Aboriginal self-determination

The 'new partnership' of the 1990s

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Self-determination for Aboriginal people should be an uncontroversial statement of Aboriginal aspirations

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In October 1992, we will mark the 500th anniversary of Columbus's discovery of the Americas. Indigenous peoples will remind us that Columbus discovered nothing which had not already been discovered, inhabited, and reflected upon for centuries by entire societies which were to suffer the down side of colonisation — dispossession, subjugation and even death. In that same month in New York, the United Nations Secretary General will formally open the International Year for the World's Indigenous Peoples with the theme 'Indigenous Peoples — A New Partnership'. State parties have been encouraged to produce and circulate 'State of the Nation' reports on the status of their indigenous peoples. There is a commitment to examine concepts such as self-development and autonomy for indigenous populations.

These timely events will again focus discussion of Aboriginal rights in Australia which have periodically fallen under the international spotlight. The international attention will force further consideration of Aboriginal rights under law as we prepare for the centenary of the Australian Constitution on 1 January 2001 which will be preceded by a major review of the Constitution commenced by the Constitutional Centenary Conference held last year in Sydney.

The Barunga

Courtesy of Bob Hawke in the dying minutes of his prime ministership, the Barunga statement which is a land council sponsored Charter of Aboriginal Rights from the Northern Territory now hangs in Parliament House, Canberra. It will hang as a constant reminder that indigenous rights are about more than alleviating poverty and combating disadvantage, and rectifying dispossession. Making the statement, the Northern and Central Land Councils spoke for 'the indigenous owners and occupiers of Australia' in their call on the Australian Government and people to recognise their rights:

to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;

- to permanent control and enjoyment of our ancestral lands;
- to compensation for the loss of our lands, there having been no extinction of original title;
- to protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
- to the return of the remains of our ancestors for burial in accordance with our traditions;
- to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our languages and in our own culture and history;
- in accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

They called on the Commonwealth to pass laws providing:

- a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
- a national system of land rights;
- a police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

They asked that the Australian Government support Aborigines in the development of an international declaration of principles of indigenous rights, leading to an international covenant, and called on the Commonwealth Parliament 'to negotiate with us a treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms'.

At the time the statement was presented to Hawke, he and his then Minister for Aboriginal Affairs, Gerry Hand, signed an agreement with land council representatives Galarrwuy Yunupingu and Wenten Rubuntja:

1. The government affirms that it is committed to work for a negotiated treaty with Aboriginal people.
2. The government sees the next step as Aborigines deciding what they believe should be in the treaty.
3. The government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations: this could include the formation of a committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting or convention.
4. When Aborigines present their proposals the government stands ready to negotiate about them.
5. The government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed treaty in the life of this Parliament.

International context

Even if the day were approaching when social indicators could be quoted to assure all that Aborigines as a group or class were no longer poor, disadvantaged and dispossessed, we would still need to consider the issue of indigenous rights. Even 500 years after Columbus, these are uncharted waters for the international community. One of the prime purposes of the United Nations is to promote and encourage respect for human rights and fundamental freedoms without distinction as to race. There is a well developed jurisprudence of discrimination legislation which permits temporary measures of benign discrimination even on the basis of race because such measures assist racially identifiable deprived groups to catch up and participate equally in the general society of which they are a part, in the sovereign nation states from which they are not permitted to separate. Is the United Nations now to encourage or permit the recognition of permanent measures of benign discrimination in favour of indigenous groups as part of its charter for promoting human rights without distinction as to race?

Since 1982, many indigenous groups have been pressing the UN Working Group on Indigenous Populations (WGIP) to recognise their entitlement to self-determination within the legal framework of the nation states built on their dispossession without consent or compensation. The abiding concern of indigenous people in the international forum since the establishment of the WGIP has been the issue of self-determination. Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights proclaim: '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 development'.

