

Indigenous Rights and the Australian Constitution - A Litmus Test for Democracy

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Indigenous people are often seen as being the special situation in Australia and in discourse about law, in particular the Constitution, we tend to be treated as a special case. It is true that we are in a unique position in Australian society given that we are the original owners of Australia. It is true that issues of colonisation, dispossession and the implementation of assimilationist policies continue to place Indigenous people on the periphery.

This 'special category' approach to Indigenous rights overlooks the very important and central role that Indigenous people can play in assessing the performance of our Constitution. I argue that, as the poorest socioeconomic group in Australia, and the most marginalised cultural group, Indigenous people become the litmus test of whether the Constitution and the system of governance that it sets up works. To put this test of democratic standards another way—if our laws and institutions fail the most vulnerable sector of our society, how effective are they? This is the question we need to ask ourselves when we look at issues of human rights protection under the Constitution.¹

I. Looking back

Indigenous people provide a powerful example of this litmus test in the 1997 case of *Kruger v. the Commonwealth*.² This was the first case to be heard in the High Court that considered the legality of the Federal Government's assimilationist policy of removing Indigenous children from their families. The plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed violations of the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s.116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

Ideologies of white racial superiority, prevalent at the time of federation, still continue to imbue the Constitution and the contemporary experiences of Indigenous people bear this legacy out.

The issue of whether the race power (s.51(xxvi)), which allows the Federal Government to make laws with regard to Aboriginal people, could be used to deprive Indigenous people of their rights was raised by the plaintiff in *Kartinyeri v the Commonwealth* (the Hindmarsh Island Bridge case).³ In that case, brought in a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an Act, the *Hindmarsh Island Bridge Act 1997 (Cth)*. That Act was designed to repeal the application of heritage protection laws to the

¹ See Larissa Behrendt. 'Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development'. *The University of New South Wales Law Journal*. Vol.24, No.3, 2001. 850-861.

² *Kruger v. the Commonwealth* (1997) 190 CLR 1.

³[1998] HCA 22

plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the federal race power to include the power to make laws concerning Aboriginal people it was with the understanding that the power would only be used to benefit Indigenous peoples. The Court did not directly answer this issue, finding that the *Hindmarsh Island Bridge Act 1997 (cth)* merely repealed legislation. The majority held that the power to make laws also contains the power to repeal or amend them.⁴

The failure to answer the question has caused much reflection on the argument of a race power that can be used to infringe upon the rights of Indigenous people. Many were shocked to find that Australia's Constitution could be read as offering no protection against racial discrimination but one need only look at the intention of the drafters to see why it remains this way.

The drafters believed that entrenched rights provisions were unnecessary in the Constitution and that the protection of rights was the proper domain of the legislature (the legislature that can pass the Heritage Protection Act and then repeal it so it doesn't apply to a particular individual—ditto the Racial Discrimination Act).

Also, it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of these attitudes held by the drafters of the Constitution then it comes as no surprise that the Constitution is a document that offers no protection against racial discrimination today. It was never intended to do so and the 1967 referendum in no way addressed or challenged those fundamental principles that remain entrenched in the document. It also shows how legislated rights can be withdrawn by the whim of legislature.

Conversations about citizenship, cultural diversity and institutions, including the Constitution, in Australian society all raise questions about the assumptions of the 'settlement' of Australia and about the contemporary relationship between Indigenous and non-Indigenous Australians. Here I want to step back from the legal document as a structure of government and look at the Constitution in its symbolic role.

The issue of the acquisition of Australia by the British has become an issue of increasing and recurring discomfort in the debates about reconciliation, Indigenous rights and a treaty. The uncertainty about this issue has resurfaced strongly in the decision in the *Mabo* case.⁵ The High Court of Australia, in overturning the legal fiction of *terra nullius* refused to pronounce definitively on the issue of the British claim to sovereignty. Instead, it held that the legitimacy of the acquisition of sovereignty was an issue that had to be taken up in an international court. This was an outcome that has meant that questions concerning the status of the legality of claims to sovereignty remain unanswered, creating a grey area of law and an uncomfortable legal silence.

The questioning of 'settlement' also arises in the context of the extent to which Indigenous peoples have been included in, participated in and given consent to the processes that have brought about the creation of the modern Australian state. In this context, much is rightly made of the fact that Indigenous people at the time of federation

⁴ For further discussion on the races power see, George Williams. 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

⁵ *Mabo v Queensland (No.2)* (1992) 175 CLR 1

were substantively excluded from debates surrounding the terms, conditions and visions of our society and their translation into our document of governance, the Constitution.

The notion of ‘settlement’ also raises questions about the extent to which the colonisation process has really finished in Australia. The argument, stated quite simply, is that until steps are taken to rectify the historical exclusion of Indigenous peoples in the nation-building processes of the Australian state, our system of governance will continue to be a colonial regime. That is, it will remain a system of laws and governance imposed upon the nations that have lived in Australia before that dubious assertion of sovereignty.

