

INDIGENOUS PEOPLES AND THE RIGHT TO SELF DETERMINATION

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It is my argument that the most fundamental of all human rights is that of self-determination and that no other right overrides it. Without this group or individual right, no other human right could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic and legal order they would live. Any right which directly conflicts with this right ought to be void to the extent of that conflict.¹

Introduction

The principle of self-determination has been described as the most fundamental of all human rights. It has been particularly important to Indigenous peoples in colonised countries as they seek to renegotiate jurisdiction and relationships with governing states. The first part of this paper traces the development of the principle of self-determination at international law and its application to Indigenous peoples. It begins with a brief overview of the development of international human rights law, with a particular focus on colonisation. It considers the development of self-determination as a human rights principle, the incorporation of this principle into various UN instruments and its application to the process of decolonisation. The final part of this section focuses on Indigenous peoples and international law, including the development and eventual adoption of the *United Nations Declaration of the Rights of Indigenous Peoples*. Several contentious issues are explored; who are the ‘peoples’ that have the right to self-determination and does self-determination challenge territorial integrity? The ongoing tension between individual rights and the collective rights of Indigenous peoples is also explored and the challenges faced by a state centric system in recognising collective rights.

The second part of this paper considers how the principle of self-determination has been interpreted and misinterpreted in Australian policy. A brief history of colonisation is offered including the development of Australian government policy in relation to Aboriginal and Torres Strait Islander peoples. The policy of self-determination introduced under the Whitlam Labor government is considered alongside the Howard government’s dismantling of what was perceived as a ‘failed experiment’. Current issues and policy, including the Northern Territory Emergency Response (NTER), are addressed in the light of the ongoing failure of the government to acknowledge the right of Aboriginal

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¹ Mukau Mutua, *Human Rights: a Political and Cultural Critique* (2002) 108.

and Torres Strait Islander peoples in Australia to exercise self-determination. How Indigenous people themselves define self-determination is considered, and an attempt is made to suggest how the right to self-determination could be incorporated into the Australian legal system. The essay concludes with the suggestion that protecting the right to self-determination in Australia will require constitutional and legislative responses, measures to strengthen the capacity of Aboriginal and Torres Strait Islander peoples to be self-determining, changes to the judicial system and strategies to reduce racism throughout the broader community.

THE DEVELOPMENT OF THE PRINCIPLE OF SELF-DETERMINATION AT INTERNATIONAL LAW

Colonisation and early development of international law

According to Mutua, the development of international law was founded on ‘four specific European biases: geographic Europe as the centre; and Christianity, mercantile economies and political imperialism as superior paradigms.’² This has had a significant impact on Indigenous peoples throughout the world. As Europe extended its reach around the globe through trade and colonisation, Indigenous peoples were murdered, dispossessed of their land, and prevented from exercising even the most basic of their human rights. This process of often violent dispossession was legitimised by what was later termed the ‘doctrine of discovery’,³ the origins of which can be traced to several papal bulls from the 15th century. This doctrine gave European Christian countries, Spain and Portugal in particular, the right to claim and conquer non-Christian lands immediately upon their discovery.⁴ While the primary goal was to set out rights between the discoverers, the rights of Indigenous peoples to their own lands were denied in the process.⁵

Not all agreed with the justification of title by discovery and queried ‘the legality and morality of claims...and of the ensuing, often brutal, settlement patterns.’⁶ Prominent scholars, such as de las Casas and de Vitoria, with their thinking grounded in the natural law philosophies of Renaissance Europe, believed in the essential humanity of Indigenous peoples with rights arising out of natural or divine law.⁷ While this provided some support for the inherent

² Ibid 18.

³ S. James Anaya, *Indigenous Peoples in International Law* (2004) 24-25 citing a series of decisions by Chief Justice Marshall of the U.S Supreme Court, eg. *Johnson v McIntosh* (1823) 8 Wheaton 543.

⁴ Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (1998) 2-4.

⁵ Ibid.

⁶ Anaya, above n 3, 16.

⁷ Ibid.

rights of Indigenous peoples, it was tempered by Vitoria's development of a theory of a 'just war' to justify the takeover of Indigenous lands. This theory was further developed by Grotius, who discarded the Christian mission as grounds for conquest or war, instead identifying three causes justifying war: defence, recovery of property and punishment.⁸ The European origins of international law, its sanctioning of colonisation and its focus on protecting the enormous wealth gained by European states through the dispossession of Indigenous peoples, sheds some light on why Indigenous rights and interests were dismissed by the international community for more than 500 years.

The emergence of the modern 'nation state' further impacted on the rights of Indigenous peoples. The focus on independent territorial integrity can be traced back to the Treaty of Westphalia in 1648.⁹ This marked a shift in the conceptualisation of natural law from 'a universal moral code for humankind into a bifurcated regime comprised of the natural rights of individuals and the natural rights of states'.¹⁰ Thinking at the time further developed this individual/state dichotomy, primarily through the work of Vattel, with an increasing focus on the primacy of the state. This laid the foundation for the doctrine of state sovereignty with its emphasis on exclusive jurisdiction, territorial sovereignty, equality amongst states, and non-intervention in domestic affairs.¹¹

During the late 18th and early 19th centuries, international law was increasingly used to justify colonisation.¹² Anaya outlines four premises underpinning this era: international law is only concerned with the rights and duties of states; the exclusive sovereignty of states is upheld; international law is between states; and importantly, that Indigenous peoples outside Europe do not have rights and duties under international law.¹³ Indigenous peoples, with their vastly different systems of law and governance, could not be tolerated as equals and colonisation resulted in the exercise of authority over Indigenous peoples against their will. While this authority was often grounded in humanism and based on notions of trusteeship, Anaya describes this as a form of 'scientific racism' that considered Indigenous peoples and their cultures as inferior.¹⁴

Colonisation ultimately resulted in the destruction of the social, economic and political fabric of Indigenous societies and their 'marginalisation and subjugation within the new, imposed colonial regimes'.¹⁵ Free, self-

⁸ Ibid 19.

⁹ Ibid.

¹⁰ Ibid 20.

¹¹ Ibid 21.

¹² Ibid 26.

¹³ Ibid.

¹⁴ Ibid 31.

¹⁵ Nin Tomas, 'Indigenous Peoples and the Maori: The Right to Self-Determination in

determining Indigenous societies were reduced to minority populations within colonial states.¹⁶

This brief analysis of the process of colonisation provides an insight into its contribution to the development of international law. It is important to note that modern decolonisation, and included here is the right to self-determination for colonised peoples, is based on the right of peoples to end colonial domination, not on an analysis of whether the original acquisition was valid.¹⁷

Wu Jianmin suggests that the majority of human rights problems facing the world today are the result of the 'aggression, exploitation and plundering' that accompanied colonisation, the responsibility of the developed Western countries.¹⁸ As it was the developed Western countries who took the lead in developing modern human rights law, this resulted in a complex balancing act as those states who had done the plundering were now developing remedies to address the consequences of colonisation. This might go some way towards explaining why human rights law was slow to address the rights of Indigenous peoples.

International law entered a new phase in response to the atrocities committed during the two World Wars in the first half of the 20th century, resulting in a growing concern for world peace and human rights. An international human rights framework was developed with the potential to monitor states and hold them to account for their treatment of both citizens and non-citizens within their borders.¹⁹ This new framework maintained the sovereignty of member states, but allowed greater interference with state sovereignty where necessary.²⁰ It also opened the way for greater protection of non-state actors, including Indigenous peoples. The principle of self-determination is critical to the development of human rights law, yet it has been an ongoing issue of contention because it is claimed (by states in particular) to challenge state sovereignty.

The principle of self-determination

The term 'self-determination' entered political discourse in the period immediately following the First World War. The United States President,

International Law- from Woe to Go' (2008) 4 *New Zealand Law Review* 639, 646.

¹⁶ Ibid.

