"SELF DETERMINATION" OR "SELF MANAGEMENT"?

Pamela Ditton

6.1. "Self-Determination" - Its Importance to Australia

The right to "self-determination" is subject to a vigorous debate, largely taking place at the macro level, which should be of vital concern at the domestic level. This article will show how the debate has been shaped by international power politics in its continuing search for answers to the many questions concerning who has a right to "self-determination", what does it involve, and how is it implemented.[2]

The debate is relevant to Australia in a number of respects. Many Australian Aboriginal groups are involved in initiatives that go beyond programmes of "self-management", and may even be contrary to the Racial Discrimination Act[3]. The survival of these initiatives may depend on Australia accepting, and then implementing, a form of "self-determination" that does not necessarily lead to secession[4]. Is Australia acting contrary to international human rights law if it fails to do so? This question is of more than academic importance to Australia, a country which believes it sets, and wishes to continue to set an example to the world in the human rights area.

6.2. Australian Government Policy

In 1983 the then Australian Minister for Aboriginal Affairs made a policy speech stating:

> This Government ... looks to achieve further progress for the Aboriginal and Torres Strait Islander people through the two principles of consultation and self-determination, that is, with the involvement of the Aboriginal people in the whole process.[5]

Recently instead of using the term "self-determination" he has pledged his Government's support for Aboriginal "self-management" but added the rider "we will

---

[1] This article is based on part of an unpublished Master of Public Law sub-thesis, Australian National University, January 1988. The author is a legal practitioner working in Alice Springs.

[2] J Clinebell & J Thomson, "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law" (1979) 27 Buffalo L Rev 669, 670; R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished), 46; R L Barsh, "Aboriginal Rights, Human Rights, and International Law" (1984) 2 Australian Aboriginal Studies 2, 3; M K Nawaz "The Meaning and Range of the Principle of Self-Determination" (1965) Duke L J 82, 83; R Emerson, "Self-Determination" (1971) 65 AJIL 459.

[3] See generally Gerhardy v Brown (1985) 159 CLR 70 and for comment on that case P Ditton, sub-thesis referred to in n 1; W Sadurski, "Gerhardy v Brown, The Concept of Discrimination: Reflections on the Landmark Case That Wasn't" Vol 11 Syd L R (March 1986) 5.

[4] Some Australian citizens from the Torres Straits go further and do wish to secede and form a separate nation. Canberra Times p 7 (12 June 1987). See also M. Mansell, "Treaty Proposal - Aboriginal Sovereignty" Aboriginal Law Bulletin (hereafter ALB) Vol 2 No 27 (1989) 4.

[5] Hon C Holding MHR, Commonwealth of Australia 134 Parl Debs (H of R) (8 Dec 1983) 3487.

have nothing to do with ideas of sovereignty or separate development".[6] In 1983 his Department put out background notes on Aboriginal "self-management":

> [I]n advancing the concept of self-management the Government has sought to open the way to Aboriginals, as individuals or in cooperation with others and in some cases with government support, to make choices as to their lifestyle, to have a say in their community affairs, to provide services for themselves, to conduct businesses, and, within the law, to make their own decisions.[7](emphasis added)

In its impressive Report on the Recognition of Aboriginal Customary Laws[8] the Australian Law Reform Commission also noted that the policy of the present Commonwealth Government has been variously described as "self-determination" or "self-management", and added that "full self-determination in a particular field implies more than either management by or consultation with the 'self' involved."[9]

6.3. The Changing Content of the Right to "Self-Determination"

6.3.1. The League of Nations era

The difficulty in giving content to this concept has even led to a suggestion that "self-determination" does not belong in the province of law at all:

> This principle is not, properly speaking, a rule of international law...it is a principle of justice and of liberty... To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life.[10]

This view has been firmly repudiated and international law now recognises the principle of self-determination.[11]

Towards the end of the First World War, largely as a result of the work of President Wilson from the USA, the principle moved from a loose formulation

---

[6] C Holding, "Directions in Aboriginal Affairs" Address to National Press Club, Canberra, Department of Aboriginal Affairs (13 September 1985) 11.