In international law, self-determination has come to have a technical meaning in the decolonisation process. When a colonial power is withdrawing from a territory, the people of the territory are to be assured a free choice in determining their political future. By a 1960 resolution of the General Assembly, the UN made a 'Declaration on the Granting of Independence to Colonial Countries and Peoples' which proclaims the right of all peoples to determine freely their political status and pursue freely their economic, social and cultural development.[1] In recent years, indigenous representatives have attempted to argue by analogy that their people are 'peoples' in the international law sense who also have the collective right to determine their future whether as part of the nation state in which they live at present or even as a separate state or entity enjoying international recognition. This analogical argument has had little appeal to governments which are prepared to concede only internal self-determination to allow indigenous groups more autonomy as of right in the domestic political arrangements of the nation. They are not prepared to recognise external self-determination which carries the right to separate nationhood and autonomous sovereignty.

There is now a domestic meaning of self-determination which connotes more than self-management. It incorporates the notion that indigenous organisations and representatives should be able to shape policy for their people and not simply manage government programs, run co-operative enterprises and administer local government functions for communities which happen to be indigenous. This political term has no guaranteed legal content. Continued attempts by Aboriginal leaders to extend it to self-determination in the international law sense take no account of the provision in the United Nations resolution which provides:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.[2]

A racially or ethnically distinct group does not necessarily constitute a 'people' in international law. In the *Western Sahara Case*, the International Court of Justice found that the principle of self-determination had broadened since 1960 to include 'the need to pay regard to the freely expressed will of peoples'. But having reviewed various instances where the General Assembly had dispensed with the need for consultation with the inhabitants of a territory, it found that there had been cases where the group did not constitute a 'people' entitled to self-determination or where consultation was unnecessary presumably because the people had been absorbed for so long as part of the state or were not in a territorially separate area.[3]

At the ninth meeting of the WGIP held in Geneva in August 1991, participants revised, amended and improved various provisions of the draft Declaration on Indigenous Rights. The draft proclaims:

> Indigenous people have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the states in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

The draft declaration concedes that the right is to be exercised 'in accordance with international law'. Furthermore indigenous people who are part of a state are not completely free to 'determine their political status'. But they are 'to freely determine their relationship with the states in which they live, in a spirit of co-existence with other citizens'.

During the re-drafting of ILO Convention 107 which is now Convention 169, there was much agitation about the issue of self-determination for indigenous people. There was agreement that indigenous and tribal people should have as much control as possible over their economic, social and cultural development. The Australian Government was agreeable to proposals which would provide Aborigines 'the greater autonomy and decision-making powers within existing legislative and administrative structures'.[4] The original

convention had spoken of 'populations'. In response to demands from indigenous groups, the ILO agreed to refer to 'peoples' but adding the rider:

> The use of the term 'peoples' in this convention shall not be construed as having any implications as regards the rights which may attach to the term under International Law.[5]

Governments were anxious to avoid erroneous interpretation of the term 'peoples' in the context of self-determination. They also wanted to avoid any promotion of separatist ideas. The committee responsible for the convention reported 'that the use of the term "peoples" in the convention has no implication as regards the right to self-determination as understood in international law'.[6]

At the 1991 session of the WGIP, the Brazilian observer delegation expressed the view that some articles of the Draft Declaration of Indigenous Rights would 'hardly be accepted by most governments if their present language is maintained: for instance, those provisions which tend to attribute to indigenous people the right to self-determination similar to that enjoyed by sovereign states under international law'. If pressed, the Australian Government delegation presumably would add the same reservation.

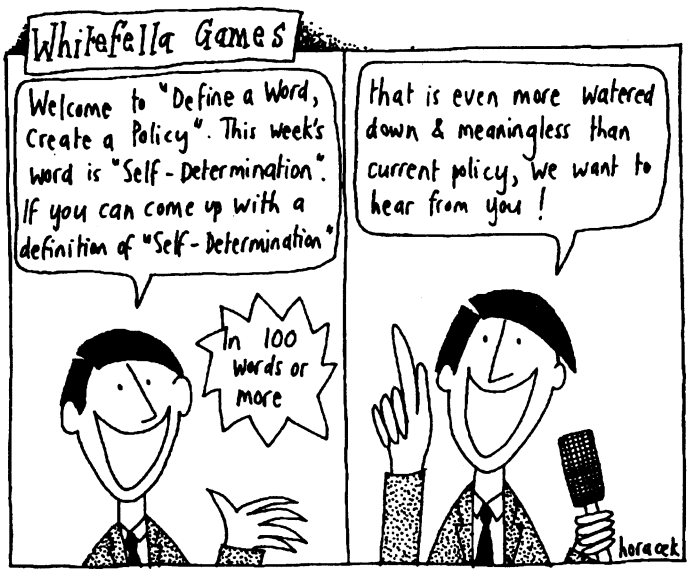
The General Assembly's resolution establishing the forthcoming International Year makes no mention of self-determination. It is restricted to self-development. However, the Australian Government in welcoming the United Nations initiative has said, 'It will be an opportunity to reflect further on what the right to self-determination means for indigenous peoples'.[7] The General Assembly has already resolved to examine the possibility of holding the 1992 or 1993 session of the WGIP in the Asia-Pacific region. Given the high participation by Aborigines in the group, Australia would have to be a frontrunner to host the conference which is usually tied to Geneva.