¹⁷ Douglas Sanders, 'The Re-Emergence of Indigenous Questions in International Law' in S James Anaya (ed) *International Law and Indigenous Peoples* (2003) 56, 79.

¹⁸ Wu Jianmin, Statement to the UN Commission, April 8, 1997 quoted in Henry Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd ed 2008) 791.

¹⁹ Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (4th ed, 2009) 651.

²⁰ Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 298-9.

Woodrow Wilson, promoted the notion of self-determination, along with Western liberal democratic ideals, as the basis for international peace.²¹ This indicated a shift away from international law's sole focus on the protection of state integrity to provide some protection for the welfare of peoples who lived within states.²² Self-determination was introduced as a principle to justify the reconstruction of Europe following the end of the war, and was seen as being applicable to "peoples" within the territory of defeated European empires'.²³

The League of Nations was set up by nations who were victors following the First World War. It was the first attempt to establish an international body with a focus on maintaining world peace. The *Covenant of the League of Nations* was adopted in 1919, containing articles on peace and security as well as articles protecting the rights of minorities, particularly in Eastern Europe.²⁴ It also committed League members to 'undertake to secure the just treatment of the native inhabitants of territories under their control'.²⁵ This in effect continued notions of trusteeship and further validated colonial occupation, rather than supporting the inherent equality of Indigenous peoples and their right to 'determine their own course'.²⁶

In order to maintain peace, fair and humane labour conditions were seen as essential. As a result, the members of the League established the International Labour Organisation (ILO) to improve the working conditions of labour all over the world. Once the United Nations was established following the Second World War, the ILO constitution was amended to provide the opportunity for the ILO to more directly promote the rights of workers, including Indigenous workers, in relation to human rights.²⁷ More recently, ILO Conventions 107 and 169 (see below) have contributed substantially to the recognition of the rights of Indigenous peoples, although neither have recognised the right of self-determination.

Following the end of the Second World War, the human rights movement gained momentum. The founding instrument of the United Nations, the *Charter of the United Nations*, gave formal and authoritative expression to the importance of human rights and sought to promote the use of treaties and other legal mechanisms to promote peace and foster economic and social development.²⁸ Among its purposes and principles is the principle of self-determination. Article 1, paragraph 2 states that the purposes of the United Nations are '[t]o develop friendly relations among nations based on respect for

²¹ Tomas, above n 15, 647.

²² Ibid.

²³ Behrendt et al, above n 20, 299.

²⁴ Venne, above n 4, 29.

²⁵ League of Nations, *Covenant of the League of Nations*, Art 23(a) <<http://www.unhcr.org/refworld/docid/3dd8b9854.html>>.

²⁶ Anaya, above n 3, 34.

²⁷ Venne, above n 4, 31.

²⁸ *Charter of the United Nations*, Art 55.

the principle of equal rights and self-determination of peoples. And to take other appropriate measures to secure universal peace.’²⁹

However, Daes argues that on the basis of textual construction, self-determination, in contrast to sovereignty, was not initially perceived in the Charter as an operative principle or as a legal right.³⁰ She believes it is not until the process of decolonisation was underway with the *Declaration of the Granting of Independence to Colonial Countries and Peoples* (Resolution 1514) in 1960, where it expressly states that ‘all peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development,’³¹ that the ‘cornerstone’ of the ‘new U.N. law of self-determination’ was laid.³²

The principle of self-determination was critical during the process of decolonisation, where the goal was to liberate territories held under colonial rule. This period evidenced a shift away from a focus on the rights of states to a collective right belonging to a group of peoples who had been colonised. During the decolonisation process, self-determination was used as a tool to advance demands for external self-determination by disallowing cultural and religious imperialism imposed by external agencies.³³

The commitment to self-determination for non-self-governing territories is inherent in the Charter. Principles by which states are to uphold the interests of colonised peoples are set out in Article 73. Two General Assembly Resolutions were passed to supplement and formalise the Charter provisions and facilitate the process of liberating territories held under colonial rule. Decolonisation in this context was seen as the creation of new institutional orders capable of supporting self-government, rather than a return to social institutions that existed prior to colonisation.³⁴ Resolution 1514, as well as confirming the right to self-determination (see above), expresses a preference for independent statehood for colonial territories with their boundaries intact. In the same month, Resolution 1541 was passed, outlining three options for self-government; emergence as a sovereign independent state, free association with an independent state or integration with an independent state.³⁵ Principle IV of Resolution 1541 clarifies that these obligations apply to territories that are ‘geographically separate’. This gave rise to what became known as the ‘salt

²⁹ Ibid Art 2.

³⁰ Erica-Irene Daes, ‘Some Considerations on the Right of Indigenous Peoples to Self-Determination’ in Anaya, above n 17, 367, 368.

³¹ *Declaration on the Granting of Independence to Colonial Countries and Peoples* (14 December 1960) GA res 1514 UN GAOR A/RES/1514 (XV).

³² Daes, above n 30, 368-369.

³³ Mutua, above n 1, 108.

³⁴ Anaya, above n 3, 54.

³⁵ United Nations General Assembly, *Resolution 1541(XV)* 15 December 1960 <<http://www.un.org/documents/ga/res/15/ares15.htm>>.

water’ or ‘blue water’ thesis. In effect, this restricted the right to self-determination to non-self-governing territories that were separated geographically, literally by the sea, denying protection to those colonised peoples, and in particular ‘enclave indigenous groups’, living within the external boundaries of independent states.³⁶ Venne argues that the unequal application of the General Assembly resolutions resulted in a ‘double standard’, creating an artificial distinction between colonisation suffered by Indigenous peoples who are not afforded the same consideration as peoples who qualified for the decolonisation program.³⁷ Thus, the decolonisation process helped restore rights to Indigenous peoples in parts of Africa and the Pacific, where those who were colonised remained in the majority.³⁸ While this process excluded Indigenous peoples that were not deemed to fit the geographic criteria, it did confirm the acceptance of self-determination as a collective right belonging to all ‘peoples’.

Article 1 of both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Social, Economic and Cultural Rights* (ICESCR) states that ‘All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’³⁹ Despite the clear unequivocal nature of the language used there has been ongoing controversy about whether the ‘peoples’ who have a right to self-determination includes Indigenous peoples. According to Kingsbury, it was unfortunate that the articulation of the right to self-determination coincided with the period of decolonisation as it meant that Indigenous peoples’ claim to the right of self-determination was seen primarily as a threat to territorial integrity.⁴⁰ The adoption by the General Assembly of the *Friendly Relations Declaration* in 1970 helped to move the right of self-determination away from its attachment to notions of decolonisation:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, *their* political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions in the Charter.⁴¹

The right to self-determination was also reaffirmed by the ‘Helsinki Final Act’

³⁶ Anaya, above n 3, 54.

³⁷ Venne, above n 4, 75.

³⁸ Behrendt, above n 20, 299.

³⁹ *United Nations International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and *United Nations International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴⁰ Benedict Kingsbury cited in McRae, above n 19, 658.

⁴¹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (24 Oct. 1970) A/RES/2625 (XXV).

in 1975, which states that '[t]he participating states will respect the equal rights of peoples and their right to self-determination...', and refers to self-determination as a right of 'all peoples always'.⁴² Daes states that it is now 'almost impossible to deny that the right to self-determination has attained true legal status' or *jus cogens* in international law.⁴³ However, a question that has created much debate in international forums, is exactly who are the 'peoples' upon whom this right is conferred?

The international instruments discussed thus far apply the right of self-determination to 'all peoples', but 'all peoples' has been interpreted as being applicable to an individual within a state, a colonised group within defined geographic parameters, or individual members of minority groups. Developing an accepted international position that 'all peoples' also applied to Indigenous peoples was a longer and more complex process.