[7] Department of Aboriginal Affairs, Background notes: Aboriginal self-management (1983).

[8] Australian Law Reform Commission, Report No.31: The Recognition of Aboriginal Customary Laws AGPS (1986), hereafter referred to as "The Customary Law Report".

[9] Ibid Vol 1, 23; see also Pat O'Shane who made a similar observation about the last Commonwealth Government's policy , "Comment" in G Nettheim (ed) Human Rights for Aboriginal People in the 80s (1983) 51.

[10] Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), LN Council Doc B7/21/68/106 [VII] 27-28 (1919).

[11] M K Nawaz, "The Meaning and Range of the Principle of Self-Determination" (1965) Duke L J 82; J Crawford, Creation of States in International Law Oxford, Clarendon Press (1979) 101; I Brownlie, Principles of International Law Oxford,

espoused by philosophers and politicians to a legal principle of world-wide importance. The distinguished legal scholar Partsch maintains that between the Two World Wars "self-determination" was understood as a political principle which applied to all kinds of "peoples" without distinction.[12] He gives, as an example of "peoples", those living entirely as minority groups inside a state ruled by another "people". That description fits the way many Aborigines now describe their own situation.[13]

In that era national independence was not seen as the only form of implementation of the principle; regional autonomy, internal protection of minorities and statehood within a federal state were other possibilities.[14] A number of minorities treaties were made which, though couched in universal terms, would not have come into existence were it not for the plight of various European ethnic groups who became minorities in the territorial rearrangements that ended the First World War.[15]

6.3.2. **The post World War Two era**

After the Second World War the issue was revived with a different theme: international attention turned to the need for an international order to ensure "self-determination for peoples living under foreign rule".[16]

In 1949 the USSR proposed that a provision should be inserted in the Civil and Political Rights Covenant that would require only colonial powers to grant self-determination.[17] The main colonial powers, United Kingdom, France and Belgium, were among those who bitterly opposed this idea. Their argument was based in part on Article 1(2) of the Charter of the United Nations, which states that one of its purposes is:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate means to strengthen universal peace.[18]

It was argued that as Article 1(2) of the United Nations Charter already recognised the right of self-determination, it was unnecessary to reaffirm it in

---

[12] K J Partsch, "Self Determination, Equality and Non Discrimination" in K Vasak (ed) The International Dimensions of Human Rights Vol 1 (1982) Unesco, Connecticut, USA, Greenwood Press 61, 63; Nawaz op cit n 2, 83-84; Emerson op cit n 2, 463.

[13] See also R L Barsh, "Indigenous North America and Contemporary International Law" (1982) 62 Ore L Rev 73, 76-78.

[14] Ibid 64.

[15] Emerson op cit n 2, 463.

[16] A Cassese, "The Self-Determination of Peoples" in Louis Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights New York, Columbia University Press (1981) 92, 93.

[17] Ibid 92.

[18] The Charter of the United Nations came into force in 1945. The same phrase "respect for the principle of equal rights and self-determination of peoples" also occurs in Art 55. "Self-determination" as used in the Charter or any other treaty has not yet been interpreted or applied by any of the competent independent international institutions.

further international human rights treaties.[19] Unfortunately the sponsoring powers left no definitive record as to what they meant by "self-determination". The United Nations Committee which discussed the concept said, rather unhelpfully:

> Concerning the principle of self-determination, it was strongly emphasised on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.[20]

There was an inconclusive discussion about a compromise position, put forward by Western states and most of the developing states who were then members of the United Nations, namely that the right to self-determination should extend to the peoples of any state who were oppressed by their own or a foreign government. This debate was predicated on the term "self-determination" giving the right to full autonomy[21].