In fact, what the recurring appearance of this debate about ‘settlement’ shows is that these unstable and questionable beginnings of nationhood continue to raise unresolved and unsettled issues. The questioning of institutional legitimacy challenges assertions that we have moved into a post-colonial era. Instead, it views the power structures of the modern Australian nation as a continuation of its colonial legacy.

II. Looking forward

To rectify this historic exclusion, many have called for constitutional change. These claims have included:

A new preamble to the Constitution: a Preamble is important because it sets the tone for the rest of the document. It can be used to give assistance in interpreting the Act that follows. Particularly in our Constitution, a new Preamble will offer an opportunity to articulate our shared goals, principles and ideals as a nation. If recognition of prior sovereignty and prior ownership were contained in a Constitution Preamble, courts may be able to read the Constitution as clearly promoting Indigenous rights protection, clearing up the unanswered question left by the *Hindmarsh Island Bridge case*.

A Bill of Rights: As the *Kruger* case showed, very few rights are protected by our Constitution. Those that appear in the text have been interpreted in a minimal manner. Although members of the High Court have implied some rights, this is a precarious approach to rights protection. A Bill of Rights that granted rights and freedoms to everyone would be a non-contentious way in which to ensure some Indigenous rights protection. Public discussion needs to be focused on whether we should have a constitutional or a legislative Bill of Rights. A legislative Bill of Rights could be viewed as an interim step towards a constitutionally entrenched Bill of Rights.⁶

A Non-Discrimination Clause: Such a clause could enshrine the notion of non-discrimination in the Constitution. Such a clause must also adhere to the principle that affirmative action mechanisms aid in the achievement of non-discrimination.

Specific Constitutional Protection: An amendment could be made to include a specific provision. In Canada, a comparable jurisdiction with a comparable history and comparable relationship with its Indigenous communities, the *Constitutional Act 1982* added the following provision to the Constitution:

⁶ For a full discussion of the legislative Bill of Rights model, see George Williams. *A Bill of Rights for Australia*. Sydney : UNSW Press, 2000.


Section 35 (1): the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Some of these steps to improve the Australian rights framework for Indigenous people—a Constitutional preamble, a Bill of Rights—would have benefits for all Australians. This reinforces the point that comes out of the litigation in *the Kruger case*, namely, that many of the rights of Indigenous people that are infringed are not ‘special rights’ but rights held by all people. On the flip side, measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

III. Looking outside

While I have, to this point, concentrated on Indigenous rights people and achievable within the existing structures of the state, I want to now turn to the arena of international law.

With its agenda up until World War I of asserting claims of colonisation and negotiating disputes between colonial powers, international law developed as a Eurocentric body of law. This Eurocentrism was compounded by the agenda set by the (primarily European) world wars that moulded international law through European politics, European stability and European control over the world order.

We, as Indigenous peoples, provided one of the greatest impetuses for the development of international law. It was in what is sometimes referred  as ‘the colonising period’ that Europeans relied on an international law—or rule of general understanding between states—to agree between themselves on the appropriate way to acquire colonies. Thus, the doctrines of ‘discovery’, conquest and *terra nullius* were all developed as norms and rules of international law during this period. All to the disadvantage of Indigenous peoples.

International law may have been a tool to justify colonisation but colonised people, after World War II, adopted the rhetoric of international human rights law and sought to gain access to the institutions of the United Nations to assert claims of sovereignty, autonomy and the protection of human rights. Much of the assertions for independence and recognition of Indigenous rights focused on the principle of self-determination. And it is erroneous to think that we, as Indigenous people, have not challenged these assertions and then sought to rebut, counter or subvert the claims to our sovereignty and land that our colonisers have cloaked in the rhetoric of international law.

The right to self-determination is recognised under international law in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although the right is clearly recognised in two of the canonical human rights instruments, there is much debate about the applicability and content of self-determination as it applies to Indigenous people.

I would argue that we, as Indigenous peoples, do not need to feel confined by the semantic debates under international law. Rather, the key to the way forward is in the concepts and rights that we have implied into the terms ‘self-determination’ and ‘sovereignty’ when we use those words to describe a vision of what we would like our communities to be like and the way we want to live our lives as Indigenous peoples.

The rights enmeshed in the concept of ‘self-determination’ includes, I would argue, everything from the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economically self-sufficient, the right to

be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.

These rights that can be unpacked from the concept of 'self-determination' point to a vision that has been described as internal self-determination. It sees increased Indigenous autonomy within the structures of the Australian state. The challenge to Australia is to alter our institutions to incorporate that vision.

This debate shows the way that international concepts can be transformed and take on new meaning in the domestic political sphere for the furtherance of rights protections in a way that is not reliant upon active international intervention.