Indigenous peoples and international law

The Indigenous population of the world has been estimated to be over 300 million '[s]pread across the world from the Arctic to the South Pacific'.⁴⁴ While international law had been developed as a tool to justify colonisation, from the 1920s Indigenous peoples sought access to the protection and remedies of its institutions, initially through the League of Nations and subsequently through the ILO and the UN. In 1924, a Maori delegation presented a petition to the League of Nations on the Treaty of Waitangi and land confiscations. As the Maori were not recognized as a 'state' they had no standing to have their petition considered.⁴⁵ In the same year, a member of the Council of the Iroquois Confederacy petitioned the League to be admitted as a member, seeking consideration of the long-standing dispute between the Iroquois Confederacy and the Canadian Government.⁴⁶ Despite support from some governments, the British intervened to prevent the petition from being considered.⁴⁷

The ILO was the first international organisation to develop standards for the protection of Indigenous peoples through the development of several conventions during the 1930s that specifically addressed the working conditions of Indigenous workers.⁴⁸ In 1957, this led to the development of

⁴² Organisation for Security and Cooperation in Europe, 'Conference on Security and Cooperation in Europe, Final Act', signed in Helsinki, 31 August 1975, 1 (a) VIII <<http://www.osce.org/mc/39501>>.

⁴³ Daes, above n 30, 369.

⁴⁴ UN Office of the High Commissioner for Human Rights, *Fact Sheet No 9 (Rev 1): The Rights of Indigenous Peoples* <<http://www.ohchr.org>>.

⁴⁵ Tomas, above n 15, 647.

⁴⁶ Anaya, above n 3, 57.

⁴⁷ Venne, above n 4, 30.

⁴⁸ See Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3(4) *Australian Indigenous Law Reporter* 473.

the first international instrument to explicitly recognise the rights of Indigenous peoples: the ILO's *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No 107)*.⁴⁹ ILO 107 deals with a range of matters relating to the rights of Indigenous peoples, including Article 11 which deals with rights to land. 'The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.' Governments were reluctant to ratify ILO 107 because of its implications for land rights.⁵⁰ ILO 107 did not receive widespread support from Indigenous peoples either, as its ideology promoted the assimilation and integration of Indigenous peoples into the dominant society. Article 2 (1) states that governments are responsible 'for the protection of the populations concerned and their progressive integration into the life of their respective countries'. Concern by both states and Indigenous peoples, and increasing pressure for its revision resulted in the introduction of the ILO's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)*⁵¹ in 1989.

While ILO 169 extended the recognition of rights, it too did not attract widespread acceptance by Indigenous peoples as it refused to recognise the right to self-determination and it contains a requirement for governments to consult and facilitate participation, rather than a requirement to obtain consent.⁵² Also, the record of committee proceedings states that the use of the term 'peoples' in the Convention 'has no implication as regards the right of self-determination in international law'.⁵³ Anaya states that despite its shortcomings, ILO 169, along with the *Declaration on the Rights of Indigenous Peoples (DRIP)*,⁵⁴ has contributed to the development of customary international norms that are more or less in line with Indigenous peoples own demands and aspirations.⁵⁵ This is a clear manifestation of an Indigenous lead movement that has challenged state centred structures and increased international understanding and concern about the rights of the world's Indigenous peoples.⁵⁶

⁴⁹ *International Labour Organisation Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

⁵⁰ Behrendt, above n 20, 301.

⁵¹ *International Labour Organisation Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

⁵² Pritchard, above n 48, 474.

⁵³ Anaya, above n 3, 60.

⁵⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc GA Res 61/295 (2007).

⁵⁵ Anaya, above n 3, 72.

⁵⁶ *Ibid.*

Indigenous peoples have increasingly turned to international law, primarily through UN forums, in the hope that increased awareness might ‘make their governments more accountable’.⁵⁷ Their increased presence has led to the broader promotion of Indigenous issues to the world community. Through this process, Indigenous peoples have developed a sense of collective history and an articulate response to past and present injustices based on the language of international human rights law. However, Indigenous peoples’ claim to a rightful place at the negotiating table remained contentious, and their continued advocacy for the right to be self-determining in international negotiations was a critical issue during the development of the DRIP.

Despite increasing awareness at an international level of the need to address violations of human rights, the UN was slow to identify Indigenous peoples as a group requiring special consideration. The first serious response to the needs and interests of Indigenous peoples came in 1971, when the Economic and Social Council (ECOSOC) authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to commission Special Rapporteur Jose Martinez Cobo to undertake a study of discrimination against Indigenous peoples.⁵⁸

The international Indigenous lobby that emerged during the 1970s sought UN scrutiny of the ongoing impact of colonisation on Indigenous peoples.⁵⁹ In response to recommendations from the Cobo study and increasing pressure from Indigenous groups,⁶⁰ ECOSOC authorized the establishment of the UN Working Group on Indigenous Populations (WGIP) in 1982 with a mandate to ‘review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations’ and to ‘give special attention to the evolution of standards concerning the rights of such populations’.⁶¹ The WGIP, made up of five independent expert members, developed flexible working procedures, enabling widespread Indigenous participation. It also encouraged a casual environment that permitted ‘frank and fearless discussion about the conduct of states’,⁶² conduct not generally permitted in other UN forums. In order to fulfil its standard setting mandate, the WGIP decided in 1985 to develop a draft declaration on Indigenous rights. Between 1985 and 1993, the WGIP, in consultation with Indigenous representatives and government observers, prepared a *Draft Declaration on the Rights of Indigenous Peoples*. In 1993, the expert members agreed on a final

⁵⁷ McRae, above n 19, 650.

⁵⁸ UN Office of the High Commissioner for Human Rights, *Fact Sheet No 9* (Rev 1): The Rights of Indigenous Peoples <<http://www.ohchr.org>>.

⁵⁹ Megan Davis ‘Indigenous Struggles in Standard-Setting: *The United Nations Declaration on the Rights of Indigenous Peoples*’ (2008) 9 *Melbourne Journal of International Law* 439, 444.

⁶⁰ Anaya, above n 3, 63.

⁶¹ ESC Res 1982/34, UN SCOR, 28th plen mtg, [26], UN Doc E/RES//1982/34 (1982).

⁶² Davis, above n 59, 445.

text, being of the opinion that the text was ‘comprehensive and reflected the legitimate concerns of indigenous peoples as a whole’.⁶³ The rights articulated in the *Draft Declaration* reflected the lived experience of Indigenous peoples. This is eloquently expressed by Mathew Coone Come, Grand Chief of the Grand Council of the Crees:

Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. The Draft Declaration began as a cry from the indigenous peoples for justice, and it is drafted to confirm that the international standards which apply to all peoples of the world apply to indigenous peoples.⁶⁴

The *Draft Declaration* was submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities where it was adopted and submitted to the Commission on Human Rights (CHR). In 1995 the CHR established an ‘open-ended inter-sessional’ Working Group on the Draft Declaration (WGDD) to further elaborate the *Draft Declaration* for consideration and adoption by the General Assembly.⁶⁵ The WGDD, as a CHR working group, required participants to have ECOSOC non-governmental status, so special arrangements were authorised to enable broad Indigenous participation with observer status.⁶⁶ Participation was a critical issue for Indigenous peoples. Commenting on the WGIP’s draft text, the Chairperson of the WGIP, Erica-Irene Daes, said that ‘...the present text reflects an extraordinary, liberal, transparent and democratic procedure that encouraged and unified Indigenous input’.⁶⁷ However, even with the WGDD’s special arrangements, the result was a lower level of access than Indigenous people had enjoyed in the WGIP⁶⁸ and Indigenous participation remained contentious. Ongoing conflict between Indigenous observers and member states resulted in very little progress over the following decade.

While the first few meetings of the WGDD saw discussion of textual issues at a general level, debate centred on rules of procedure and the extent of Indigenous participation. Davis provides a good summary of the issues that dogged the WGDD for more than a decade, identifying two main reasons for the slow progress.⁶⁹ First she considers the role of the Chairperson, in particular his support of states to undertake much of the redrafting in private sessions and his

⁶³ *Report of the Working Group on Indigenous Populations on its Twelfth Session*, [133] UN Doc E/CN.4/Sub.2/1994/30 (1994).