The wording finally adopted in Article 1(1) of the Civil and Political Rights Covenant is quite blunt:

> 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.[22]

The few states who opposed this article did so because they feared that the article would confer rights of secession on their minorities, despite the by then prevailing legal view that it did not confer any such right.[23]

The Civil and Political Rights Covenant does not give any guidance as to the interpretation of "peoples".[24] Sohn, the well known legal commentator in this field, believes that the problems of interpretation have been compounded by using the expression "peoples", rather than "nations" as in earlier drafts.[25] He does not reach a conclusion as to whether "minorities" (the definition of "minorities" is another vexed question)[26] are "peoples" in this context, but certainly indicates it is far more arguable than if the term "nation" had been used. Another

---

[19] Brazil, UN Doc A/C 3/SR 309 para 59 (1950).

[20] UN Doc 343 I/1/16, 6 UN Conf International Ord Docs 296 (1945).

[21] New Zealand, UN Doc A/C 3/SR 649 para 9 (1955); also Partsch op cit n 12, 66.

[22] The same wording was adopted in the International Covenant on Economic, Social and Cultural Rights 1976.

[23] L B Sohn, "The Rights of Minorities" in L Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights (1981) 270, 276.

[24] Bennett states that an examination of the travaux preparatoires does not clarify the matter, G Bennett, Aboriginal Rights in International Law London, Royal Anthropological Institute (1978) 50.

[25] Sohn op cit n 23, 276.

[26] F Caporti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities UN Doc E/CN 4Sub2/384/Rev 1 (1979) 11-12, 95-96, hereafter referred to as the Caporti Report.

respected scholar, Cassese, considers the same issue and comes to a firm conclusion that "peoples" "is not limited to peoples of dependent territories but also [refers] to the peoples of sovereign states".[27] Coulter concedes that the question of what are "peoples" has not been settled but tends to support Cassese; he considers it reasonably clear that Article 1(1) is not limited to "peoples" who are part of colonial empires.[28]

Even if "minorities" are "peoples" in this context a further question arises: are minority autochthonous groups to be considered "peoples"? It has been argued that "minorities" only includes alien groups settled in a territory, thus excluding groups such as Aborigines.[29] McKean, in his important book Equality and Discrimination under International Law,[30] which was cited by Brennan J in Gerhardy, rejects this argument and suggests that the real reason underlying it is a fear of secessionist tendencies.[31]

6.3.3. **The "salt-water doctrine"**

As a response to the numerical power of the newly independent nations, whose concerns are addressed below, a narrow view of "self-determination" has developed. It is known as the "salt-water doctrine". It defines as "colonies" only those non-self-governing territories separated geographically from the administering state, as by an ocean. Once the "colony" has gained independent statehood the right of self-determination has been fully exercised; there is no notion of a continuing right to self-determination for internal minorities.[32]

The central feature then of the "salt-water doctrine" is, as Gross puts it, that it abandons the concept that "peoples" formed "on the basis of political consciousness, but living under foreign rule, are entitled to self-determination":[33] Gross also suggests a motivation for the doctrine:

> [o]nce formed, however, the state exists in dialectic opposition to further group formation, governing elites jealously preserving their existence against the formation of groups which do not find the state supportive of their needs.[34]

That analysis can be applied to the numerous African States which have become members of the United Nations in the decolonisation following the adoption in 1960 of the Declaration of the Granting of Independence to Colonial Countries and Peoples.[35] Many of their boundaries are artificial, a legacy of the colonial era. They have good cause to fear fragmentation if their stability is threatened by the

---

[27] Cassese op cit n 16, 96.

[28] Coulter, op cit n 2, 46.

[29] UN Doc A/C3/SR 1103.

[30] W McKean, Equality and Discrimination under International Law Oxford, Clarendon Press (1983).

[31] Ibid 143.

[32] P Thornberry, "Minority Rights, Human Rights and International Law" (1980) 3 Ethnic and Racial Studies 248, 259; Emerson op cit n 2, 464.

