol. 2: 254, 262, ss 4 and 22) as a 'special measure' under the RDA. How such legislation would be reconciled with the RDA is of course a moot point, given that the legislation has not been enacted.

So does the customary law spearing scenario I discussed earlier, that resulted in injury but not death, challenge the rule of law? I think that it does not. For while a

central tenet of the rule of law is the idea that the law is applied equally to all people, this has never meant that all people, regardless of circumstance or motive, should receive exactly the same punishment for similar breaches of the law. Quite the opposite. One of the fundamental aspects of sentencing philosophy is the discretion afforded to judges to consider the particular circumstances of the offender when deciding on the sentence to be imposed. Courts routinely hand out different sentences for similar looking crimes after examining the particular situations of the offenders, their level of remorse, and so on. Indeed the removal of this sentencing discretion in the Northern Territory and to a lesser extent in Western Australia by mandatory sentencing laws has itself quite correctly been seen as a challenge to the rule of law. While supporters of mandatory sentencing laws would see these laws as an absolute embodiment of the rule of law, inasmuch as they force judges to apply the same (equal) punishment to offenders regardless of circumstance, mandatory sentencing laws have at the same time, and more correctly, been seen by others (Goldflam and Hunyor 1999) as a fundamental breach of the rule of law, for their removal of judicial discretion and their implicit erosion of the separation of powers doctrine.

While taking customary law into account when sentencing an individual is one thing, does the creation of a partial customary law defence to, for example, a charge of murder challenge the rule of law? Again, I think that it does not. There are several other partial defences that exist to reduce the crime of murder to that of manslaughter where certain circumstances exist. The ALRC report referred to diminished responsibility. It is worth noting also that certain acts of provocation can reduce a crime of murder to one of manslaughter. The point here is that, leaving customary law aside for one moment, the law in Australia has always allowed for the possibility that the same action by two offenders will not result in both being convicted of the same crime, much less that both will receive the same punishment. So the fact that the recognition of customary law exists as a further consideration to be taken into account when considering partial defences and sentencing, hardly amounts to a challenge to the rule of law. Indeed, the greater threat to the rule of law is likely to come from judges not taking customary law into account, since the possibility exists that Indigenous people will be too severely punished (indeed, punished twice), when compared to non-Indigenous people, for breaches of the law.

That is not to say that there are not difficult legal and policy questions raised by the recognition of customary law. Such questions range from concerns about legitimacy to ones of practicality, and would include the following: what criteria are used to ascertain whether a system of customary law can be said to exist? What evidence is required to be shown that customary law punishments have been carried out in accordance with this system of law? While it is one thing for a court to take notice of

a customary law punishment that has taken place, should a court take into account likely future customary law punishments that might take place? Should sentencing be delayed to give time for customary punishments to take place?[13] There do not exist easy answers to these difficult questions. But the point is that, as it stands, the level of recognition of customary law in Australia does not challenge the principle of non-discrimination. On the contrary, there is scope for greater recognition to be given to customary law.

Alcohol

The legal and policy questions posed by the attempts of Aboriginal communities to limit the sale of alcohol to Aboriginal people were addressed in 1995 by the then Race Discrimination Commissioner, Zita Antonios. In *Alcohol Report*, Antonios confronted these difficulties and concluded (RDC 1995b: 148; see also Rowse 1998: 95-7) that:

> The Race Discrimination Commissioner ... recognises that the [*Racial Discrimination Act*] is based on a formal equality model, and is an unsatisfactory means of accommodating the broader issues relevant to indigenous peoples, particularly their rights to self-determination and protection of cultural integrity.

But with that recognition, does the existence of a ban within an Indigenous community lead to the thinking that there is one law for one group and another law for another group? A short answer is that there really only exists a threat to the principle of non-discrimination when alcohol restrictions are based on racial rather than health considerations. The task is to differentiate the two. It may seem semantic to argue that it is not necessarily racial considerations that lead to the banning of alcohol consumption in a largely Indigenous community. And it is easy to conflate two differing sets of motivations that may well lead to the same outcome. But there is a substantial issue of legitimacy that underwrites one line of thinking and that does not underwrite the other.

If the decision has been made or supported by a representative Indigenous community organisation, then there is every reason to conclude that the decision has been made for reasons that would not constitute unlawful or 'invidious' racial discrimination. In contrast, if the same decision to ban alcohol in a predominantly Indigenous community was made by a non-Indigenous council without Indigenous support, there would be every reason to suspect that racial reasons were central to the decision.

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13 On these issues see McRae et al 1997 (chapter 8).