⁶⁴ Mathew Coone Come, Grand Chief of the Grand Council of the Crees, cited in Pritchard above n 48, 477.

⁶⁵ UN Office of the High Commissioner for Human Rights, *Fact Sheet No 9* (Rev 1): The Rights of Indigenous Peoples <<http://www.ohchr.org>> at 23 October 2009.

⁶⁶ Sarah Pritchard, ‘The United Nations and the Making of a Declaration on Indigenous Rights’ (1997) 89 *Aboriginal Law Bulletin*, 4, 7.

⁶⁷ *Ibid.*

⁶⁸ Anaya, above n 3, 85 (footnote 92).

⁶⁹ Davis, above n 59, 447.

tendency to preference the objections of the CANZUS group (Canada, Australia, New Zealand and the US) in seeking consensus. The US was the most frequent objector, and for the Chairperson this became evidence of non-consensus: if the US objected, there was no consensus.⁷⁰ The second reason was what Davis calls the ‘no change’ position adopted by the Indigenous caucus.⁷¹ This position was in part due to the strong emotional connection the Indigenous observers had to the original text, along with a fear that any changes could result in a watering down of the significant rights contained in the draft. This fear led to the rejection of any suggested amendments to the original text, despite inconsistencies and repetition.⁷² The position taken by the Indigenous observers could also be seen as a protest against the lack of inclusion and transparency in the process. This impasse took years to resolve. One of the major sticking points in the deliberations of the WGDD was the inclusion of the right to self-determination. While states raised concerns about territorial integrity, Indigenous people continued to call for full, democratic and equal participation in the drafting process. The conflict that played out in the WGDD could itself be interpreted as one of Indigenous peoples actively asserting their right to self-determination.

When the DRIP was finally adopted by the General Assembly in September 2007, Australia, along with the United States, Canada and New Zealand, was one of only four countries to vote against it. It is significant that these four countries have populations of Indigenous peoples who were excluded from the UN’s decolonisation program. Each of these countries has ‘significant outstanding claims of wrongful dispossession of indigenous authority over territory and resources’⁷³ that are yet to be settled.

Self Determination and Indigenous Peoples- contentious issues

The inclusion of the right to self-determination in the DRIP continued to be a contentious issue throughout the drafting process. Article 3 replicated article 1 of the ICCPR and the ICESCR, firmly embedding the right to self-determination in the DRIP. Some states continued to view self-determination for Indigenous peoples as ‘synonymous with decolonisation’ and therefore a threat to the sovereignty and territorial integrity of states.⁷⁴ The insertion of article 46 was designed to allay fears about territorial integrity and renders all of the articles subject to existing international law. Article 46 states that ‘Nothing in this Declaration may be...construed as authorising or encouraging any action which would dismember or impair... the territorial integrity or

⁷⁰ Ibid 449.

⁷¹ Ibid.

⁷² Ibid 450.

⁷³ Tomas, above n 15, 659.

⁷⁴ Davis, above n 59, 458.

political unity of sovereign and independent states'.⁷⁵ Another effective counter argument put forward by Indigenous observers was that self-determination had developed in international law from a right to decolonisation to a right to democracy, a right held by peoples to determine their political destiny. Self-determination was said to be at the core of democratic entitlement.⁷⁶

The 2002 *Social Justice Report* claims that the protracted debate on whether self-determination is indeed synonymous with secession, in both the international arena and here in Australia, is a result of states protecting their own interests and their 'illegitimate gains'.⁷⁷ The debate illustrates that the decision making processes within the UN result in standards made by states to be applied to themselves: the application of the principle of self-determination to Indigenous peoples has become a matter of politics rather than law, as states fear the consequences of recognising the rights of Indigenous peoples.

Another issue of contention that has been debated over many decades is who are the 'peoples' to whom the right of self-determination is attaches? If it is agreed that this right belongs to Indigenous peoples, then who are Indigenous peoples and how are they defined?

Interest in Indigenous peoples grew out of concern for minority groups following the two World Wars. Early human rights thinking developed in response to concerns for the rights of minority groups, specifically ethnic minorities, in defeated European states. This raised the questions of whether minority groups have the right to self-determination and whether Indigenous peoples are minority groups. Five major reports have been prepared by Special Rapporteurs to the Sub-Commission on the Protection and Promotion of Minorities. These reports found that there was no distinction between 'peoples' and 'Indigenous peoples', that the right of self-determination did not apply to minority groups, and that Indigenous peoples should be included as a separate category.⁷⁸ More recent work undertaken by Eade identifies significant differences between Indigenous peoples and minority groups. He states that minority groups place emphasis on 'effective participation in the larger society' and their rights are individual rights. Indigenous peoples, on the other hand, hold collective rights, including rights to land and resources and the authority to make their own decisions.⁷⁹

⁷⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc GA Res 61/295 (2007).

⁷⁶ See Davis, above n 59, 459.

⁷⁷ Human Rights and Equal Opportunity Commission, *Social Justice Report* (2002) 28 <http://www.hreoc.gov.au/Social_Justice/sj_report/sjreport02/Social_Justice_Report02.pdf>.

⁷⁸ Studies undertaken by Cristescu, Espiell, Capotori, Deschenes and Cobo, cited in *Social Justice Report*, above n 77, 15.

⁷⁹ Asbjorn Eade and Erica-Irene Daes, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' (2000) E/CN.4/Sub.2/2000/10 <<http://www.un.org/en/documents>>.

The 2002 *Social Justice Report* concludes that Indigenous peoples ‘constitute a “peoples” and possess the necessary collective identity to be recognised as enjoying a right to self-determination.’⁸⁰

There is no settled definition of ‘Indigenous peoples’ in international law. The most frequently cited definition is the definition found in the Cobo study. While the UN Permanent Forum has found that no formal definition is necessary, Cobo’s definition provides some general parameters:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁸¹

Central to this definition is the connection to land, the importance of ongoing connection to a defined territory and the desire to preserve ‘ancestral territories’ for future generations.

Underpinning the discussion on self-determination is the ongoing tension between the collective nature of the rights of Indigenous peoples and the focus of universal human rights on individual rights. The discussion above traces the development of international law through its Eurocentric, Western liberal roots. The development of human rights law was also developed out of a Western liberal tradition. The basic philosophical framework that underpinned the initial human rights instruments favours ‘individual and political rights over collective solidarity rights’.⁸² The human rights’ discourse ‘confers its highest priority on individual freedom’⁸³ without considering the limits of rights, their interrelationship and their correlative responsibilities. Human rights are also considered universal, therefore applying to everyone. Universalism does not address the issue of cultural integrity, an issue at the core of Indigenous rights. As Mutua states:

Although the human rights movement arose in Europe, with the express purpose of containing a European savagery, it is today a civilizing crusade aimed primarily at the Third World. It is one thing for Europeans and North Americans, whose states share a common philosophical and legal ancestry, to create a common political and cultural

⁸⁰ *Social Justice Report*, above n 77, 19.

⁸¹ *Ibid* 16.

⁸² Abdullah Ahmed An-Na'im, ‘Human Rights in the Muslim World’ (1990) 13(3) *Harvard Human Rights Journal*, cited in Henry Steiner, Philip Aston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2008) 531-2.

⁸³ Mary Anne Glendon, ‘A World Made New’ (2001) 221 in Henry Steiner, Philip Aston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2008) 141.

template to govern their societies. It is quite another to insist that their particular vision of society is the only permissible civilization which must now be imposed on all human societies, particularly those outside Europe.⁸⁴

The DRIP, with its focus on the collective rights of Indigenous peoples, poses a direct challenge to traditional human rights discourse. It provides a ‘political and cultural template’ to meet the needs and aspirations of the world’s Indigenous peoples.