[33] Gross, "The United Nations, Self-Determination and The Namibia Opinions" (1973) 82 Yale LJ 533, 65. See also Barsh (1982) op cit n 13, 81.

[34] Gross, op cit n 33. See also J W Nickel, "Cultural Diversity and Human Rights" in J L Nelson & V M Green (eds) International Human Rights: Contemporary Issues, New York, Earl M Coleman Enterprises (1980) 45.

[35] General Assembly Resolution 1514(XV).

classifying of minorities", whether or not autochthonous, as "peoples" able to seek any form of self-determination.

6.4. "Self-Determination" for Indigenous Populations

The "salt-water doctrine" of self-determination is still the dominant view among international lawyers,[36] but it is increasingly coming under attack by minorities and indigenous populations.[37] At the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention in 1986 the representatives of indigenous and tribal organisations present stated that "the only concept which would respond to their needs was that of self-determination".[38]

In 1981 the International NGO Conference on Indigenous Peoples and Land included in its Final Declaration a request that the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities should appoint a Special Rapporteur to "further study the right to self-determination, focusing in particular on this right as it refers to indigenous nations and peoples".[39] This was done, and Cobo has now completed a detailed report.[40] In it he has noted the constant reference by indigenous communities and organisations to "self-determination", "which they consider the only form [of political arrangement] that would enable them to determine for themselves the future course of their existence".[41] He quotes with approval a summary of the discussion at a United Nations seminar held in 1981:

> Self-determination in its many forms was the basic pre-condition to the possibility for indigenous populations to enjoy their fundamental rights and to determine their future and preserve, develop and transmit to future generations their ethnic specificity.[42]

After reviewing all the evidence he was persuaded that "self-determination" was the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights.[43]

---

[36] Australian Law Reform Commission op cit n 8, 128; V Van Dyke, "The Cultural Rights of Peoples" in Universal Human Rights Stanfordville, NY, Vol 2 No 2 (1980) 1, 4; K M'Baye, "Human Rights in Africa" in K Vasak and P Alston (eds) The International Dimensions of Human Rights 583; Gross, op cit n 33, 533.

[37] Bennett op cit n 24, 50; General Assembly Resolution 1514 (XV), (14 Dec 1960); A Field, "Indigenous Peoples Network" 18 Aboriginal Law Bulletin (February 1986) 4, 5.

[38] Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107), Geneva 1-10 Sept 1986, Appl/MER/107/1986/D.7 para 50.

[39] E/CN 4/Sub 2/1983/21/Add 6 Para 152.

[40] J R M Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Study of the Problem of Discrimination Against Indigenous Populations Revised version E/CN 4/Sub 2/1986/7 Add 1-3 (1983-1985); hereafter referred to as "The Cobo Report".

[41] Ibid E/CN 4 Sub 1/1983/21/Add 6 para 148.

[42] Ibid E/CB 4/Sub 2/1986/21/Add 6 para 6 quoting from the Report of the United Nations Seminar held in Managua, Nicaragua in connection with the Decade for Action to Combat Racism and Racial Discrimination ST/HR/SER A/11 para 58(m).

[43] Ibid E/CN4/Sub 2/1983/21/Add 8 para 580.

As long ago as 1973 Gross saw not only claims for secession, but also demands "not for independence but for some greater role in the body politic".[44] He refused to accept that the General Assembly's pronouncements were applicable only to the colonial phenomenon. His argument was that if the United Nations is to retain its authority its principles must be embedded in the expectations of the effective participants in the world community; and these may change.[45]

6.5 Internal "Self-Determination"

There are conflicting views among international lawyers as to the content to be given to the concept of "self-determination" contained in international human rights instruments. The dominant view has been discussed above. A view that is gaining ground is that "internal self-determination", namely "self-determination" operating within the boundary of an existing state, is an aspect of "self-determination". In 1978 UNESCO recognised and adopted the concept in its statement on Race and Racial Prejudice.[46]

