SELF-DETERMINATION: THE LIMITS OF ALLOWING ABORIGINAL COMMUNITIES TO BE A LAW UNTO THEMSELVES

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I. COMMUNITY JUSTICE AND INDIVIDUAL RIGHTS

On the evening of Show Day 1993, in the Queensland country town of Murgon, there was a fight involving young people including whites from Murgon and Aborigines from the nearby Aboriginal community of Cherbourg. Queensland police ultimately became involved. Local publican and Murgon Shire Councillor, Mr Dermot Tiernan, then stepped in attempting to placate the crowd gathered outside his hotel. He received one fatal blow to the head. A Cherbourg youth aged 16 appeared some days later in the Murgon Children's Court charged with Mr Tiernan's murder. Even before Mr Tiernan's death had been reported, the

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Cherbourg Aboriginal Council had decided unanimously that the Aboriginal youths involved in the fight would be banished for life from their community. Mr Les Stewart, Chairman of the Council, informed the media that even if the youths were convicted of offences and served jailed terms, they would never be permitted to return to Cherbourg. He claimed that if they did return they would be fined $50 for every day they remained in the community.

The Council, exasperated by the conduct of young people and concerned with poor race relations between the communities at Cherbourg and Murgon, was concerned to make an example of these young people. Mr Stewart said: "Often these young people get on the town, they get on the booze and they like to fight every Tom, Dick and Harry they see. They do it in gangs, that is the worst part of it. Like a mob of dingoes, they like to attack people." Having no faith in the leniency and delays in the European justice system, the Aboriginal Council "decided to use our traditional law". Mr Stewart said he had grown tired of seeing Aboriginal youths being lightly treated by the Magistrate's Court: "I think the Aboriginal tribal law is the answer. I think this will be a lesson to other young fellows who like to think they are big men around the place. I always reckon if you act like men you're treated like men".

The Cherbourg community of 1500 people lives on 3,130 hectares of land which is held by the Cherbourg Aboriginal Council under a Deed of Grant in Trust, the Council holding the estate in fee simple as trustee for the benefit of the Aboriginal inhabitants. The Council also exercises all powers of local government in the area. The Aboriginal territory of Cherbourg does not fall within the jurisdiction of the local Murgon Shire. Though Cherbourg people appear in the Magistrate's Court at Murgon or in the superior courts at Toowoomba or Brisbane for more serious offences, the Cherbourg Aboriginal Council is able to establish its own Aboriginal Court pursuant to s 42 of the *Community Services (Aborigines) Act* 1984-1990 (Qld). This Court is constituted by two Justices of the Peace who are Aboriginal residents. If there be no resident justices available, the Court can be constituted by members of the Aboriginal Council. The Council can confer jurisdiction and powers on the court by bylaws which have to be authorised by the Queensland Governor in Council. As well as dealing with breaches of bylaws, the Aboriginal Court has jurisdiction to hear and determine disputes involving matters accepted by the community as being rightly governed by "the usages and customs" of the community.[1]

Prior to 1990, it was only Aborigines who could be tried before the Aboriginal Court. Others had to appear before a Magistrate's Court. However now the jurisdiction of an Aboriginal court extends to all persons of whatever race "who are

1 *Community Services (Aborgines) Act* 1984-1990 (Qld) s 43(2)(b).

in or who enter upon or reside in the area for which the court is constituted". Though members of the police force of Queensland have the same powers in relation to persons within a Deed of Grant in Trust area as elsewhere in Queensland, they may be assisted in the performance of their duties by Aboriginal police whose function is to maintain peace and good order in the area. Aboriginal police are appointed by the Aboriginal Council. They perform the functions, duties and powers conferred upon them by Council bylaws.

The Cherbourg Aboriginal Council reached a decision to banish the youths for life without the benefit of hearing from the alleged offenders who were all in police custody. They had no lawyers available to put their case. The Aboriginal Council acted as a court. There is no record of what constitutes 'Aboriginal tribal law' in relation to street fights between Cherbourg youths and residents of Murgon.

The Queensland Council for Civil Liberties expressed serious misgivings about the banishment of the Cherbourg youths. In a strangely assimilationist tone, the Council president Mr Terry O'Gorman said the Civil Liberties Council believed that as a general principle there should not be one set of laws for Aborigines and another for the rest of the community. However he said his Council did err on the side of accepting the application of traditional law in remote communities especially when community leaders wanted to ban alcohol.