Attempting a definition

In attempting a current definition of self-determination it is important to recognise that the notion of self-determination has a temporal aspect, it has meant different things to different peoples at different times. During the decolonisation process, self-determination was linked to independent statehood, or complete independence; so-called ‘external’ self-determination. While self-determination can still be used to justify secession, its more common use is as an external constraint placed on states in relation to identified self-determining groups. Anaya has said that ‘self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation and cultural suffocation.’⁸⁵ The principle of self-determination as it developed post decolonisation has been described as ‘a technique or method, a continuum of rights, a plethora of possible solutions’⁸⁶ rather than complete independence or secession.

Anaya states that self-determination is not separate from other human rights, rather it is ‘a configurative principle or framework’⁸⁷ linking human rights’ norms to the governing institutional order in both form and procedure. He outlines five elements that could be said to constitute the right to self-determination. These are non-discrimination, cultural identity, lands and natural resources, social welfare and development, and self-government.⁸⁸

Tomas argues that self-determination is ‘at heart an open-ended, *enabling* principle of an *emancipatory* kind’.⁸⁹ Behrendt maintains that it is for Indigenous peoples themselves to define self-determination. She outlines a spectrum of rights that she describes as ‘internal self-determination’, a ‘vision of increased Indigenous autonomy within the structures of the ...state.’⁹⁰

⁸⁴ Mutua, above n 1, 19.

⁸⁵ Anaya, above n 3, 98.

⁸⁶ Law Book Company, *Laws of Australia*, vol 1 (at 23 August 2009) 1 Aborigines and Torres Strait Islanders, ‘1.7 International Law’ [66].

⁸⁷ Anaya, above n 3, 99.

⁸⁸ *Ibid* 129.

⁸⁹ Tomas, above n 15, 640.

⁹⁰ Larissa Behrendt, ‘Indigenous Self-determination in the Age of Globalization’ (2001) 3 *Balayi: Culture, Law and Colonialism* 26.

Self-determination is basically about choice and can therefore be exercised in different ways. Shin Imai defines four models of autonomy or choice for Indigenous peoples.⁹¹ The model providing the highest level of autonomy is sovereignty and self-government, allowing control over social, economic and political development. The self-management and self-administration model leads to greater control of community affairs and service delivery within a mainstream government framework. Co-management and joint management embeds Indigenous participation in the management of lands and resources, while the participation in public government model offers opportunities to influence mainstream policies.⁹²

Castellino and Gilbert argue that the concept of self-determination is based on the ideal of protecting oppressed peoples living under external oppression.⁹³ While they maintain that the resolution of self-determination should be encouraged within existing state structures, alternative solutions should not be ruled out.⁹⁴ If a group faces physical extinction from the state within which they exist, then a natural right to self-defence arises that may result in secession.⁹⁵ It has also been claimed that to exclude the right of secession from the right to self-determination is to afford Indigenous peoples an inferior category of self-determination to that held by all other peoples.⁹⁶

Despite lack of clarity around the perimeters of a definition of self-determination, and the fact that it remains a contested legal concept, Anaya believes that normative assumptions about the right of self-determination are developing. Common understandings about the rights of Indigenous peoples, that can be characterised as customary international law, are 'sufficiently crystallized' to respond to the demands of Indigenous peoples in international law.⁹⁷ Like Daes,⁹⁸ Anaya maintains that the principle of self-determination can now be considered to have achieved *jus cogens* in international law.⁹⁹

Although significant progress has been made in the international arena, clarifying and confirming Indigenous peoples' right to self-determination, the situation for Aboriginal and Torres Strait Islander peoples in Australia remains

⁹¹ Shin Imai, 'Indigenous Self-Determination and the State' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous peoples and the Law: Comparative and Critical Perspectives* (2009) 285, 292.

⁹² See *Ibid*, 292-306.

⁹³ Joshua Castellino and Jeremie Gilbert, 'Self-determination, Indigenous Peoples and Minorities' (2003) 3 *Macquarie Law Journal* 155, 166.

⁹⁴ *Ibid* 178.

⁹⁵ *Ibid* 177.

⁹⁶ Law Book Company, *Laws of Australia*, vol 1 (at 23 August 2009) 1 Aborigines and Torres Strait Islanders, '1.7 International Law' [67].

⁹⁷ Anaya, above n 3, 72.

⁹⁸ Daes, above n 30, 369.

⁹⁹ Anaya, above n 3, 97.

dire. The second part of this paper traces Australia's response to the increased commitment to human rights, including self-determination, for Indigenous peoples at the international level. It considers how Indigenous peoples themselves define the right to self-determination and offers some suggestions for a legal response.

THE RIGHT TO SELF-DETERMINATION IN AUSTRALIA

Brief historical overview of Indigenous policy in Australia

It is not possible to understand the current issues and difficulties facing Australia's Aboriginal and Torres Strait Islander peoples and their struggle for rights without an understanding of the violent history of dispossession following colonisation. From the arrival of the first fleet in 1788, Aboriginal and Torres Strait Islander peoples have systematically been stripped of their lands, their culture, rights and in many instances, life itself. Government policy in relation to Indigenous peoples, and the impact of dispossession, has gone through various iterations over the past two hundred or more years.

When the British first invaded Australia, the early governors were instructed to 'conciliate and protect the Aboriginal natives.'¹⁰⁰ However, prevailing racial theories that categorised Aboriginal and Torres Strait Islander peoples as inferior and barbaric, along with the need to gain access to land, provided justification for an end to a brief period of conciliation and protection and an increase in hostilities.¹⁰¹ And so began decades of violence and massacre, extending from at least 1830 to 1910. This period has become known as the 'killing times',¹⁰² during which more than 20,000 Aboriginal people were killed in 'frontier warfare'.¹⁰³ While Aboriginal peoples were supposed to receive the protection of the British legal system, the law was skewed towards the interests of the colonisers. Aboriginal people were not allowed to give testimony (as non-Christians they could not take the oath), and the reality was that very few of those who committed the massacres and the violence towards Aboriginal people were prosecuted.¹⁰⁴ Although there were various attempts to introduce policies to protect Aboriginal peoples over this time, governments were either unable to stop the violence or turned a blind eye. Once the domination of the colonists was established, a more systematic era of protection followed.

From the 1860s onwards, specific legislation was passed in most states to regulate the lives of Aboriginal peoples. These were collectively known as the

¹⁰⁰ David Neal, *The Rule of Law in a Penal Colony* (1991) quoted in McRae, above n 19, 19.

¹⁰¹ McRae, above n 19, 21.

¹⁰² Ibid 25.

¹⁰³ P Grimshaw et al, *Creating a Nation* (1994) in McRae, above n 19, 21.

¹⁰⁴ Behrendt, above n 20, 10.

‘Aborigines Acts’.¹⁰⁵ While this legislation was ostensibly geared to ‘protection’, the reality was that during this time Aboriginal peoples experienced extreme racial discrimination and violation of their basic human rights. Under this policy they were segregated from the rest of society and forced to live on reserves. For example, in Victoria the *Aboriginal Protection Act 1869* (Vic) allowed government to prescribe where Aboriginal peoples lived, negotiate if and on what terms they could be employed, appropriate wages and assume custody of all Aboriginal children.¹⁰⁶ By the end of the nineteenth century, further legislation was passed and Aborigines Protection Boards were set up with powers to control almost all aspects of Aboriginal peoples’ lives.

During the 1930s, protest against the discriminatory protectionist laws grew and Indigenous activists drew the nation’s attention to the ongoing inequality and segregation. In 1937, the first Commonwealth-State Native Welfare Conference was held. This conference agreed that the destiny of Aboriginal people of mixed descent lay in their ‘ultimate absorption by the people of the Commonwealth.’¹⁰⁷ This official shift to a policy of assimilation brought an increased awareness of the importance of racial equality. However despite the introduction of formal equality into legislation, the indiscriminate application of those laws resulted in ongoing segregation and denial of basic equality.¹⁰⁸ This policy also assumed that mainstream culture was superior, and that assimilation meant appropriation of European culture by Aboriginal peoples, rather than white Australia learning about and adopting Aboriginal culture. The removal of Aboriginal people from reserves led to further fragmentation and disruption of family, community and cultural life.

