CONSTITUTIONAL RECOGNITION, SELF-DETERMINATION AND AN INDIGENOUS REPRESENTATIVE BODY

by Melissa Castan

INTRODUCTION

This article addresses a specific aspect of constitutional recognition of Indigenous Australians through the framework of international human rights and self-determination—particularly the potential role of a constitutionally established representative consultative Indigenous body. It considers the extent that such a representative body would give substance to those rights.

This article does not address the broad arguments in favour of, or against constitutional recognition of Aboriginal and Torres Strait Islander peoples, nor does it specifically address the work of the Prime Minister's Expert Panel (2102), or the work to date of the Joint Select Committee itself. It takes as its focus, the Cape York Institute ('CYI') proposal[1] and the proposed text submitted by Professor Anne Twomey to the Joint Committee.[2]

This article proposes that the CYI proposal is capable of meeting international human rights law standards regarding self-determination, political participation and the emerging standard of free, prior and informed consent.

THE HUMAN RIGHTS LAW FRAMEWORK

The International Covenant on Civil and Political Rights ('ICCPR'), signed by Australia in 1972 (ratified in 1980), is a key human rights instrument. It is recognised that while Australia has not fully incorporated this covenant into Australian law, it is nevertheless the leading human rights treaty at international law, and it represents the international legal standard.[3]

Article 1 of the ICCPR states that, 'All peoples have a right to self-determination.' It is also the first article of the International Covenant on Economic, Social and Cultural rights; and self-determination is deeply embedded within the 2007 United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), which Australia acceded to in 2009.[4]

The right of self-determination attracts a lot of attention, and there are wide ranges of scholarly writings on it, particularly regarding Indigenous peoples self-determination.[5] Put simply, self-determination embraces the fundamental proposition that people should collectively have control over, and be empowered to make decisions over their own lives.

In Australia self-determination is almost exclusively synonymous with the claims of Aboriginal and Torres Strait Islander people, and it is generally expressed as calls for self-government, democratic participation, land rights, cultural protection and political representation. It rarely is expressed in terms of secession, territorial break-away or renunciation of citizenship.

Leading Indigenous rights scholar James Anaya, the UN's Special Rapporteur on Indigenous Rights (2008-2014), explained this Indigenous expression of self-determination in a very clear way: He draws a distinction between the 'constitutive' and the continuing or 'ongoing' manifestations of self-determination.[6] Anaya proposes that 'constitutive' self-determination requires that the governing institutional order be created by processes that are 'guided by the will of the peoples who are governed.'[7] This aspect of self-determination requires that the political order reflects 'the collective will of the peoples concerned', and to meet that standard, there must be participation and consent of the governed peoples, particularly in times of institutional development and reform.

If we apply this analysis to Australia's legal story, it is self-evident that Indigenous people were not included in the development of the legal and political order. They were excluded from the constituent self-determination acts that saw the birth of the federation and its governing constitution, 115 years ago. That very omission underpins the current constitutional recognition debate.

Anaya also explains that self-determination also has an on-going aspect: 'The governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.'[8]

So, ongoing self-determination necessitates the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.[9] In Australia this means there is an obligation to develop institutional frameworks that include Aboriginal and Torres Strait Islander peoples in the decisions, processes, lawmaking and administration that impact upon their lives.

There are also other ICCPR human rights standards that are applicable to this obligation to guarantee participation and consent such as:

- article 25: guaranteeing rights of political participation
- article 27: protection of minority rights
- articles 2, 3 and 26 which guarantee non-discrimination.[10]

Self-determination is thus not a destructive, or threatening weapon wielded by decolonising separatists seeking to 'fracture the skeletal principle' of the legal and political integrity of our nation. It is better understood as a 'relational' concept: Indigenous self-determination is a relationship characterised by participation, choice, consent and non-domination.[11] It is an inclusive principle, rather than a separatist one. This is consistent with practice in North America, New Zealand, Scandinavian nations and elsewhere.

Indigenous people need time to consider what form their constitutional recognition will take.

