

## Introduction: Can Indigenous Peoples' Experiences of Colonisation Reshape Our Constitutional Language?

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There would be few places on earth which could illustrate more clearly the growing fellowship of Indigenous peoples than Geneva airport a day before the gathering of the Working Group on Indigenous Populations (WGIP). Far from their homelands, Indian leaders in their multicoloured, wool-woven costumes from the mountains of Peru, converse with leather and turquoise-beaded, or western-suited leaders from the United States, Canada, Australia, and New Zealand. (Hazlehurst 1995)

The 'international fellowship' that has emerged from the WGIP has helped foster both inter- and intra-Indigenous knowledge of the conditions they mostly share. It has also provided the momentum whereby Indigenous peoples are seeking to regain, at least in part, some of what they have lost through the imposition of colonialism. This book recognises from the outset that Indigenous peoples are still facing what many describe as genocide with the destruction of 'their land and their own physical destruction' (Cunneen 2001). It starts from the premise that the common thread—a recognition of the human right of land ownership and political participation post-colonialism—reflects 'the nature of the political community on which the constitution is based' (Russell 2005) in the countries from which chapters are drawn in this book.

In searching for the nature of that political community, this collection continues upon the Australian path paved by Garth Nettheim, Gary D. Meyers and Donna Craig (Nettheim et al 2002) While their focus was on the design of governance structures rather than upon the principle of self-determination per se, they included discussion of the principles of international law which support notions of self-determination, self-government and political participation as well as questions of the design of interface structures.

The approach is also that of Paul Havemann, who suggested that a major technique for facilitating comparison and contrast is to assemble country-specific essays on a common topic, explore it in the specific setting and to then draw out key themes and points of comparison (Havemann 1999). Comparisons of key commonalities and specific differences across colonised and settler societies has characterised human rights legal research

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in particular (Bartolomei et al 1999). Modern comparative law method uses a functional approach, aimed at finding similarities and convergence, not in the technical rules of law, but in the solutions to particular legal problems. Comparative legal analysis illuminates similarities and differences across legislative and ethical policies, both on the national and international level and illustrates how closely law is connected with the culture or experience of a given community (van Erp 1998).

For the Australian Indigenous people the experience was one where, briefly, their status was above that of the convicts transported to their shores. That situation was however rapidly transgressed as disease, wars and land and resource prospecting, reinforced by dramatic assimilation policies, decimated their families, communities and their languages.

The Australian Indigenous experience was comparable with that of the Maori in New Zealand, the Indians and Inuit of the continent of North America, and the Indigenous peoples of British settled colonies in Africa. Constitutionally, however the Australian experience differed from that in New Zealand where the Treaty of Waitangi provided some recognition of the political reality of the Maori people. Southern Rhodesia (now Zimbabwe) was an exception to the classification of settled colonies. It was classed as a conquered colony, although inhabited by indigenous peoples soon dispossessed by white English settlers. Theoretical argument raged for many years as to whether the British colonies of the Americas had been conquered or settled and, strangely, New Zealand was not considered conquered despite the Maori wars. With the exception of Australia, the intricacies of the constitutional debates differed but the constitutional issues were raised, at least in part, and not neglected. The social legacy of colonialism in all these countries is also similar.

Havemann, for example, pointed to the distribution of benefits to the colonists and the 'immiseration' of Canadian indigenous peoples. Such observations are echoed in Australia where it has been claimed that the 'colonial mentality' persists despite the recognition of native title by the High Court. In his many writings, Russell explores the ways in which Australia, as demonstrated by the High Court decision in *Yorta Yorta*, continues to exclude Indigenous peoples from common law developments in native title (Russell 2005). Comparisons across the countries examined in this book illuminate the ebb and flow of Indigenous self-determination and their shared and dissimilar experiences of colonialism and what some consider post-colonialism. It is not necessary for the purposes of that comparison that the countries in our book be similar: it is the shared experiences that preoccupy our contributors in their individual analyses of Indigenous self-determination and their search for 'the nature of the political community on which the constitution is based' (Russell 2005).