Under the *Community Services (Aborigines) Act* 1984-1990 (Qld), the Cherbourg Aboriginal Council does not have any statutory power to banish people for life. However the Council being not only the local authority, but also the landholder, the owner of most housing, the employer of Aboriginal police, and the appointer of Aboriginal court personnel, is uniquely situated to make return to community life at Cherbourg difficult for the banished youths. These extensive Council powers may be consistent with the principle of self-determination for an indigenous community whose authority structure of elders and lawmen knew nothing of the separation of powers nor notions of natural justice as applied in the British legal tradition. However there is a need to strike a balance between the collective right of a community through its elected Council or unelected elders to determine the law including the application of traditional law to community disputes, and the individual rights of community members demanding due process and just outcomes reviewable by courts and tribunals of the national legal system. Also, where the victim and relatives are not members of the indigenous community, there is no justification for the Aboriginal legal system alone discharging the function of the criminal law.

Aboriginal communities which are geographically isolated and which still maintain some system of traditional law may find that they have a capacity for harnessing that system to govern better their community affairs. However the Cherbourg example highlights the difficulties once the principle of self-

determination is expanded to include the application of Aboriginal tribal law to a mixed community which is not remote and whose members are in contact with other mainstream communities; are conversant with their individual rights; and whose actions affect the interests of other citizens who are not members of the community.

II. THE RECOGNITION OF ABORIGINAL LAW

In *Mabo* v *Queensland (No 2)* the High Court ruled that native title to particular land, its incidents and the persons entitled to land are ascertained "according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land".[2] It is immaterial that the laws and customs have undergone change "provided the general nature of the connection between the indigenous people and the land remains." According to Brennan J (Mason CJ and McHugh J concurring), native title can be extinguished if the clan or group, by ceasing to acknowledge its laws and to observe its customs, loses its connection with the land. Deane and Gaudron JJ, having observed that traditional law or custom is not frozen, said: "Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land".[3] They were of the view "that, at least where the relevant tribe or group continues to occupy or use the land," the members would not lose their rights through "the abandonment of traditional customs and ways". Toohey J said, "So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life."[4]

Having established the existence and continuation of traditional native land title, the majority of the High Court in *Mabo* has enunciated the common law's recognition of traditional Aboriginal law for determining the owners of various lands. As the common law recognises Aboriginal land law, there is now a strengthened argument for recognition by statutory or other means of other aspects of traditional or Aboriginal law. An indigenous community living within the nation state and enjoying recognition of its legal system by the legal system of the nation is a community entitled to more than self-management. It is entitled to self-determination within the life of the nation. The real issues are the definition of self-

2 (1992) 170 CLR 1 at 70.
3 *Ibid* at 110.
4 *Ibid* at 192.

determination and the articulation of the limits of such a principle applied within the domestic context so as not to threaten the integrity of the nation state nor to qualify the dispute resolution processes extant within the nation state.

In exploring the limits of the principle of self-determination for Aboriginal communities, we have to expect conflicts and showdowns in the contest between the two laws. During the 1980 Noonkanbah mining dispute, Mr Ginger Nganawilla portrayed the conflict starkly:

> If we are to allow Amax (the mining company) to return to Noonkanbah they must show us Law, not paper law. Paper is nothing. Paper can be washed away. Our Law, Aboriginal law, will last forever. If Amax has this Law then they must show us.[5]

Ironically the enduring Aboriginal law is being recognised by the colonising legal system at a time when it is coming under greater threat from its own practitioners. The primary custodians of the only cultures unique to this land have a rich heritage and an abundant resource which gives value to the political struggle, the physical labour and spiritual trauma of living in two worlds. Aboriginal law embraces all we might variously describe as law, religion, philosophy, art and culture. Discrete groups of individuals are able to ascertain with practical precision their relationships, rights and duties with each other, their land, and their possessions. It is binding law which is life-giving and death-dealing. As Langton puts it:

> What our people mean when they talk about their Law, is a cosmology, a worldview which is a religious, philosophic, poetic and normative explanation of how the natural, human and supernatural domains work. Aboriginal Law ties each individual to kin, to 'country' - particular estates of land - and to Dreamings. One is born with the responsibilities and obligations which these inheritances carry. There are many onerous duties, and they are not considered to be optional. One is seen to be lazy and neglectful if these duties are ignored and the respect, authority and advantages, such as arrangements for good marriages, opportunities for one's children, are not awarded. As many of our people observe, Aboriginal Law is hard work.[6]

The genius of the Aboriginal religious world view was summed up by Professor WEH Stanner in his description of Murinbata religion:

> It affirms reality as a necessary connection between life and suffering. It sees the relation as continuously incarnate and yet as needing reaffirmation. It celebrates the relation by a rite containing all the beauty of song, mime, dance and art of which human beings are capable.[7]

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5 S Hawke and M Gallagher *Noonkanbah* (1989) p 193.

6 E Johnston, Royal Commission Into Aboriginal Deaths in Custody *National Report* (1991) vol 5 p 361.

7 WEH Stanner *Aboriginal Religion* Oceania Monograh 36, Reprinted 1989, p 56.

Aboriginal law, though now recognised for the first time as part of the law of the land even in the eyes of the colonisers, has to survive under challenge from its own practitioners who sense both new horizons and shifting foundations in their lives. If it is to maintain its appeal to contemporary practitioners, the Aboriginal religious world view has to embrace, or at least encounter and accommodate the world views of others. Aboriginal cultures are changing, being lost and retrieved at a rate never before experienced. Aboriginal people themselves know best that their system of law is under threat.

The breakdown of the law, the abandonment of myth and ritual, and violence in Aboriginal communities are exacerbated by readily available alcohol, widespread unemployment and concentrations of population which draw together groups from various clans and language groups for administrative convenience and economies of scale. Communities of such size, variety and outside contact (Cherbourg being an example) never existed previously except for periodic ceremonial, trading and meeting purposes. As permanent societies, they are new creations in the post-contact era resulting from the push and pull of outside service delivery. Such 'communities' as they are felicitously described do not and never have had a simple or uniformly acknowledged law, religion, or culture which could provide the basis for a customary dispute resolution structure or process.

In 1981, I was junior counsel for Alwyn Peter who was charged with the murder of his woman, Deidre Gilbert, on the Weipa Reserve in Cape York. Like many defence counsel, I was proud of our win in reducing the charge to manslaughter and obtaining a sentence which guaranteed Alwyn almost immediate parole. An anthropologist put it to me: "In a reserve situation like Weipa, there is no customary law sanction to protect Deidre and women like her. All you will succeed in doing is removing the limited sanction applicable by the whitefella law. There will be nothing left to protect the black women." Her words came back to haunt me as I read Marcia Langton's 1990 report *Too Much Sorry Business* to the Royal Commission into Aboriginal Deaths in Custody:

> It is clear...that the appalling level of domestic violence against Aboriginal women is not being addressed by Aboriginal Law. Many women are hesitant to speak about it, but the daily parade of women with bandaged heads and broken arms, especially in towns and larger communities where there is access to alcohol, is plain for all to see.[8]

The mainstream Northern Territory legal system is perceived by these women to be too lenient, too late and ineffective. As Langton put it:

> In many instances, justice is not seen to be done by Aboriginal people, because punishment imposed by a Northern Territory court is often too lenient. ...[S]tatistics on lengths of sentences for most serious crimes bear out precisely the

8 Note 6 *supra* p 373.

> Aboriginal view that sentences imposed by Northern Territory courts for homicide, rape and other serious crimes are too lenient.[9]

She heard much evidence that elders in communities thought the European legal system too humane and lacking in deterrence:

> Many elders, because of the stringency of their traditional Law and because of their experiences of police in the early days...feel that 'humanitarian' European laws provide no deterrent to Aboriginal offending. Indeed Aboriginal Law seems to have worked to prevent breaches by the threat, if not the actuality in most instances, of severe corporal punishment and even death.[10]

In many areas, culture is fading away; law is breaking down; languages are being lost; the ceremonies are dying out. Langton reports one testimony:

> Culture fading away slowly. So many people think they're white these days Especially young people.
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> Yeah, culture broken down. Yo, they running away from ceremony, cause of nganaji (grog). Young children, school age, they got to learn their culture. But middle age boy and girl they want to run away to the parks, they come back really drunk. Fussing about you know in the ceremony, they fighting, and talking wrong time, too fussy.
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> When they sober, like we today, we never be break up culture. When that happening, drinking business, they break and kick the culture. When people are making ceremony you know, then they come in and disturbing our ceremony and culture.[11]

Like Langton in the Northern Territory, Commissioner Patrick Dodson in Western Australia "found that much of the content of discussions related directly to problems arising from alcohol use and how to solve them".[12] Having said that "alcohol cannot be seen as the absolute or, indeed, the only cause of violent behaviour", Dodson conceded that alcohol can "be seen to exacerbate violent behaviour among Aboriginal people".[13] He found that in some areas violence was endemic among those who make extensive use of alcohol in circumstances which "can undermine respect for Aboriginal Law, and social relationships and practices that seek to maintain Aboriginal societies". He concluded:

> [V]iolence has increased among Aboriginal society, both in the amount of violence inflicted, and in how, and to whom, that violence is inflicted. What appears to be true, is that, whereas in previous times, members of Aboriginal society often used what may be described as violence or physical force to enforce certain aspects of law and order, today physical force has, in many areas, where excess alcohol use

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9 *Ibid* p 351.

10 *Ibid* p 355.

11 *Ibid* pp 311-2.

12 P Dodson Royal Commission into Aboriginal Deaths in Custody *Regional Report of Inquiry Into Underlying Issues in Western Australia* (1991) vol 2 p 731.

13 *Ibid* p 761.

> occurs, become almost uncontrollable and mindlessly violent. This is especially so not only with regard to the violence directed towards women and children but also among men themselves.[14]

The evidence quoted by Langton and Dodson and their considered reflections put to rest some of the more romantic notions about contemporary Aboriginal life, the ideal interpretations of Aboriginal law and the panacea of communal self-determination freed from interference or assistance by the whitefella law. Aborigines are living under two laws. But one law is losing its sanction, its appeal, its practitioners and its teachers, despite such recent recognition by the High Court. It is becoming optional. Some desire its continuation and transmission. Others, especially when drunk, can opt out when it suits them or lose it when living in a social situation where that law no longer makes whole sense of the individual's new world filled by Toyotas, videos, satellites, faxes, firearms, computers, cash, grog, school and fast food - all of which have their advantages and disadvantages.

Outstations are set up as sanctuaries for the preservation of the traditional way. But there is a limit to which outstations can be used as reform schools in the old law for young Turks playing up in their communities or in town. Young men facing initiation, banishment or some corporal punishment or young women facing a traditional betrothal to a much older man increasingly want to opt out of the traditional law and opt in to the system of individual choices and liberties they see on television or in the streets of Murgon or Brisbane. The whitefella legal system in these instances prizes individual rights and individual freedom of choice over collective rights of the group and the requirements for handing on a tough, holistic law which is hard work. Aboriginal law no longer controls every aspect of their lives. Free to choose, the young may abandon culture even if only for short term gain or liberty. Affected by alcohol and confronted by change, the elders may lose their confidence and abandon their duties to the law.

Once elders are denied the power to impose their law on the young without their consent, having already been denied the power to impose their law's ultimate sanction even with the consent of all parties, Aboriginal law inevitably becomes an optional way of living for the new generations who may want to move freely between two worlds.

Customary law is of little use in disciplining the young for grog related property and motor vehicle offences. Today, law and culture remain strong only while they hold appeal for, or can be imposed without human rights violations on the young who see and want to roam far beyond the boundaries of their traditional country. Culture is breaking down because, as the old say, the young are running away from ceremony. The old law which was all embracing is shattered by outside contact.

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14 *Ibid* p 763.

Some of the law may be salvageable and amendable if reshaped by those who have a memory and a vision of the law, having the skill and authority to impart it to the young who have geographic and cultural choices previously unimagined. Aboriginal communities might then keep afloat and mobile in the sea of all cultures, remaining true to themselves and their ancestors. Imposed solutions will generate further alienation and despair. Government with and at the request of local communities might keep in check needless violence and even remedy the causes embedded in a shattering colonial history.