Cassese has no doubt that a proper interpretation of Article 1 of the Civil and Political Rights Covenant requires the peoples of sovereign states to have "internal self-determination", but he gives a limited content to the right. He believes that these peoples have enjoyed "internal self-determination" when they have been accorded their other rights under the Covenant, such as freedom of expression and opinion (Article 19), and the right to vote (Article 25(b)).[47]

Brownlie and the other writers cited below are less certain that there is a right to "internal self-determination", but this may be because they are seeing it as having a far greater content. Brownlie stresses that there are various forms of self-determination, some involving statehood, others "self-government" or "autonomy", neither of which he sees as terms of art.[48] Partsch, when considering whether such right exists, hypothesised that if it did it could take the form of an ethnic group gaining a certain autonomy, whether as a State in a Federation or even as a self-administered unity in a decentralised unitarian State.[49]

Although Brownlie argues forcefully that Aboriginal populations should, inter alia, be entitled to "self-determination" he cautiously falls short of saying that international law presently recognises the right.[50] Coulter is braver: he claims a "qualified doctrine of self-determination appears to be emerging [it would be more accurate to say re-emerging], in which territorial enclave populations have a right to internal autonomy within the structure of the State".[51] If he is correct, much of the credit must go to indigenous peoples who have become "effective participants in the world community".[52] Nettheim, a veteran champion

---

[44] Gross, op cit n 33, 555.

[45] Ibid

[46] Cobo, op cit n 40, Revised Version E/CN 4/Sub 2/1983/21/ Add 8. Cf Meeting of Experts, op cit n 38, paras 51-60.

[47] Cassese, op cit n 16, 97.

[48] Brownlie, op cit n 10, 108.

[49] Partsch, op cit n 11, 67.

[50] Ibid

[51] Coulter op cit n 2, 27.

[52] See generally for discussion of the progress of this movement: H Hannum,"The Thirty-Third Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" (1981) 75 AJIL 172; Robin Wright (ed), Native Peoples In Struggle: Cases from the Fourth Russell Tribunal Erin Publications, USA (1982); J Hantke, "The 1982 Session of the UN Sub Commission on

of Aboriginal rights, is less optimistic than Coulter. He also sees this trend, and recognises its importance, but he believes that for "international political reasons" it is unlikely to succeed in the near future.[53]

In 1971 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Cobo as a special rapporteur to conduct a thorough investigation of discrimination against indigenous populations. His report unequivocally supports indigenous peoples right to internal self-determination, which he concludes constitutes:

> the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.[54]

It would assist those asserting that indigenous populations are "peoples" at least entitled "internal self-determination" if they could rely on legal as well as political arguments. Crawford suggests an argument that is likely to appeal to Aboriginal activists, although he describes it as acutely controversial.[55] The right to "self-determination" could apply to:

> entities part of a metropolitan State but which have been governed in such a way as to make them in effect non-self-governing territories, or in other terms, territories subject to carence de souverainete [deficiency in sovereignty]... [The mismanagement]' must therefore be substantially in that ... area of misgovernment and denial of fundamental human rights.

Using this rationale, Aborigines could readily claim that they are entitled to self-determination. Those working in the international arena have frequently

---

Prevention of Discrimination and Protection of Minorities" (1983) 77 AJIL 651; R L Barsh, "Aboriginal Rights, Human Rights, and International Law" (1984) 2 Australian Aboriginal Studies 2; R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished); L Garber & Ors, "The 1984 UN Sub Commission on Prevention of Discrimination and Protection of Minorities" (1985) 79 AJIL 168; Aboriginal Law Research Unit, "UN Action on Aboriginal Rights" 15 ALB (August 1985) 1; Aboriginal Law Research Unit, Briefing Paper, UNESCO - International Protector 17 ALB (December 1985); E Lucas, "Towards an International Declaration on Land Rights" 14 ALB (June 1985) 10; A Field, "Indigenous Peoples Network" 18 ALB (February 1986) 4; T Simpson, "On the Track to Geneva" 19 ALB (April 1986) 8; R L Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) AJIL 369; T Simpson, "Geneva, September '86" (1987) 24; T. Simpson, "Geneva - Indigenous Rights in International Forums (1988) 10;