So, to take just one point of difference, the extreme affluence and advanced democratic status of some of the countries included in our collection does not complicate the confrontation with the impact of

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colonialism on the part of those wealthier nations, such as Canada and Australia. There is little justification for that affluence and democratic advantage of the majority population muddying the post-colonial waters. Bill Ashcroft takes that form of denial to task in this way:

One of the most tenacious controversies in post-colonial criticism continues to be the argument about whether all the different forms of colonized societies can truly be called 'post-colonial'. For societies such as those in Africa and the Caribbean the situation is very clear, as it is perhaps for South Asia or, say, Melanesia. But for colonies formed by invasion and settlement a post-colonial status seems, to many commentators (although they wouldn't put it this way), to be somehow refuted by subsequent economic development. I think that this implicit equation of post-coloniality with Gross National Product is a very dangerous position, for it completely obscures the real and persistent nature of cultural imperialism. Two regions which seem ideal for reviewing this question, because they appear so totally different, are Africa and Australia (Ashcroft 1994).

The purpose of Helena Whall's paper is to analyse the process of consensus building on the issue of Indigenous self-determination, one of the most difficult and sensitive issues in the Draft Declaration, specifically at the sixth session of the United Nations Working Group of the Commission on Human Rights on the Draft Declaration (2000), and examine the role played by member states of the Commonwealth of Nations in this process. Whall argues that a handful of prominent Commonwealth member states are at the forefront of the opposition to the inclusion of Article 3 in the Draft Declaration, as currently drafted, which deals with the right of self-determination, and are thereby playing a vital role in obstructing the adoption of the Draft Declaration. While the adoption of the Draft Declaration will be important, since it will provide Indigenous peoples with a mandate to take states parties to task if they fail to uphold its principles, it is just one aspect of a larger process taking place at the international, national and local level, by which Indigenous peoples are finally beginning to secure their rights.

John Bradley and Kathryn Seton's chapter focuses on the *Aboriginal Land Rights (Northern Territory) Act 1976*, and they acknowledge that legislation can assist Indigenous people greatly in pursuing their rights to ancestral lands. They look beyond the law to contend that this legislation, in itself, cannot be seen to be beyond critique, and whilst Indigenous people use this legislation to try and achieve the return of their country, the practical administration of the Act is a powerful and eclectic blend of anthropology, European law, and Indigenous, State and Federal Government bureaucracies. Bradley and Seton provide an overview of the

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Northern Territory legislation and discusses aspects of its application in the field through the use of two land claim case studies and the types of issues that confront Indigenous people when they engage with this legislation.

Chris Cunneen's chapter links a number of themes together such as citizenship, self-determination and sovereignty to explore the issue of policing in regards to Indigenous people. It is particularly concerned with the intersections between policing and the concepts of sovereignty and Indigenous self-determination. He advances the argument that policing as a state activity was fundamentally caught within the broader processes of colonisation. As a result, the contemporary demands for Indigenous self-determination will necessarily involve a decolonisation of existing institutions like policing. The historical movement from legislated racial discrimination to assimilation and formal equality before the law changed the nature of policing Indigenous peoples, lead to a prolonged period of criminalisation and new forms of racialisation. In all the major Indigenous discussions on this issue over the last two decades, the right to develop and maintain institutions of Indigenous law, order and policing have been central. Ultimately, continued Indigenous resistance to colonial power and the assertion of alternative forms of governance provide us with the broader opportunity to re-think the institution of policing and its relationship with processes of decolonisation.

Aileen Moreton-Robinson 'recasts the feminist standpoint theory by looking at the Indigenous women's position, which is different from that of the white feminist, as it also is based on oppression' (Foley 2003). The aim in bringing together Indigenous women and whiteness is to illustrate how the relationship between white race privilege and racial oppression operates to circumscribe Indigenous women's self-determination. Moreton-Robinson's key point is that racialised power relations are rarely discussed in relation to self-determination.

Philip Morrissey also provides Indigenous perspectives on self-determination and sovereignty and focuses on the ways that institutions mask colonialist racism while at the same time appearing to address and protect indigenous rights. Since this chapter was written, ATSIC has been abolished, but the political issues surrounding its existence and demise, and the political representation and participation of Australian Indigenous people remain perennial.