The UNDRIP also deals with self-determination and, of course, the issues of free, prior and informed consent. A number of other international instruments acknowledge that Indigenous people have a right to participate in decision-making matters which affect their rights.[12] It is acknowledged that at this point, the UNDRIP is not explicitly 'enforceable' in Australia, or under international law generally, but there certainly is a longstanding body of human rights law which asserts the fundamental right of Indigenous communities to genuinely and deeply participate in the issues and decisions that impact upon them.[13] Similar rights are expressed in the Convention on the Elimination of Racial Discrimination,[14] to which Australia is a signatory, and has incorporated in Commonwealth legislation via the *Racial Discrimination Act 1975* (Cth).

The meaning of 'free, prior and informed consent' has been explored in detail by the United Nations' Expert Mechanism on the Rights of Indigenous Peoples:

> The element of "free" implies no coercion, intimidation or manipulation; "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; "consent" implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.[15]

They describe requirement of Indigenous participation and consultation as follows:

> The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights.[16]

Appropriate consultation and participation in the political processes and lawmaking will be a significant element of meeting the free, prior and informed consent standard for Indigenous Australians. Turning then to constitutional reform, a representative body can be analysed in terms of the recalibration of the 'terms and dynamics of non-domination' and embedding a relationship between Indigenous communities, and peoples, and the nation state.[17] The point of that recalibration is to preclude Indigenous people from being controlled and coerced unilaterally by the state.[18]

CAPE YORK INSTITUTE PROPOSAL

This article now turns to the CYI model, and applies this self-determination framework.

The CYI model, in brief, calls for the creation of an Aboriginal and Torres Strait Islander representative body vested with advisory functions. The body is a creature of the Commonwealth Parliament, created by normal legislation, and its existence is guaranteed by a new constitutional provision.[19] Professor Twomey has provided model language to consider.[20]

The establishment of such a representative body, approved by the Australian electorate at referendum, could certainly satisfy the human rights standards of self-determination, political participation, and consultation leading to free, prior and informed consent. It would amount to a structural development of the

'constitutive' kind described by Anaya. It would bring Australia into compliance with the international human rights standards articulated in the ICCPR, and the UNDRIP.

With the approval of Indigenous communities, and electoral approval, a representative consultative Indigenous body could ensure greater 'ongoing' self-determination by making Indigenous participation an integral part of the lawmaking process (while still leaving parliamentary sovereignty undiminished). It could function as a recalibration of the Indigenous and state relationship, by providing Indigenous people with the mechanism to make meaningful choices and have informed impact in the development of reforms that affect their communities. Ideally it could function on a 'dialogue model', which engages functions of advice, debate, and even political negotiation over decision-making.[21] In this sense, it builds in a continuing process, so constitutional reform becomes more than just a moment, with clear steps as to what follows the high point of the referendum event.

This shifts the relationship between Indigenous peoples and the Australian Parliament from a monologue to a dialogue, from unilateral to multilateral, and from a majoritarian agenda to a consultative, participatory one.

CONSULTATION AND CONSENT

For any model or body to meet the standard of human rights law, and of self-determination, there has to be more than the approval of constitutional lawyers, political leaders and public commentators. There also needs to be proper, deep consultation with, and consent of, Aboriginal and Torres Strait Islander communities before this reform can be put to a referendum. Legitimacy with Indigenous people is required. So while a referendum is the legal process for lawful change, this alone will not deliver legitimacy within a human rights framework. There needs to be a form of consultation and debate that is appropriate (and adopted) by Indigenous Australians. These processes would address the nature of the representation within such a body, which could include appointed, elected or 'electoral college' members, drawn from existing representative groups, or any other appropriate models.

Recently there has been discussion of Indigenous conferences or conventions. Conventions have a long history as effective ways of advancing constitutional change in Australia.[22] If conducted according to Indigenous consultative processes, these may meet the free, prior and informed consent standard. An appropriate process for achieving a consensus amongst Indigenous communities is critical, because in a human rights framework, it's not enough that the outcome meets a particular standard, the process for the adoption of the outcome must also be conducted properly.