While Indigenous policy underwent a radical transformation in the 1970s with the election of the Whitlam Labor government, it could be argued that the legacy of the protectionist and assimilationist policy is still embedded in the nation’s psyche. The longer-term implications of these policies can be seen in the ongoing racism that is still prevalent across much of the country, and deeply held suspicion that Aboriginal people are incapable of managing their own lives. This is particularly evident in the ideology underpinning the NTER discussed later in this paper. Negative perceptions of Aboriginal and Torres Strait Islander peoples have been compounded by competing versions of the history of colonisation, evident in what have been called the ‘history wars’ that were encouraged to flourish under the Howard government. These have been described as ‘battles about identity and legitimacy’.¹⁰⁹ The winner of these

¹⁰⁵ McRae, above n 19, 25.

¹⁰⁶ *Aboriginal Protection Act 1869* (Vic).

<http://foundingdocs.gov.au/resources/transcripts/vic7i_doc_1869.pdf>.

¹⁰⁷ Quoted in Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 2 (1991) 510.

¹⁰⁸ *Ibid* 39.

¹⁰⁹ Behrendt, above n 20, 4.

battles continues to be a western liberal ‘Christian’ idealisation of social and cultural superiority.

The policy of ‘self-determination’

‘Self-determination’ was first applied to Indigenous policy in Australia when the Whitlam Labor Government came to power in 1972. This policy was a radical shift from the assimilationist policies of the previous decades, and was undoubtedly influenced by the increasing focus on the principle of self-determination at international law.¹¹⁰ While this policy was called ‘self-determination’, there was never an intention that it include rights to sovereignty, secession or independent statehood.¹¹¹ It did however herald a major change in the way government engaged with Aboriginal and Torres Strait Islander peoples. As a policy, self-determination received broad support and in 1991, when the Royal Commission into Aboriginal Deaths in Custody recommended that self-determination be the underlying principle in any policy or program affecting Aboriginal people, it was supported without qualification by all Australian governments.¹¹² In 1992, the Council of Australian Government’s (COAG) *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal and Torres Strait Islanders*, established as a guiding principle for service delivery at all levels of government ‘the empowerment, self-determination and self-management of Aboriginal peoples and Torres Strait Islanders’¹¹³

Sanders outlines four areas of institutional reform brought in under the Whitlam government’s new federal policy.¹¹⁴ First, the government strengthened the role of the Commonwealth and established a federal Department of Aboriginal Affairs; second, it encouraged the development of incorporated community-based Indigenous organizations; third, it established a Royal Commission into the recognition of land rights; and fourth, it established a national Indigenous elected body, the National Aboriginal Consultative Committee (NACC).¹¹⁵ Despite several changes of government at the federal level, these four strands were developed over almost three decades and significant advances were made in all areas.

The most significant shift in policy under Whitlam was the commitment to national land rights and a Royal Commission was set up to inquire into how

¹¹⁰ Will Sanders, ‘Towards an Indigenous Order of Australian Government: Rethinking Self-determination as Indigenous Affairs Policy’ Centre for Aboriginal Economic Research *Discussion Paper* 230/2002 1 <<http://anu.edu.au/caepr>>.

¹¹¹ McRae, above n 19, 41.

¹¹² Sanders, above n 110, 2.

¹¹³ Council of Australian Governments, *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal and Torres Strait Islanders*, COAG, Perth, 1992, para 4.1.

¹¹⁴ Sanders, above n 110, 3.

¹¹⁵ *Ibid.*

land rights could be realised across Australia. As a result, land rights legislation was first passed in 1976 in the Northern Territory and by 1996, most Australian jurisdictions had passed legislation recognising Indigenous rights to land. The landmark *Mabo*¹¹⁶ decision was also during this period, ending the legal fiction that Australia was terra nullius at the time of colonisation. The Keating government responded to the *Mabo* decision with the *Native Title Act 1993* (Cth), along with the establishment of the Land Fund, the Indigenous Land Corporation and a proposal for a ‘social justice package’. The Land Fund was set up in acknowledgement that dispossession would make it impossible for most Aboriginal people to prove native title and therefore benefit from the *Mabo* decision.¹¹⁷ The social justice package was to address broader unresolved issues, and included a rights based approach to improved living conditions and an improved relationship between Indigenous and non-Indigenous Australians.¹¹⁸

In 1973, the NACC was set up to advise government on Indigenous policy and was the first representative national body elected by Aboriginal people. It went through several iterations before being replaced by the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1990. ATSIC had both a representative function and an administrative function; it advised government and set funding priorities. It represented a significant shift in power from government to an elected body with decision-making power over Aboriginal programs and an annual budget of over \$1 billion.¹¹⁹

Rowse argues that the proliferation of Indigenous-run organisations, set up to deliver services and programs for Indigenous peoples, were one of the most important things to come out of the period of self-determination.¹²⁰ It has also been argued that the role of the ongoing Indigenous sector can be seen as a contemporary expression of Indigenous rights to self-government and self-determination.¹²¹

During this period the *Racial Discrimination Act 1975* (Cth) (the ‘RDA’) was passed, effectively embedding the *UN Convention on the Elimination of All Forms of Racial Discrimination* (CERD) into Australian domestic law. Other significant initiatives included several attempts to progress a treaty and the work of the Council for Aboriginal Reconciliation (CAR). In the international arena, Australia actively supported the drafting of the DRIP and supported the inclusion of the right to self-determination, acknowledging that self-

¹¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹¹⁷ Behrendt, above n 20, 319.

¹¹⁸ McRae, above n 19, 691.

¹¹⁹ *Ibid* 165.

¹²⁰ Rowse cited in Sanders, above n 110, 5.

¹²¹ Sanders, above n 110, 8.

determination did not imply a right of secession.¹²²

While the era of self-determination was a time of significant progress in the recognition and implementation of rights for Indigenous peoples across Australia, self-determination as it was implemented was largely a bureaucratic notion imposed on Indigenous communities, with limited institutional capacity, who were expected to comply with bureaucratic frameworks.¹²³ Funding was often short-term, preventing communities from engaging in more holistic, long term planning. This led to inefficiency and uncoordinated service delivery. Paradoxically, this version of self-determination meant that Indigenous communities stayed tied to government control. The *Social Justice Report 2002* states that self-determination has largely been a ‘statement of intention rather than of action’.¹²⁴

The *National Report* of the Royal Commission into Aboriginal Deaths in Custody suggests that while Aboriginal people were keen to take up the opportunity and take charge of their communities, appropriate structures were not in place and they were not trained for the task. The Report describes self-determination as a ‘cruel hoax’; Aboriginal people ‘were bequeathed the administrative mess that non-Aboriginal people had left and were ... told to fix it up’.¹²⁵ Rowse identifies the irony in Aboriginal communities being expected to adopt non-Indigenous structures in order to have ‘greater control over their own affairs’.¹²⁶ Perhaps, as the WA Law Reform Commission argues, the rhetoric of ‘self-determination’ allowed governments to abdicate their responsibility for providing services that are an entitlement of citizenship, services non-Indigenous Australians take for granted.¹²⁷

Ignoring clear evidence of the link between years of government neglect and the dysfunction in Aboriginal communities, self-determination was deemed a ‘failed experiment’ providing the rationale for a shift in policy when the Howard government came to office in 1997.

¹²² Megan Davis, ‘The United Nations Declaration on the Rights of Indigenous Peoples’ (Working Paper no 16, *University of New South Wales Faculty of Law Research Series*, 2008) 59 <<http://law.bepress.com/unswwps/flrps08/art16>> quoting a statement made by Mr Bill Barker, on behalf of the Australian Delegation, Geneva, 21 November 1995.