Moreover, in practical legal terms, so long as the prohibition is area-specific (and does not, for instance, specify that the ban only applies to people of certain racial groups), then it is unlikely that anyone could successfully bring a case arguing that there had been a breach of the RDA. Using the example of Tennant Creek, the alcohol restrictions there (Wright 1997: 247-51; NT Liquor Commission 1999; d'Abbs et al 2000; Edgar 2001) are not racially specific, nor are they so geared towards Indigenous people that they constitute indirect racial discrimination. Rather the restrictions take the form of limiting, for example, the sale of take-away drinks on pension days. As such, they raise no problems for the principle of non-discrimination. The same applies to a remote Indigenous community that chooses to prevent the sale of alcohol within its community. So long as the measure is geographically based, so that the restriction applies to all people in the area, then the restriction raises no contradictions with the non-discrimination principle. There are numerous examples of locales in Australia where the consumption of alcohol is prohibited, for instance in the public spaces in the central business district of Melbourne.[14]

Again, there are difficult questions raised by the issue which I have not here attempted to answer. Could a non-Indigenous council, which claimed to be motivated by health concerns, legitimately ban alcohol in a predominantly Indigenous community without extensive consultation with Indigenous people living there? How does one ascertain the legitimacy of a community's decision to ban alcohol? Without seeking to answer these questions, my point here is simply that a locale-based prohibition on the consumption of alcohol does not breach the principle of non-discrimination.

Community Development Employment Projects

Reviews of the CDEP scheme point out that often the scheme is the only source of employment in remote communities, and that the vital services performed under the scheme are such that outlying communities have come to rely on it for their continued functioning (RDC 1997: 21; Sanders 1997: 4-5; ATSIC 2000: 48). As with attempts to restrict the sale of alcohol, the scheme has been a positive and, on balance, successful exercise in self-determination.

But does the CDEP scheme breach the principle of non-discrimination? In discrimination terms it is similar to the banning of alcohol, in that it arguably provides no special benefit to the communities involved. Indigenous people employed under the scheme are actually often worse off, financially, than

14 This is regulated by the Activities Local Law 1999 (Melbourne), section 3.1.

unemployed non-Indigenous people on government benefits, and there exists evidence (RDC 1997: 41) that there is pressure on Indigenous people within communities involved in the scheme to become involved in the scheme and not to choose to take unemployment benefits (there remains a policy question of whether governments have a responsibility to discourage this sort of pressure). The scheme, however, differs from alcohol regulation in that it is not purely geographically focused. The program is not available to non-Indigenous people, even if they live in or near communities that are engaged in CDEP work.

In considering whether the CDEP scheme constituted racial discrimination the Race Discrimination Commissioner discussed the possibility that the scheme might either be viewed as a 'special measure' or an instance of 'reasonable differentiation on the basis of race'. Although Antonios (RDC 1997: 35) left it 'for the courts' to decide which of these the scheme constituted, she found that 'the CDEP scheme does not appear to raise any significant issue of racial discrimination'.

Antonios raised three points (RDC 1997: 35-6) to support this understanding. First, the CDEP scheme was created to redress Indigenous disadvantage in access to employment and social security. Second, non-Indigenous people do not suffer disadvantage as a result of the scheme. And third, the scheme, at least originally, was designed specifically to address the employment problems of remote Indigenous people (it should be noted that the scheme is now not restricted to remote communities). These points led to the conclusion that the scheme did not constitute unlawful racial discrimination, because the scheme did not disadvantage Indigenous or non-Indigenous people.

I would agree that the scheme does not breach the principle of non-discrimination. While there does exist evidence of pressure on Indigenous people in CDEP communities not to opt to take unemployment benefits, that evidence is not significant enough to say that the CDEP scheme impairs the rights of Indigenous (or non-Indigenous) people to work or receive social security, and as such does not get past stage one in constituting a breach of the principle.

But even if there is not agreement on this, then the scheme clearly constitutes either differential treatment or is a special measure. Any discrimination that is germane to the scheme is not invidious, inasmuch as the scheme exists, in part, to address the results of past discriminatory practices. And indeed the scheme has many of the hallmarks of a special measure. While there is no financial benefit to participants in the scheme, there is arguably a cultural benefit (in that community building projects that might otherwise not occur, such as heritage restoration, can be undertaken). It is likely that the CDEP scheme will not exist indefinitely, and again it is a program that

has been designed to address a chronic problem that in one way or another is the legacy of past discriminatory laws.

Conclusion

I have argued in this article that Australia's limited recognition of Indigenous rights does not constitute a threat to the principle of non-discrimination, or the rule of law. There are, however, as I have indicated throughout, difficult legal and policy questions that confront Australia should, as justice demands, further recognition be given to Indigenous rights. And I agree with those theorists (for example Havemann 1999b: 67, 1999c: 474-5) who have called for a more nuanced application of 'conflict of laws' theories to Australia.

The fact that the greater recognition of Indigenous rights will produce more and not less difficult legal and policy questions is, of course, no argument against their further recognition. These difficulties are merely the logical result of living in a country like Australia in postcolonial times. ●

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