III. SELF-DETERMINATION

A. THE KEY RECOMMENDATIONS OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

In his *National Report* of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Elliott Johnson QC identified the empowerment and self-determination of Aboriginal people as the fundamental issue in reducing the number of Aboriginal people in custody. In his view there were three essential prerequisites to the empowerment of Aboriginal society whereby Aboriginal people might have control over their lives and their communities.

He identified the "desire and capacity of Aboriginal people to put an end to their disadvantaged situation and to take control of their own lives" as the first and most crucial prerequisite.[15] Second was assistance from the broad society which would include assistance from governments "with the support of the electorate, or at least without its opposition".[16] Third he identified the need for "a procedure whereby the broader society can supply the assistance...and the Aboriginal society can receive it whilst at the same time maintaining its independent status and without a welfare dependent position being established as between the two groups".[17]

Commissioner Johnston expressed his shock at the constancy of "non-Aboriginal Australia's" treatment of Aboriginal people as if they were inferior and unable to make decisions. He identified the "pinpricking domination, abuse of personal power, utter paternalism, open contempt and total indifference with which so many Aboriginal people were visited on a day to day basis".[18] He then dedicated a 64 page chapter to the theme of self-determination but made only two minor recommendations in the chapter, one relating to funding of local communities from

15 Note 6 *supra* vol 1 p 16.
16 *Ibid* p 17.
17 *Ibid* p 19.
18 *Ibid* p 20.

the Commonwealth local road funds and another relating to the access of Aboriginal community councils to the capital works subsidy scheme. He dedicated a later chapter to "The Path To Self-Determination". This chapter contains 17 recommendations including "that governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or programme or the substantial modification of any policy or programme which would particularly affect Aboriginal people."[19] In its tabled response to the Royal Commission, the Commonwealth Government claimed that this principle already underlay the Commonwealth approach and had been adopted by all states and territories.[20]

The Commonwealth pointed to the Aboriginal and Torres Strait Islander Commission (ATSIC) structure as the appropriate vehicle to ensure the upholding of the principle of self-determination. The New South Wales Government indicated its support for the primary self-determination recommendation claiming that government agencies providing substantial services to Aboriginal people usually "have a specialist Aboriginal unit to ensure adequate consultation". New South Wales also claimed that the *Aboriginal Land Rights Act* 1983 (NSW) allowed land councils to determine policy and priorities in the expenditure of funds. The Victorian Government said its commitment to self-determination was being partially implemented through the establishment of Aboriginal advisory bodies and provision of funding to Aboriginal community organisations to deliver programmes. Queensland acknowledged that self-determination was "part of the Government's policy framework". Western Australia said that it would work through existing Aboriginal structures so as to support the recommendation. South Australia endorsed the philosophy of self-determination by pointing to its use of advisory mechanisms established by government. All governments indicated support for the general principle of self-determination but intimated that its implementation would mean more of the same in policy formulation and service delivery.

The Royal Commission's recommendations on self-determination advocated that where possible, government should use the services of local Aboriginal organisations for the delivery of services. While conceding the need for proper accountability in the expenditure of government funds, the Royal Commission saw a place for such Aboriginal organisations developing their own priorities and

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19 Note 6 *supra* vol 4 p 7.

20 Australian Government Publishing Service *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission* (1992) vol 2 p 718.

shaping programmes for the delivery of services. Commissioner Johnston observed that it was "remarkable how a concept which is so widely recognised as being central to the achievement to the profound change which is required in the area of Aboriginal affairs remains so ephemeral and so difficult to define".[21]

Johnston saw self-determination as "an evolving concept which encompasses a wide range of ideas".[22] He took as his starting point the definition proposed by the House of Representatives Standing Committee on Aboriginal Affairs in its report, *Our Future Our Selves*, which included: the devolution of political and economic power to Aboriginal and Torres Strait Islander communities; control over the decision making process as well as control over the ultimate decisions about a wide range of matters including political status, economic, social and cultural development; and having the resources and capacity to control the future of communities within the legal structure common to all Australians.[23]