The Australian context

Within Australia, the most appropriate forum for consideration of the limits of self-determination will be the Council for Aboriginal Reconciliation which has a statutorily guaranteed life until 1 January 2001. The ten-year-old word games about treaties and sovereignty have meant the Council's establishment has been clouded in suspicion. There has never been any prospect of the Commonwealth, State and Territory Governments negotiating an agreement conceding or ceding sovereignty to an Aboriginal nation or nations.

There is no prior legal or philosophical reason why areas such as Torres Strait and Arnhem Land could not be constituted as States of the federation or even as separate nations some time in the future. The usual provisos of discrete territory, people and economic base together with consent of affected persons could be met in the distant future, especially if there were to be major oil discoveries in the Torres Strait. A compact of free association with mainland Australia could deal with defence and foreign policy issues. But there is no indication of overwhelming desire for such a regime from the traditional residents of these areas. They are a long way from economic and service self-sufficiency. They find advantages as well as disadvantages in being part of the Australian nation. Many see themselves as and want to remain Australians, albeit recognised and respected as the indigenous peoples of the continent.

Even if Aborigines in Redfern, Fitzroy or West End wanted separate statehood within the federation, or nationhood, they would be ineligible as they lack a discrete land base with readily identifiable boundaries. Their yearnings for self-determination would have to be realised within the States and Territories of the federation composed of a mix of races. For them, constitutional and legal accommodation within the Australian nation is the only way to go. This does not necessarily entail assimilation or integration. Within the constitutional framework, they could be accorded greater autonomy as discrete communities for the governance of matters relating only to members of those communities. The difficulty in setting limits would arise between the rights of an individual who wants to be treated like any other Australian (e.g. not being forced into a traditional marriage or initiation process) and the entitlement of the community to order its affairs according to customary law so as to maintain and preserve the culture. There would have to be guaranteed opting out procedures.



A new approach

In the political process, we have yet to move beyond the paternalistic phase of open-ended consultation to negotiation within agreed or non-negotiable parameters. Romantic rhetoric about a monolithic and mythical Aboriginal nation, and unyielding insistence that all Austr-alians be treated the same without regard to, or legal protection of, prior rights and entitlements, must give way to a creative partnership to explore possibilities for maximum indigenisation within the life of the nation.

At the very least Aborigines ought to be able to call the executive arm of government to account before an independent tribunal for practices or policies inconsistent with the entitlement to self-determination. Our parliaments should be required by the Constitution to legislate subject to Aboriginal law in circumstances when all parties are Aborigines who consent to Aboriginal law prevailing. Our courts should apply Aboriginal law when all parties, including a victim's closest kin, are Aboriginal and agree to such law applying. Aboriginal law would be best set down by Aboriginal councils and applied by Aboriginal courts. Even these limited incidences of self-determination within a more diverse nation may not be sought by most Aborigines. As a nation we need to hear the aspirations of contemporary indigenous Australians and then debate their moral entitlements.

At the end of the recent sit-in by Aborigines in the old Parliament House on Australia Day 1992, the National Aboriginal and Islander Legal Services

Secretariat (NAILSS) acting 'on behalf of the Aboriginal nation' presented the Minister for Aboriginal Affairs, Mr Robert Tickner, with a declaration of Aboriginal sovereignty:

> We, the members of the Aboriginal Nation and Peoples, do hereby give notice of invoking our claim to all the land of the Territories of our ancestors. Accordingly, we invoke the Rule of International Law that we have never surrendered nor acquiesced in our claim to these lands and territories. This occupation of the site of the old Parliament building is evidence of our right to self-government and self-determination in our lands and territories.
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> We therefore draw the attention of the International Community and the United Nations to our peaceful and lawful right of occupation of our lands and territories.