[53] G Nettheim, "The Relevance of International Law" in P Hanks & B Keon-Cohen Aborigines & the Law (1984) 50, 7; T Simpson "Geneva, September '86" (1987) 24 Aboriginal Law Bulletin 7, 9; See also M D Kirby "Introduction" (1985) 9 Bulletin of the Australian Society of Legal Philosophy 101, 102.

[54] UN Doc E/CN 4/Sub 2 / 1983 / 21 Add 8 para 581.

[55] Crawford, op cit n 11, 100.

pointed to evidence of genocidal practices by the Australian Government,[56] such as statistics showing they have the highest imprisonment rate in the world,[57] and to last century's destruction of Aboriginal society in Tasmania. Genocide was condemned by the United Nations in the Convention on the Prevention and Punishment of the Crime of Genocide 1948.[58] What should be included in a list of "fundamental human rights" is another grey area, but freedom from genocide is included in even the shortest lists.[59]

The concept and content of "internal self-determination" is in its infancy. Exactly who are the "Aboriginal People/s" entitled to assert this right is obscure.[60] Are all Aborigines[61] one "people" or are they many "peoples"? How the right is to be asserted at a domestic level is a critical but unresolved issue. These issues are beyond the scope of this article.

6.6. The Flaw In "Self-Management"

The point was made at the beginning of this chapter that the Australian Government, while it vehemently denies all Aboriginal claims to sovereignty, recognises and claims to encourage "self-management". Is "self-management" different from "internal self-determination"? The former Human Rights Commission got to the nub of the matter when considering submissions that the Community Services (Aborigines) Act 1984 (Qld) does not give self-management to Aboriginal communities. It saw that:

> There is, however a dilemma in providing for self-management. It is that if the wishes of Aboriginal communities are fully met, then they may well have arrangements for self-management which differ from those for the community generally.

The disbanding of the National Aboriginal Conference illustrates the point made by the Human Rights Commission. In 1983 the Conference was cited by the Department of Aboriginal Affairs as the showpiece of Aboriginal self-management,[62] but the following year it was disbanded by the government. On the assumption that it met the wishes of the Aboriginal communities, but that its performance did not satisfy the Government, then it shows that self-management consists merely of

---

[56] Simpson, op cit n 53, 8.

[57] M Mansell, "Can White Law Accommodate Black Demands?" (1986) 23 Aboriginal Law Bulletin 10.

[58] See generally A Field, "Indigenous Peoples Network" 18 Aboriginal Law Bulletin (February 1986) 4; Aboriginal Law Research Unit, Briefing Paper, UNESCO - International Protector 17 Aboriginal Law Bulletin (December 1985).

[59] M Meron, "On a Hierarchy of International Human Rights" (1986) 80 AJIL 1, 14-16. McKean argues that genocide is generally accepted as being contrary to the jus cogens, Equality and Discrimination under International Law Oxford, Clarendon Press (1983) 281.

[60] The right to "internal self-determination" is not dependent on whether Aborigines are able to establish that they are a sovereign people. The Aboriginal claim to sovereignty has been rejected politically, see n 3 above, and in the Federal Court Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141. The question of sovereignty may finally be determined by the High Court in Mabo & Ors v The State of Queensland and the Commonwealth of Australia (1986) 64 ALR 1.

[61] See generally Australian Law Reform Commission, op cit n 8, [88] - [95] for a discussion of who is an "Aborigine".