Johnston was satisfied that the House of Representatives Committee definition was compatible at least in its core with submissions put by the National Aboriginal and Islanders Legal Services Secretariat (NAILSS) which agitated for a range of possibilities including, "statehood, free association (within the colonial state), the creation of an international territory, autonomy or integration". Johnston was of the view that Aboriginal people themselves should decide what they see as the scope of their demand for self-determination. In his view if the demand were to exceed what governments and the broader community were prepared to accept, there would then be a need for negotiation. He conceded that there was a variety of Aboriginal opinions about the scope of self-determination but he identified what he regarded as a solid core of common ground including:

1. That Aboriginal people have the control of the decision making process as well as the control over the ultimate decisions about a wide range of matters including political status, and economic, social and cultural development.
2. An economic base.
3. Choices of legal status within the legal structure common to all Australians.

Distinguishing self-determination from self-management, he insisted that Aboriginal people be involved at all levels in the decision making process including policy design as well as service delivery. Given the lack of agreement about the content of self-determination, Commissioner Johnston concluded that it was a principle rather than a right.

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21 Note 6 *supra* vol 2 p 503.

22 *Ibid* p 504.

23 House of Representatives Standing Committee on Aboriginal Affairs *Our Future Our Selves: Aboriginal & Torres Strait Islander Community Control, Management and Resources* (1990) p 12.

B. THE STUMBLING BLOCK OF THE WORKING GROUP ON INDIGENOUS POPULATIONS

Since 1982, many indigenous groups have been pressing the United Nations 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 United Nations made a *Declaration on the Granting of Independence to Colonial Countries and Peoples* which proclaims the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development.[24] In recent years, indigenous representatives and their advocates 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 presently live 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 which would 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 programmes, run co-operative enterprises and administer local government functions for communities which happen to be indigenous. This political interpretation of self-determination 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:

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24 Resolution 1514 (XV), s 2, 14 December 1960, GAOR, 15th Sess, Supp 16 p 66.

> 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.[25]

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".[26] 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.[27]

At the conclusion of the tenth session of the Working Group On Indigenous Populations on 20 August 1992, the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, observed that the group had enjoyed "a stimulating and productive discussions of certain key concepts and notions, in particular the concept of self-determination."[28] A record 42 member states of the United Nations were represented by observers at the tenth session of the working group. Australian indigenous representation included fifteen groups.[29] The group is in the final stages of drafting a *Declaration on the Rights of Indigenous Peoples* (Draft Declaration).

The fourteenth preambular paragraph of the Draft Declaration presently reads: "Noting that the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development." The fifteenth preambular paragraph states: "Bearing in mind that nothing in this declaration may be used as an excuse for denying to any people its right of self-determination". Operative paragraph one then states: "Indigenous peoples have the right of self-determination, in accordance

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25 *Ibid* s 6.

26 *Id.*

27 [1975] ICJ 12 at 33.

28 E/CN.4/sub.2/1992/33/add 1, p 13.

29 The Australian groups included the National Aboriginal & Islander Legal Services Secretariat, the Aboriginal Law Centre, the Aboriginal and Torres Strait Islander Commission, the Australian South-Sea Islanders United Council, the Central Land Council, the Iina Torres Strait Islanders Corporation, the National Coalition of Aboriginal Organisations, the National Committee to Defend Black Rights (CDBR) Aboriginal Corporation, the New South Wales Aboriginal Land Council, the Northern Land Council, the Top End Aboriginal Coalition, the West Queensland Aboriginal and Torres Strait Islander Corporation for Legal Aid.

with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government". Operative paragraph four then states that nothing in the draft declaration can be interpreted as allowing any person, group or State to act contrary to the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.* This effectively limits self-determination to a right exercisable within the nation state and not in violation of the territorial integrity of the nation state.