The Expert Panel conducted a process of consultation with Indigenous people in 2011. Any deviations from the Expert Panel's proposals, whether in the form of a representative body, or other deviations, must also be genuinely discussed and accepted by Indigenous people.

It is evident that there is not yet consensus from Indigenous Australia as to the specific model for constitutional recognition.[23] This is understandable, given the complexity of the legal and political landscape on this issue. Indigenous people need time to consider what form their constitutional recognition will take. This change should have lasting impact, thus developing and adopting an appropriate model is not an easy process, and it takes time.

There is little value in expending political and community goodwill, or the money required for a referendum, on ineffective and merely symbolic change.

CONCLUSION

Self-determination cannot be met by pure poetry, or 'minimalist' models. Symbolic change may be socially enriching, and politically achievable, but it is not the kind of reform that amounts to self-determination, or political participation, or free, prior and informed consent. There is little value in expending political and community goodwill, or the money required for a referendum, on ineffective and merely symbolic change.

Indigenous peoples' calls for self-determination, often embodied in calls for a treaty, for 'sovereignty' or self-determination, should not be dismissed as unfeasible. Our common-law cousins have found their own mechanisms for establishing proper lawful relations with their Indigenous communities, whether it is as domestic dependent nations, tribes, or citizens.

Australia is well overdue for a just settlement with Aboriginal and Torres Strait Islander peoples. Constitutional reform grounded in genuine free, prior and informed consent, and manifesting self-determination, is an essential aspect of that settlement.

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1 Cape York Institute, Submission No 38.2 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015.

2 Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online), 20 May 2015 <http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.

3 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 3rd ed, 2013) ch 1.

4 Australia announced its support of the UNDRIP on 3 April 2009: see, eg, Jenny Macklin, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

5 See, eg, Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2005); S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009); Megan Davis, 'Indigenous Struggles in Standard-setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

6 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 104–5.

7 Ibid.

8 Ibid 106.

9 Ibid.

10 Joseph and Castan, above n 3.

11 See Iris Marion Young 'Two Concepts of Self Determination' in Austin Sarat and Thomas R Kearns (eds), *Human Rights, Concepts, Contests and Contingencies* (University of Michigan Press, 2001) 25. See also Benedict Kingsbury 'Reconstructing Self Determination: A Relational Approach' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-determination* (Institute for Human Rights, 2000) 19.

12 See, eg,*Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j); *International Labour Organisation Indigenous and Tribunal Peoples Convention 1989 (No 169)*, opened for signature 27 June 1989 (entered into force 5 September 1991); United Nations Conference on Environment and Development, *Rio Declaration*, UN Doc A/CONF.151/26 (Vol 1) (28 September 1992); United Nations Conference on Environment and Development, *Agenda 21* (1992); Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

13 Melissa Castan, 'DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 492–511. See also Davis, above n 5.

14 Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51st sess, UN Doc A/52/18 (18 August 1997) Annex V, [4].

15 Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) 27.

16 Ibid 26.

17 I acknowledge the work of Dylan Lino for this articulation of the 'recalibration' of the Indigenous-state relationship: see Dylan Lino 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34 *Melbourne University Law Review* 839, 854.

18 Ibid.

19 Cape York Institute, above n 1.

20 Towmey, above n 2; Anne Twomey, Submission No 131 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 21 May 2015.

21 This 'dialogue' model is often used in the context of human rights legislation, as seen in the discussion of the *Charter of Rights and Responsibilities* 2006 (Vic): Julie Debeljak 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), Contemporary Perspectives on Human Rights Law in Australia (Thompson Reuters, 2012).

22 Paul Kildea, 'A People's Convention can Make Indigenous Recognition a Reality', *The Conversation* (online), 11 December 2014 < http://theconversation.com/a-peoples-convention-can-make-indigenous-recognition-a-reality-35139>.

23 See, eg, Celeste Liddle, '87% of Indigenous People do not Agree on Recognition. You'd Know if You Listened' *The Guardian* (online), 19 June 2015 <http://www.theguardian.com/commentisfree/2015/jun/19/87-of-indigenous-people-do-not-agree-on-recognition-youd-know-if-you-listened>.

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