[62] Department of Aboriginal Affairs, op cit n 7.

those powers that the government decides to devolve to Aborigines. Self-management can crumble any time that it proves inconvenient to the State. Put another way, the Government will only allow self-management within the framework of Australian law.[63]

Since the term "self-determination" is used in international human rights instruments; a body of jurisprudence is developing as to its meaning. "Self-management", by contrast, is merely a political term used within Australia, without a precise, internationally accepted meaning. Therefore, if it wishes, a government could use "self-management" as a smoke-screen to "sell" programmes to Aboriginal communities that they would otherwise find unacceptable.

In terms of the content of any right, it is a matter of conjecture what differences exist between "internal self-determination" and "self-management".[64] To Cassese "internal self-determination" under the Civil and Political Rights Covenant means nothing more than implementing the other rights enshrined in the Covenant. This writer considers that if "internal self-determination" is to have any value it must mean more than that. It should mean, and this view is consonant with those of several writers cited above, that the State, through its legislative, executive or judicial branches, cannot exercise control over a measure taken by a "self-determination unit" as part of a progressive right of "internal self-determination".

Another interesting example that may highlight the difference between the terms is the new Canadian arrangement for by-laws for Canadian Indian reserves controlling the use of alcohol.[65] This has been hailed as "a small, yet important advance in Indian self-determination".[66] The scheme enables each Band Council to settle the content of its by-laws without ministerial interference.[67] Morse and his co-authors assert that Canadian Indians have an inherent "aboriginal right of self-government" which they use consistently with the way the term "internal self-determination" has been used above.[68] They suggest that if the validity of any particular set of by-laws is challenged in court as contrary to section 15 of the Charter of Rights and Freedoms (guarantee of equal protection without discrimination on the ground of race), then the by-law might be saved under section 25 of the same Charter which exempts "aboriginal, treaty or other rights

---

[63] Morse B W, Aboriginal Self-Government in Australia and Canada Kingston, Ontario, Institute of Intergovernmental Relations (1984) 79.

[64] See generally Task Force to Review Comprehensive Claims Policy, Treaties: Lasting Agreements Ottawa, Department of Indian Affairs and Northern Development (1985) 22-23 35-41.

[65] The Indian Act in Canada made it an offence for "persons" to be intoxicated on a reserve. Although worded to apply to every "person", the Manitoba Court of Appeal found that in practical terms those sections would apply to the predominant group, namely, Indian persons. The Court struck down the offending section on the ground that it constituted a racial inequality under the Canadian Bill of Rights. In 1976 Bill C-31 amended the Indian Act and enables band councils, subject to the approval of band electors at a special meeting, to prohibit the sale or possession of intoxicants on reserves and to make it an offence for everyone, whether or not band members, to be intoxicated on a reserve.

[66] B Morse, M Sherry, W Taggert, for Chiefs of Ontario, Intoxicant By-Laws, The Indian Act and Indian Government (1986 unpublished) 31.

[67] Ibid 29. The by-laws must be consistent with the Indian Act which confers the power to enact them ibid 29.

[68] Ibid 21, 24.

or freedoms" from being harmed by other clauses of the Charter.[69] The success of this argument depends on accepting that "internal self-government" is an "aboriginal right" under the Charter. If such an argument was accepted by the courts then this scheme comes closer to a measure of "internal self-determination" than any arrangements currently in force in Australia, as the content of the by-laws would be beyond scrutiny by the executive arm of the state. However, the scheme is still not beyond the reach of the legislative arm of the State, which could repeal or amend the Indian Act 'that gives the power to pass by-laws as subordinate legislation. For that reason this writer would still define this scheme as one of "self-management" not "self-determination" as claimed by Morse and his co-authors.

Notwithstanding all the problems, the concept of progressive "internal self-determination" may, eventually, provide a more secure theoretical legal basis for Aboriginal initiatives than the slippery concept of "self-management".[70]

---

[69] Ibid 21.

[70] At present, in Australia, "self-management" can only operate within the restrictive parameters of "special measures" under the Racial Discrimination Act, Articles 1(4) and 2(2). See n 3.