Michael Mansell outlines the sovereignty of Norfolk Island, determined long ago and respected to this day. Concepts of sovereignty and self-determination are not concrete: they are capable of development depending on the political context. The Norfolk Island model, while currently being revisited by some residents, has provided the people of the island with the independence to develop their own unique customs and culture, an independence still denied to many Indigenous Australians

whether they live in urban areas or remote communities. Mansell's key point, however, is that we need to know if the debate will be heard.

An issue of great importance for Maori especially over the last 15 years is the appropriate representation of hapu and iwi for the purposes of Treaty settlement negotiations and consultation with Crown agencies. The Maori Land Court has played an important role in resolving representation issues by adjudication under section 30 of the *Maori Land Act 1993* but with mixed success. Recent amendments to section 30 now allow the court to channel representation issues into a mediation process. Andrew Erueti reviews the Maori Land Court's new mediation power and comments on traditional forms of Maori dispute resolution; the factors that give rise to representation issues; the suitability of the Maori Land Court as a forum for resolving representation issues with tikanga; and the role of Maori custom in mediating representation issues under section 30.

Catherine Iorns Magallanes's chapter provides comparisons of aspects of political self-determination in New Zealand, and illustrates how different indigenous peoples might devise different systems of separate indigenous political representation to accord with their different visions of self-determination. Magallanes contends that it is necessary to take a wider perspective on indigenous self-determination than temporary political imperatives provide. She makes it clear that separate political representation can be used as an effective tool to achieve indigenous self-determination in Australia, but that a vision of Indigenous self-determination and what it entails in Australia must be agreed upon first.

John Buick-Constable's chapter provides the politico-legal backdrop to the debates on issues of indigenous self-determination in New Zealand. He explores the historical and contemporary attempts to address these issues in New Zealand through what is identified as a 'contractualist' approach to indigenous self-determination. From this perspective, the history of relations between indigenous Maori and the New Zealand state can be understood properly as that of a contractual relationship. Buick-Constable emphasises that, because of the original treaty-based relationship and through contemporary domestic legislative agreements, certain Maori tribes and peoples have had grievances recognised and achieved measures of sovereignty and justice in their pursuit of self-determination.

Joshua Cooper's chapter provides an historical overview of the Kanaka Maoli in Hawaii and the way they are using self-determination to assert their rights to land and their right to continue their cultural practices through ecology. This has been a difficult situation in the light of the onslaught of tourism and the USA military bases on Kanaka Maoli land. The chapter therefore deals with the non-violent struggle for the human rights of Kanaka Maoli; a struggle which continues daily, as it has for the previous two centuries—in the legislature, legal system and everyday living in Hawaii. Cooper asserts that the main challenges to traditional protocol and politics continue to be colonisation, militarisation and

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corporate globalisation threatening the cultural survival of the Indigenous peoples of Hawaii.

Jennifer Corrin Care's chapter turns to Solomon Islands, which has been thwart with more overt conflict than Hawaii, despite gaining its independence in July 1978, with a Constitution framed to incorporate ideals of national unity and parliamentary democracy. As Care's chapter makes clear, the reality is that these introduced ideals have little resonance in a country where tribal allegiances run far deeper than political affiliations. Care adds an historical perspective to the earlier research, examining the governmental arrangements from the time Solomon Islands became a British Protectorate. She includes comments on provincial government and updates the research to include developments in late 2002 and early 2003, including the *Malaita Province Autonomy Bill 2002*.

Since this chapter was written, there have been several developments, the most dramatic of which is the arrival of 'RAMSI', the Regional Assistance Mission to Solomon Islands. The paper has been updated to make mention of recent events, but does not include any detailed analysis of them. These developments do not detract from the arguments put forward in this paper; if anything the danger of introducing solutions without proper reference to local circumstances and norms has become more acute since Solomon Islands has been forced to accept outside assistance to solve its problems.

In Peter Russell's view, a new kind of constitutionalism has been emerging in Canada that is more pluralist and human-rights oriented than the classic liberal constitutionalism that was so influential at the time of Australia's founding. Michael Ignatieff shares this view, arguing that: 'Canada has moved away from a constitutional debate dominated by governments and first ministers to a system of constitutional renewal driven essentially by citizens, interest groups, and nations.'