Having said that, it is important to make the following point about Indigenous participation at the United Nations, and that is that Indigenous peoples have understood how the international arena can provide a springboard for substantive changes that will allow greater respect for the rights of Indigenous peoples within our own states.⁷

Some avenues for action by individuals have opened up in recent times in relation to the human rights covenants. For example, if a state has signed the optional protocol to the International Covenant on Civil and Political Rights it opens an avenue of redress for an individual who claims state violation of their individual rights under that instrument. Convention for the Elimination of all Forms of Discrimination against Women is developing a similar mechanism.

In the absence of rights protection in the Constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia. A recent example of this role can be seen in the United Nations Committee on the Elimination of All Forms of Racial Discrimination. In 2000 it issued a report critical of Australia and claiming that our country, and our government, had failed to meet certain obligations that we, as a nation, have agreed to uphold under the Convention to Eliminate All Forms of Racial Discrimination.⁸ The Committee's report expressed concern about the absence of any entrenched law guaranteeing against racial discrimination, provisions of the Native Title Amendment Act of 1998, the failure to apologise for the stolen generations and its refusal to interfere to change mandatory sentencing laws.

The Federal Government's response to the report is to be noted as it signals an emerging resentment towards external monitoring of human rights standards. The Howard Government's response to the report was one of outrage, which labelled the report unbalanced and unfair. They rejected the notion that we are bound by the United Nations and asserted that a country like ours is capable of looking after our own affairs. They added sincerely that we have a good record on human rights, especially compared to other countries in our region. This comparison with worse human rights violators to negate international scrutiny of Australia promotes a method of assessing human rights

⁷ For example, lawyer Loretta Kelly notes the importance of recognition of rights in an international context, understanding that the recognition of rights internationally as being only the first step towards the recognition of greater rights at the domestic level:

'If the United Nations General Assembly agrees to a Charter of Indigenous Rights that recognizes the right of political self-determination, then that will add a great deal of weight to our claim to sovereignty'.

Interview with the author.

⁸ Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, Un Doc CERD/C/56/Misc.42/rev.3, (2000).

standards against worst practice rather than aspiring to best practice.

I would assert, however, that it is precisely because our domestic arena contains so few avenues of rights protection that we will need to rely on the developing norms and standards of international law in order to hold governments accountable for their actions. This antagonism towards outside interference in domestic matters stands in stark contrast to the internationalisation of trade policy and the embrace of neo-liberal economic policy that has seen increased interference with domestic matters through trade agreements.

This neo-liberal economic regime is also a challenge to Indigenous human rights. It is an economic regime unsympathetic to the cultural concerns and specific historical and contemporary legacies facing Indigenous communities as a result of the colonisation process. The cold rationale of neo-liberal economic policy impacts most heavily on sectors of the community that are vulnerable to economic shifts—and the Indigenous community is perhaps the most vulnerable of these. The erosion of hard-won workers rights, the erosion of land rights, degradation of the environment which leads to a loss of cultural heritage and the lack of protection from the agenda's of multinational corporations are just some of the signs of this vulnerability.

III. Looking inside

I want to conclude by reflecting upon three lessons from the Indigenous experience under the Australian Constitution:

- The protection of Indigenous rights does not occur in a lineal progression. There is often an assumption that as time goes on, rights protections will gradually improve. Recent experience in Australia should highlight the fact that rights that have been recognised in the past—native title and heritage protection—can be extinguished. So it is more accurate to view Indigenous rights—and indeed rights in general—as something that has high and low water marks. It is an important observation in terms of strategy as it means more diligence must be exercised in the way which gains in protection are made at moments of increased support for these issues.
- The Constitution is just one arm of a strategy for rights protection. Rights must be placed in a respectful environment so any constitutional agenda needs to be matched with legislative political and educational strategies about rights protection.
- We have yet to have a moment of inclusive nation-building. These issues of reconciliation, treaty and self-determination will remain recurring themes on Australia's domestic agenda until there has been some step to counter the exclusion of Indigenous peoples from the creation and development of the modern Australia nation-state.

The way forward is one that moves away from the zealous embrace of neo-liberal economic policy and instead seeks to match economic sustainability with the protection of fundamental rights. It is a model that measures quality of life by considering and valuing non-economic factors such as cultural heritage and environmental protection alongside the economic factors that are taken as indicators of our performance.

Indigenous people can offer this aid to a better and fairer Australia: if laws, institutions and policies do not work for us, the most vulnerable, socioeconomically disadvantaged cultural minority in the country, they are not working. We are the litmus

test, not the special case. This test for our performance as a nation would move Indigenous people from the periphery, where we stood at the moment of federation, to the centre, where we need to be to ensure that Australia's nation building processes become inclusive. This is the role we need to have in Australia's political, legal and psychological life to ensure we move from a neo-colonial to a post-colonial Australia.