This declaration is reminiscent of Mr Paul Coe's proceedings in the High Court in 1978 when he attempted to agitate the issue of Aboriginal sovereignty against the Commonwealth and the Government of the United Kingdom of Great Britain and Northern Ireland. In that action, he claimed to have authority from 'the whole Aboriginal community and nation to bring this action'.[8] Such claims are not entertainable by the International Court of Justice nor the High Court of Australia. Naturally, it is for Aboriginal leaders to determine their political strategy of ambit claims and rhetoric which effects a shift in the goal posts or middle ground. However, inflated rhetoric from a minority always risks further alienation from the majority, especially if the self-interest of the majority is threatened in any way.

Self-determination — Federal Parliament's view

There has been only one sustained parliamentary debate in the Australian Parliament on self-determination and its limits for Aborigines. That was at the time of the 1988 resolution passed by both Houses affirming the entitlement of self-determination 'subject to the Constitution and the laws of the Commonwealth'.[9] The Liberal and National Parties would agree to this clause only if the entitlement to self-determination were further qualified by the words 'in common with all other Australians'. Proposing the amendment to Parliament, Mr Howard said, 'We are concerned that the motion in its present form, and without the addition of those words, can create the perception of separate development and the impression of divisions in the Australian community'.[10] Urging adoption of their amendment, he claimed it was 'not provocative, was not negative, was not destructive and would not in any way destroy the thrust of the motion'.[11] It was potentially all four.

Senator Fred Chaney put forward two novel arguments for the amendment. First, he said the entitlement to self-determination was insufficiently qualified because 'all peoples seeking self-determination . . . are within some existing body politic and subject to its constitution and its laws'.[12] And second, government departments 'have agreed that Australian government delegates in international fora will not use the term 'self-determination' to prevent its misinterpretation or its extension beyond Australian Government policy'.[13] Chaney told the Senate that he had attended the 1988 session of the ILO where the Australian Government made the point that it did not want to hear the expression 'self-determination' used in a way that might require 'national political institutions and legal systems be redesigned to reflect the character of indigenous populations'. He told the Senate:

> Advice has been sought and I am told, according to an officer of the Department of Foreign Affairs and Trade, that that Department and the Department of the Prime Minister and Cabinet have agreed that Australian Government delegates in international fora will not use the term 'self-determination' to prevent its misinterpretation or its extension beyond Australian Government policy.
>
> Mr Deputy President, that is the sole area that the Opposition raises as an objection of substance to this motion. This Government itself has cautioned against the use of the expression 'self-determination' in an International Labour Organisation convention specifically relating to our indigenous people. We raise the same concern and ask the Senate, therefore, to make a modest amendment to this motion simply to ensure that people of ill will cannot misuse it and that it cannot be used internationally to suggest that there is within Australia the seeds of a separate national state.[14]

These arguments, if valid, would indicate a need for exclusion altogether of the term 'self-determination' rather than a qualification. The first argument misconstrued the effect of the words of qualification. The entitlement to self-determination was qualified by the words 'subject to . . . ' This is not the same as saying 'Aborigines subject to the Constitution . . . are entitled to self-determination' in an unqualified sense.

The second argument was refuted by the Government's own willingness to sponsor the resolution and by the Government's own proposal for legislation (later dropped because of Australian Democrat concerns about other issues) which stated that Aborigines were entitled to self-determination 'within the Australian nation'.[15]

At best, the proposed amendment was ambiguous suggesting that the entitlement to self-determination was universal but exerciseable discretely by separate groups. At worst, it was ruthlessly assimilationist suggesting that self-determination could be exercised only collectively by all Australians thereby excluding the Aboriginal choice between a traditional lifestyle and that of other Australians.