¹²³ *Social Justice Report* above n 77, 10.

¹²⁴ *Ibid.*

¹²⁵ Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 4 (1991) 39.

¹²⁶ Tim Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination* (1992) 98.

¹²⁷ Janet Hunt et al (eds), *Contested Governance: Culture Power and Institutions in Indigenous Australia* (ANU E Press, 2008) 35

<http://epress.anu.edu.au/caepr_series/no_29/pdf/whole_book.pdf> quoting the WA Law Reform Commission.

A shift in ideology under Howard- Mutual Obligation

The neo-liberal ideology of the new government assumed that dispossession alone did not explain ongoing disadvantage in Aboriginal communities. Under a policy of 'mutual obligation' Aboriginal and Torres Strait Islander people themselves were expected to take responsibility for improving their own situation. This placed Aboriginal people in an invidious situation, where government asked them to take more responsibility yet removed the decision-making structures and resources that make this possible. The result was increasing paternalism as government increased its control over services while claiming it was not prepared to support different rights for one section of the community. 'Self-determination' was replaced with 'practical reconciliation'; based on an assumption that rights alone cannot improve levels of disadvantage. The rejection of self-determination as foundational policy was confirmed in the government's response to the CAR report.

The Council for Reconciliation (CAR) was an initiative of the Hawke government, set up to promote reconciliation after treaty discussions were abandoned.¹²⁸ The outcome of its nine years of broad consultation and active collaboration were two documents of reconciliation, the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*. The *Declaration* states that '...Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation'.¹²⁹ The Howard government's immediate response to this wording was its own version of the *Declaration*, replacing the above words with '... the right of Aboriginal and Torres Strait Islander peoples, along with all Australians, to determine their own destiny'.¹³⁰ Self-determination was thus seen as an adversary to the government's approach.¹³¹

Gunstone identifies two other factors that indicate that the shift in policy from self-determination to practical reconciliation was a deliberate shift in ideology rather than a search for something to replace a 'failed' policy. First is an increased focus on nationalism, a discourse that emphasises unity rather than difference. Within a nationalist discourse, a commitment to self-determination, an issue that requires acknowledgement of difference, cannot be tolerated.¹³² Second, practical reconciliation has a limited notion of justice, focussing on socio-economic issues rather than substantive justice such as the right of self-determination or addressing unequal power relationships.¹³³

¹²⁸ McRae, above n 19, 680.

¹²⁹ Council for Aboriginal Reconciliation, *Australian Declaration Towards Reconciliation in* McRae, above n 19, 324.

¹³⁰ *Social Justice Report*, above n 77, 33.

¹³¹ *Ibid* 35.

¹³² Andrew Gunstone, 'Unfinished Business: the Australian reconciliation process from 1991 to 2000' (2005) 8 (3-4) *Journal of Australian Indigenous Issues* 10.

¹³³ *Ibid* 11.

In UN forums at this time, Australia's support for the DRIP was withdrawn. In the final years of the drafting process, Australia actively opposed the DRIP and the inclusion of a right to self-determination was one of its major concerns. In his official explanation to the General Assembly, Ambassador Robert Hill outlines why Australia voted against the DRIP. He states that Australia could not support a concept 'that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative government'.¹³⁴ Hill was also concerned that self-determination would mean that the government was 'obliged to consult with Indigenous peoples about every aspect of the law that might affect them' and that a 'sub-group of the population [would] be able to veto the legitimate decisions of a democratic and representative government'.¹³⁵

Perhaps the clearest example of how far the Howard government moved away from the policy of self-determination is the NTER. Despite years of solid evidence on the dire situation in Aboriginal communities in the Northern Territory (NT), and the many, often successful Indigenous lead responses, in June 2007 the federal government initiated an 'emergency response' to tackle child abuse and violence in NT Aboriginal communities. This response, and the plethora of legislation and policy that accompanied it, has been an almost complete antithesis to self-determination. The army was sent in to 'stabilise' communities, there was no consultation with Indigenous peoples themselves, the RDA was suspended to enable quarantining of welfare payments and very little of the substantial allocated funding ended up in Aboriginal communities. Perhaps most damaging has been the punitive nature of the response and the return to sentiments of the protection era; a belief that Aboriginal and Torres Strait Islander peoples are incapable of looking after themselves.

Since the election of the Rudd Labor government in November 2007, there have been some positive changes. Rudd delivered an Apology to the Stolen Generations in February 2008 and Australia has belatedly adopted the *DRIP*. More recently a new representative body, the National Congress, has been established, and an Expert Panel has been appointed to report to Parliament and recommend ways to recognise Indigenous peoples in the *Australian Constitution*. Despite these incremental changes, there is much that needs to be done to adequately protect the rights of Aboriginal and Torres Strait Islander peoples in Australia.

Evidence base to support self-determination

There are sound economic and social reasons for promoting a policy of self-

¹³⁴ Robert Hill, 'Explanation of Vote' by the Hon Robert Hill Ambassador and Permanent Representative of Australia to the United Nations' General Assembly, 13 September 2007. <http://www.australiaun.org/unny/070913_GA.html>.

¹³⁵ *Ibid.*

determination.¹³⁶ Research undertaken by Chandler on Indian reserves in Canada shows that suicide rates are lower when the reserves have self-government over health, education, child protection, policing, access to traditional lands and preservation of culture. Maintaining traditional languages was also seen as a positive indicator.¹³⁷

In the United States, the Harvard Project on American Indian Development conducted research over almost 20 years to document the factors influencing economic development among Indian nations in the United States. The results show that self-determination and economic prosperity are ‘inextricably linked’.¹³⁸ The project identified four key factors that have a positive impact on economic development: sovereignty, effective governance institutions, culture and leadership.¹³⁹ When Indigenous peoples have jurisdiction or sovereignty over major decisions such as resource allocations, project funding and development strategy, they consistently out-perform external decision makers.¹⁴⁰ Sovereignty must however be backed up with capable institutions of governance. This includes putting in place non-political dispute resolution processes, eradicating corruption and separating politics from business and program management. Governing institutions must have the support of the people they govern, and this means institutions need to be culturally grounded in Indigenous conceptions of how authority should be organised and exercised. The final factor is effective leadership that convinces people that things can be different and inspires them to take action.¹⁴¹

The above discussion highlights that without effective jurisdiction or sovereign control over substantive decision-making, Indigenous peoples find it difficult to exercise their right to self-determination. Self-government that is limited to operational administration, allowing Indigenous peoples to administer services that were once administered by somebody else, is not effective self-determination.¹⁴²

What do Aboriginal and Torres Strait Islander peoples in Australia say they want?

True self-determination must surely mean the right of a people or peoples to define for themselves what self-determination means. Behrendt argues that while international law has been a useful tool, especially in the development of

¹³⁶ Imai, above n 91, 289.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Harvard Project on American Indian Economic Development, overview at <<http://www.hks.harvard.edu/hpaied/overview>>.

¹⁴⁰ Stephen Cornell, ‘Nation Building and the Treaty Process’ (2002) 5 (17) *Indigenous Law Bulletin* 7, 7-8.

¹⁴¹ *Ibid* 8-9.

¹⁴² *Ibid* 10.

a specific language of rights, Australian Indigenous peoples shouldn't feel constrained by the ways self-determination has been defined at international law. Instead of imposing definitions and solutions that have been developed elsewhere, the starting point should be the way self-determination is expressed by Indigenous peoples at a 'grass roots' level.¹⁴³ How then do Aboriginal and Torres Strait Islander peoples in Australia define their aspirations for self-determination and increased autonomy? There is a plethora of material to answer this question.