During the 1989 redrafting exercise of *International Labour Organisation Convention 107* which is now *International Labour Organisation Convention 169* (ILO 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 "with greater autonomy and decision-making powers within existing legislative and administrative structures".[30] 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.[31]

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".[32]

Though indigenous groups have tried to expand the concept of self-determination, the member states have either insisted on withdrawal of all reference to self-determination or countenanced its inclusion within very strict parameters. References to self-determination are generally seen by member states to be highly controversial. The official minutes of the tenth session of the WGIP note, "Most representatives of observer Governments put forward strong reservations with regard to the inclusion with references to self-determination".[33] At the last two meetings of the WGIP, the Canadians have expressed their concerns "that great caution be exercised in any references to self-determination or to such attributes

30 Opening statement of Australian Government Delegation, ILO Conference, Seventy-sixth session, June 1989.
31 ILO Convention 169 Article 1.3.
32 E/CN 4/sub. 2/AC.4/1989/3/add 2, p 5.
33 E/CN 4/sub.2/1992/33, p 17.

such as the term 'indigenous peoples' in the plural form". They said, "[e]ither a right to self-determination exists with all of its implications or it is circumscribed in some way. Simply put, Canada does not recognise this right of self-determination in the Working Group on Indigenous People process to be a right of self-determination as that term is understood in international law."[34] Canada does support the principle of self-determination for indigenous people within the framework of existing states "where there is an interrelationship between indigenous and non-indigenous jurisdictions that gives indigenous people greater levels of autonomy over their affairs but that also recognises the jurisdiction of the state."[35] The Canadians insist that the term self-determination and peoples be sufficiently qualified as they were in ILO Convention 169. The Government of Canada would be prepared to vote in favour of the insertion of the principle of self-determination if it were stipulated to be exercisable within the framework of existing nation states and in a manner recognising the interrelationship between the jurisdiction of the existing state and that of indigenous communities where the parameters of jurisdiction were mutually agreed upon.

The United States has forcefully expressed its objection to any unqualified reference to self-determination in the Draft Declaration. The US would prefer omission of the term 'peoples'. At the very least it will insist on a provision similar to that used in ILO Convention 169 making it clear that the use of the term does not imply the right to self-determination for indigenous people as it is understood in international law.

The United States' delegation prefers language of autonomy rather than self-determination, affirming that "indigenous people should exercise as much control as possible over their economic, social and cultural development, and that they should enjoy the right of full participation in the political life of their country, on a basis of equality with other citizens".[36] But the United States' delegation is insistent that there will be occasions when national laws will interfere with the capacity of indigenous groups to control their own lives. The United States has also taken exception to the fact that the Draft Declaration is based on the assumption that indigenous people subject to the provisions of the declaration will live in separate areas from the rest of the population of the state. The Americans see a need for the declaration to take into account the many indigenous persons who do not live in isolated enclaves but who live with other members of their societies. It is hard to see the United States' position and that of similar

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34 Statement of the Observer Delegation of Canada, July 21 1992, p 6.

35 *Id.*

36 Comments of the United States Government on the draft *Declaration on the Rights of Indigenous Peoples* (July 1992) p 7.

governments being any different from an avowal to eliminate racial discrimination and to keep a check against assimilationist policies.

Against a background of general government antipathy to the inclusion of a right of self-determination, the Australian Government has conceded that many states have a problem with the language of self-determination in such a declaration. Australia has been one of the "very few states" that has supported the inclusion of a right of self-determination for indigenous peoples with the proviso that there be a strict recognition and protection of member states' territorial integrity. It is common ground among member states that there is no current substantive international law of recognition of a right of self-determination for indigenous peoples as separate and distinct peoples with nation states. Neither is it established as customary international law.

As the world moves beyond the colonisation process, the focus naturally turns to the claims and aspirations of ethnically distinct groups within national borders. While most governments would prefer to abandon the rhetoric of self-determination, subsuming it as a principle or aspiration rather than as a right, whether collective or individual, the Australian Government has been happy to triumph the Aboriginal cause to the extent of the inclusion of a right to self-determination with qualifications. However not even the Australian Government countenances a right sufficiently expansive such that the goal of separate nation status for an indigenous population would be conceivable. According to the Australian delegation, the appropriate goal is the overcoming of barriers which inhibit the full democratic participation by indigenous people in the political process by which they are governed. The recognition of separateness and distinctness is tolerated only so as to ensure the overcoming of all discrimination and assimilation practices which preclude indigenous people from full democratic participation within the nation state while at the same time maintaining their cultural integrity.