Those nations are the Indigenous people: the Inuit nations of Canada. And in Russell's view, despite a 'back-lash' movement led by Conservative political forces, indigenous peoples in Canada, since 2001, have been able to consolidate gains and move forward on a number of fronts. On 19 April 2004, just a few days after Australia's Prime Minister John Howard announced the dismantling of ATSIC, Canada's new Prime Minister, Paul Martin, in a nationally televised meeting with Aboriginal leaders promised to make Aboriginal affairs a priority of his administration and to abandon the Liberal government's previous plans to impose legislative changes on Indigenous communities. Russell maintains that, the progress that has been made in Canada over the last three years in preserving past gains and advancing Indigenous self-determination has come about mainly through Indigenous peoples making effective use of their own political resources.

Canada's northern neighbour the United States also provides us with perspectives on and experiences surrounding Indigenous self-determination. Anne Waters's chapter attempts to provide a philosophical analysis of decolonization, Indigenous identity, self-determination and sovereignty. Waters also attempts to provide a Native American perspective of these largely western terms and concepts. She tries to find a balance between the individual Native American and the collective Native American groups. The chapter reminds us of the need to be aware of language and the ways in which philosophical understandings of identity vary depending on one's own personal and cultural experiences.

Common to many of the contributions here about former colonies, we see in the Nordic nations of Norway, Sweden and Finland the extent to which migratory Indigenous people have also suffered from relatively recent impositions of political borders. Like Indigenous peoples in Australia, Canada, and New Zealand, the Saami constitute a visible minority—and a very small minority—and have confronted similar experiences of dislocation of family and destruction of their livelihoods and resources.

To understand self-determination for the Saami people, one must recognise that their culture has traditionally been based to a large extent in reindeer herding even though many in the population no longer live from this activity. However, the specific constitutional form that recognition of their evolving culture takes is also contingent upon the history of each of the nation states and the largesse of the governing Parliament. In the case of the Nordic countries, the most known vehicle of self-determination has been the Saami Parliament. The agenda of such Indigenous Parliaments reflects both the specific borders within which they were created as well as the international dimensions of the Indigenous movement. Perhaps reflecting the larger number of Saami citizens, Norway alone ratified Convention # 169 concerning Indigenous and Tribal peoples in Independent Countries. As promising as such developments appear in Norway, self-determination is nevertheless limited by the absence of clear land titles; and disputes are ongoing as to the extent of the recognition of traditional reindeer herding. There were recently serious contentions over the proposed Finnmark Act, which it was claimed fell well short of Norway's obligations under the ILO Convention. In neighbouring Sweden, issues persist as to recognition of the Saami, particularly in the context of capacity to vote for the Saami Parliament. An enhanced constitutional capacity may be presaged, however, with the long-standing and only recently re-activated proposals for a Nordic Saami Convention, which is expected to draw to a large extent upon the obligations of the ILO Convention.

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Cleopatra Magwaro investigates the impact that international human rights law should have within the legal dynamics of Indigenous communities generally. She examines the main aspects behind safeguarding Indigenous dispute management systems, and illustrates why Indigenous methods of managing disputes should be internationally guaranteed so that communities can retain their cultural identity whilst administering and managing their own disputes.

*Unfinished Constitutional Business?* aims to get us thinking about Indigenous self-determination within the specific realities (some would say confines) of our Australian political and constitutional system (Pengelley 1998). Given we are currently re-engaging vigorously with the Bill of Rights debate, particularly in the light of our political and legal responses to the so-called ‘war on terror’ and to the concentration of federal government power following the 2005 election (Williams 2005) it is timely to reflect upon the wide-ranging constitutional and human rights debates unfolding in Australia, as well as those elsewhere that may be of relevance to or influence in Australia (Tierney 2005). In many of the chapters in this book we witness a consideration, in other nations, of Justice Brennan’s pronouncement in *Mabo No. 2* that:

‘...the expectations of the international community accord with the contemporary values of the Australian people to require that any interpretation of this power which would be adverse to Aborigines and Torres Strait Islanders is no longer acceptable.’  
(*Mabo v Queensland*)

Where is Australia in this debate about Indigenous rights and the expectations of the international community? How will Australia work towards ‘better constitutional accommodation’ (Tierney 2005) in a global environment where it has been suggested that ‘the old constitutional categories are losing their meaning’? (Keating 2001).

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