Behrendt kicks off with a spectrum of rights including:

...the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas waters and natural resources, the right to be educated and to work, the right to be economic[ally] self-sufficient, and the right to be involved in decision making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.¹⁴⁴

Perhaps the most comprehensive survey of the aspirations of Aboriginal and Torres Strait Islander peoples in Australia was the work done by ATSIC to help the government prepare the social justice package. This remains the 'most accurate blueprint for reforms that reflect the views' of Australia's Indigenous peoples.¹⁴⁵ The list of rights enumerated in this report, along with recommendations in similar reports undertaken by CAR and the Social Justice Commissioner, outline a list of 'unfinished business'.¹⁴⁶ The rights listed include both citizenship and equality rights and Indigenous rights. Citizenship/equality rights are basically socio-economic rights and include equality, special measures, education and training, economic and social development and participation and partnerships.¹⁴⁷ The Indigenous rights fall under three headings and include: territorial rights, including land, resources and resource development; cultural rights including culture, spiritual tradition, language and law; and political rights including self-government, self-determination, constitutional recognition, treaties and agreements, and legislation.¹⁴⁸

Strengthening human rights protection in Australia

Aboriginal and Torres Strait Islander peoples in Australia argue that they have never ceded their right to self-determination and continue to exercise it in a variety of ways. However, the need for formal recognition and adequate protection of Indigenous rights in Australia is critical and any attempt to seriously address the right to self-determination will require a range of

¹⁴³ Behrendt, above n 90, 2.

¹⁴⁴ *Ibid.*

¹⁴⁵ Behrendt, above n 20, 320.

¹⁴⁶ McRae, above n 19, 694.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* 696-698.

measures. The existing political and legal structures will continue to limit what might be possible and protecting the right to self-determination in Australia will require a transformation of existing power structures resulting in a more equitable power sharing between Aboriginal and Torres Strait Islander peoples and the state. Substantive constitutional and legislative change is needed, along with policy initiatives to reduce levels of disadvantage and strengthen the capacity of Indigenous peoples to participate as self-determining peoples. Cultural and legislative changes are also needed to reduce the limitations inherent in the judicial system to increase the capacity of the courts to address the rights of Aboriginal and Torres Strait Islander peoples. Finally, a focus on reducing racism is required to create a more tolerant and educated Australian society.

International law provides a clear framework for the protection of Indigenous rights. International law can influence domestic law either by the incorporation of international obligations into domestic law or by using international human rights norms to interpret domestic law through the courts.¹⁴⁹

Human rights instruments are not legally enforceable in Australia unless they are incorporated into statute. For example, Australia's obligations under CERD are incorporated into domestic law through the RDA. However, as the NTER demonstrates, unless those rights are embedded in the *Australian Constitution*, they are vulnerable to the political forces of a majoritarian democracy and can be changed by parliament. The capacity of Aboriginal and Torres Strait Islander peoples to influence the political agenda is limited by being a small, dispersed population that has become economically and socially marginalised. While the *Australian Constitution* could offer stronger protection of rights, constitutional change is only possible through a referendum and this has proven extremely difficult to achieve in Australia: there have been 44 referenda of which eight have been successful. Constitutional protection against racial discrimination would involve both the removal of s 25, the controversial races power, and the inclusion of a section to embed this protection into the *Australian Constitution*. The RDA has been suspended several times now directly affecting the rights of Indigenous peoples and without constitutional protection, history has shown that it provides weaker protection. Anti-discrimination legislation across the country could also be extended to protect 'peoples' alongside individuals, offering further protection for Indigenous peoples.

A treaty between Aboriginal and Torres Strait peoples and the government would provide a foundation for the protection of substantive rights, including the right to self-determination. Frameworks to promote self-government are more likely to protect rights to self-determination if they are protected by either a treaty or legislation.

¹⁴⁹ Behrendt, above n 20, 310.

The DRIP provides a comprehensive list of rights that would provide substantial protection of Indigenous rights if they were incorporated into domestic legislation. Most importantly, legislative change is needed in the areas of land and culture. Self-determination requires access to land and resources, an integral part of Indigenous identity and essential for economic development. Native title is the weakest form of land title and it has become even weaker with the progressive changes to native title legislation since the *Native Title Act 1993* was introduced. Strengthening legislation relating to both native title and land rights is essential to restore lands to Traditional Owners. Self-determination also includes the right to maintain cultural identity. Culture is protected in various pieces of legislation across the country, but this does not always offer protection in practice.

As Australia has no constitutional recognition of the rights of Aboriginal and Torres Strait Islander peoples, the courts have often been the only available avenue for Indigenous peoples to assert rights that may not be politically popular. The *Mabo* decision is the clearest example of the courts using international human rights standards to effect significant change in the way international norms are perceived in a domestic context. However, Strelein outlines the limits within the judicial system that may work against the recognition and protection of those rights.¹⁵⁰ She identifies constitutional or structural barriers that limit the power and independence of the courts, including the perceived power by the judiciary to invalidate legislation.¹⁵¹ Strelein also identifies procedural barriers that limit the capacity of the courts to hear evidence from an Indigenous perspective. She cites analysis from Canada indicating that the biggest hurdle faced by Indigenous peoples in the court system is the failure of the courts to acknowledge cultural bias.¹⁵² This includes a reluctance to view the evidence from an alternative perspective and conscious or unconscious stereotyping of Indigenous peoples. The courts are therefore a ‘cultural institution with inherent limits to understanding, recognising and respecting indigenous claims’.¹⁵³

Communities need capacity and infrastructure to negotiate with government on an equal footing. This will require both effective government policy and a corresponding injection of resources to improve and promote the economic and social welfare of Indigenous peoples. Areas to be targeted include education, health, housing and community infrastructure.

¹⁵⁰ Lisa Strelein, “‘The Courts of the Conqueror’: the Judicial System and the Assertion of Indigenous Peoples’ Rights” (2000) 5(3) *Australian Indigenous Law Reporter* 1, 2.

¹⁵¹ *Ibid.*

¹⁵² Michael Asch and Catherine Bell, ‘Definition and interpretation of fact in Canadian Aboriginal title litigation: and analysis of *Delgamuukw*’ (1994) 19 (2) *Queens Law Journal* cited in Strelein, above n 150, 12.

¹⁵³ Strelein, above n 150, 17.

While the articulation of self-determination in Australia needs to be led by Aboriginal and Torres Strait Islander peoples, and rights firmly embedded structurally, a lasting change will also require a shift in societal attitudes. The existence of international and domestic standards does not necessarily mean that people can enjoy or exercise their human rights. Strategies to educate the broader community and address ongoing and deeply held racist beliefs are essential. As Malezer states:

In Australia we need to build a tolerant, informed society where individuals are prepared to stand up and defend human rights. To do this we need to improve knowledge about the role of universal human rights standards, and greater commitment to these standards at the highest levels of society.¹⁵⁴

Conclusion

The principle of self-determination has developed in international law from its early beginnings, through the development of human rights law and the process of decolonisation. It has become particularly important to Indigenous peoples in colonised countries as they seek to renegotiate relationships with governing states. Growing evidence in international research indicates that improvement in social and economic outcomes are more likely when Indigenous people are free to exercise their right to self-determination.

Australia has been slow to acknowledge the rights of Indigenous peoples and without a treaty or constitutional protection, the right to self-determination remains vulnerable. Current neo-liberal policy in Australia indicates that without constitutional entrenchment of rights, even rights protected by legislation are subject to changes in political ideology.

The protection of the right to self-determination requires constitutional and legislative change, including a treaty, along with policy initiatives to reduce levels of disadvantage and strengthen the capacity of Indigenous peoples to participate as self-determining peoples. Cultural and legislative changes to improve the accessibility of the judicial system and strategies to reduce racism are also required. It will take strong commitment from all governments and the Australian community to address this unfinished business, and recognise the right of self-determination for Aboriginal and Torres Strait Islander peoples in Australia.

¹⁵⁴ Naomi Hunt, 'An Interview with Les Malezer' (2009) 7 (11) *Indigenous Law Bulletin* 9, 11.