The Australians have proposed a threefold basis for self-determination:

1. Guaranteeing full and genuine participation;
2. Guaranteeing fundamental human rights;
3. Recognising the special position of indigenous people within the nation state.[37]

The Australian Government has seen its approach as being consistent and informed by the Royal Commission into Aboriginal Deaths in Custody. If self-determination were to include the option of full independence and separate nation status, nation states would not accept the application of the right to groups such as

37 Mr Colin Milner from the legal office, Department of Foreign Affairs and Trade, read the statement on behalf of the Australian Delegation, reproduced in ATSIC *The Australian Contribution* (1992) p 81.

indigenous peoples. The right must be exercised in the manner consistent with the principles of territorial integrity and the peaceful settlement of disputes. The notable contribution of the Australian delegation to the last working group was the suggestion that the Draft Declaration could include a provision similar to the *Declaration on the Granting of Independence to Colonial Countries and Peoples* and the *Declaration of Principles of International Law on Friendly Relations and Cooperation among States* in accordance with the *Charter of the United Nations*. Paragraph four of the latter provides that no provision of the declaration shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples who are possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. This suggestion must constitute the high water mark of what will be achievable by a declaration winning support from the member states of the United Nations. Without such support, the Draft Declaration will remain simply an aspirational document summarising the shared hopes of indigenous groups independent of the wishes of their own governments.

C. AN INDIVIDUAL RIGHT OR A PRINCIPLE FOR COLLECTIVE PARTICIPATION?

Recently when considering an application by doctors to discontinue artificial feeding of one of the victims of the 1989 Hillsborough football disaster who was in a persistent vegetative state, the British courts had cause to posit the sanctity of life as one of the cluster of ethical principles to be applied over and against other such principles including "respect for the individual human being and in particular for his right to choose how he should live his own life". Lord Justice Hoffmann described this individual autonomy as the right of self-determination. Comparing the two principles, Hoffman LJ said:

> We all believe in them and yet we cannot always have them both. The patient who refuses medical treatment which is necessary to save his life is exercising his right to self-determination. But allowing him, in effect, to choose to die, is something which many people will believe offends the principle of the sanctity of life.[38]

Hoffman LJ sees the decriminalisation of suicide as "a recognition that the principle of self-determination should in that case prevail over the sanctity of life". Lord Goff of Chieveley observed that there were times when "the principle of the sanctity of human life must yield to the principle of self-determination."[39]

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38 *Airedale National Health Scheme Trust v Bland* [1993] 2 WLR 316 at 351.

39 *Ibid* at 367.

If self-determination is viewed as a principle of allowing and encouraging individuals and groups to order their lives freed from unsolicited state interference or assistance, it can be set alongside other principles such as due process and equality under the law which inform social policies and justify legal structures striking the balance between individual rights and collective interests.

Within Australia, the most appropriate forum for consideration of the limits of Aboriginal 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 sometime in the future. The usual provisos of discrete territory, people and economic base together with consent of affected persons may be able to 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 limit of their entitlement to self-determination. 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 (for example, not being forced into a traditional marriage or initiation process or not being banished from home, family, 'country' and kin without due process), and the entitlement of the community to order its affairs according to customary law so as to maintain and preserve the culture and the old way of doing things whatever the sensibilities

of councils for civil liberties and departments of family services. There would have to be guaranteed opting out procedures.

IV. CONCLUSION

In the political process, we are yet to move beyond the paternalistic phase of open ended consultation to negotiation within agreed or non-negotiable parameters. Romantic rhetoric about some monolithic and mythical Aboriginal nation which knew no conflict between ever just elders and always compliant youngsters provides no clear answer for the Cherbourg Aboriginal councillors seeking a better way to maintain law, order and culture. Unyielding insistence that all Australians be treated the same, as if there were no indigenous peoples with rights, entitlements and law before 1788 and whose descendants ought be allowed to bring up their young their way in community, may leave the youths of Cherbourg immune from the only law they understand and respect. A national commitment to the principle of self-determination could provide the basis for a creative partnership in exploring the possibilities for maximum indigenisation within the life of the nation subject to inevitable economic and social constraints.

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 principle of self-determination. Our legislatures 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.

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 forums within the predetermined and immovable parameters, they may gain more room to move on their lands, permitting the transformation of land rights and native title from a simple issue of property rights 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. 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 local solutions which will do justice

according to law, new and ancient, domestic and international, for the well being of the Cherbourg youths, their councillors and elders as well as their neighbours in Murgon.