The present Minister for Aboriginal Affairs, Mr Robert Tickner, has taken his lead from the recent Royal Commission into Aboriginal Deaths in Custody and enunciated self-determination as a key concept of Government policy. He told the recent session of the WGIP that the Aboriginal and Torres Strait Islander Commission (ATSIC) 'was a significant step toward Aboriginal self-determination and self-management'. NAILSS rejected the suggestion from the chairperson of ATSIC that such a commission could be a move towards giving effect to the right to self-determination: 'Such disingenuous use of the term which has a very different meaning in international law and practice must be condemned'. The Department of Foreign Affairs and Trade in its statement to the United Nations Association of Australia 1991 Conference has said:

> Indigenous non-government organisations at the meeting this year generally showed a strong preference for self-determination language in the same terms as found in article 1 of the two international covenants on human rights. It raises anxieties for many governments which seek to preserve their often hard won national unity and territorial integrity in the face of what appears to some as the threat of secession. The traditional meaning of self-determination has become associated since the Second World War with the attainment of national independence by colonial peoples. However, changes in the international system suggest that the concept of self-determination must be considered broadly, as peoples seek to assert their identities to preserve their languages, cultures and tradi-

> tions and to achieve greater autonomy, free from undue interference by central governments. The challenge to governments is to respond effectively to the growing demands of indigenous peoples in this area. We have therefore supported the use of self-determination language in the draft declaration.[16]

Self-determination subject to the Constitution and laws of the Commonwealth of Australia ought now be seen as a non-controversial statement of the legitimate and recognisable aspirations of Aborigines seeking maximum community independence while remaining part of the nation state. If the 1988 Parliamentary resolution were to be reintroduced, it ought to be able to receive unanimous support in Parliament. Presumably Mr Chaney could now be advised by the Department of Foreign Affairs and Trade that there is nothing objectionable in such a use of the term self-determination subject to such qualifications.

An international complaints mechanism

Last Christmas Day, Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights became effective. But this new international avenue provides little prospect for agitating directly the right to self-determination.[17] Complaints can only be entertained regarding individual rights set out in Part Three of the Covenant, and not regarding the collective right of self-determination in Article One.

Under the Part III Article 27 an individual who is a member of a minority (including an indigenous minority) can claim breach of the right: 'in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. But the Human Rights Committee has noted:

> While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources as stipulated in Article 1 of the Covenant, the question whether (an indigenous group) constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27 inclusive. There is, however, no objection to a group of individuals who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.[18]

The good news for indigenous people is that the utilisation of the Human Rights Committee can provide an international equivalent of injunctive relief for stalling developments which may be a threat to their enjoyment of their own culture. However they must demonstrate that they have exhausted all local remedies and that the matter is not being examined under any other procedure of international investigation or settlement. Cases take years to determine, and this takes place by correspondence only. The Committee has only a couple of staff. The 18 members of the Committee hold only three 3-week sessions a year. By March 1991, they had received 445 communications of which only 119 had been completed.[19] But it is one more avenue for agitating the limits of the right to enjoy one's own culture in community with other members of one's group, thereby exploring the limits of domestic self-determination which is more than the power to exercise local government functions in a federal structure.

The Commonwealth Attorney-General's Department has funds from the budget for the implementation of the Royal Commission into Aboriginal Deaths in Custody Report to set up an optional protocol unit. Given that complaints will be lodged by citizens other than Aborigines and presuming the unit's responsibility will be to prepare government defences to complaints rather than the preparation of complaints by aggrieved Aborigines, government ought also provide resources for independent professional advice for and education of prospective complainants. Otherwise, the optional protocol will be perceived as an international public relations exercise of no benefit to Aborigines and Torres Strait Islanders.

Conclusion

In the decade ahead, Aborigines will gain little by abandoning the word games of Canberra in favour of the word games of Geneva. If they contribute to the debate in both fora within the predetermined and immovable parameters, they may gain more room to move on their lands, permitting the transformation of land rights from a simple issue of land title to one of community self-determination. This will require use of the Council for Aboriginal Reconciliation back home as well as the WGIP in Geneva. The Council ought to be able to recommend improved domestic remedies which would make recourse to the Human Rights Committee less necessary. The Coalition parties should now acknowledge the right of self-determination in the domestic sense. An accurate delimitation of the scope of self-determination by Aboriginal advocates will be more productive than the expansive rhetoric of sovereignty, unless the politics of ambit claims is still judged more efficacious than the negotiation of achievable and justifiable rights.

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