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# INDIGENOUS CONSTITUTIONAL RECOGNITION FROM THE POINT OF VIEW OF SELF-DETERMINATION AND ITS EXERCISE THROUGH DEMOCRATIC PARTICIPATION

by Megan Davis

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## INTRODUCTION

This paper is on Indigenous peoples' right to self-determination and its exercise through democratic participation. First, I will expound on why the right to self-determination—as configured in international law, translated by many states and adopted by Indigenous communities—enhances liberal democratic governance. Then I will provide a cursory glance at the many and varied ways in which Western and non-Western liberal democracies have made efforts to accommodate Indigenous peoples in their public institutions.

## THE RIGHT TO SELF-DETERMINATION

The normative principle of the right to self-determination has been adopted as the legal right underpinning Indigenous polities' human rights worldwide. Within the framework of liberal democratic governance, the right to self-determination is the gold standard for virtually all countries with Indigenous populations—except for Australia.

Unlike most United Nations Member States including Canada, the United States, New Zealand and Nordic countries, the right to self-determination has been eviscerated from the lexicon of Australian politics.<sup>1</sup> It has been coarsely defined as a 'failed experiment' and even more erroneously described as antithetical to Aboriginal economic development.<sup>2</sup> This is news to the many successful liberal democracies around the world that succeed in delivering far better outcomes in health and wellbeing, employment and education than we do in Australia. Economic development is inextricably linked to self-determination. Self-determination is about freedom.

Australian policy makers have abandoned self-determination as a framework to underpin Indigenous policy. However, the right to self-determination and human rights remains fundamental to the aspirations of Aboriginal communities. This disconnect is significant and scaffolds the ongoing disparity in health, employment, education and other outcomes in Australia.

Human rights and the right to self-determination have been critical to the advancement of Indigenous rights in Australia because the

state has been deficient in resolving the fact of dispossession and that Aboriginal people never ceded the land. Given Australia's history of delivering "bucket loads" of unfreedom to Aboriginal communities, it would be ahistorical to pillory the allegiance of the Aboriginal political domain to human rights and in particular the right to self-determination.<sup>3</sup>

The General Assembly's adoption of the United Nations Declaration on the Rights of Indigenous Peoples expounded not only on the right to self-determination and participation in decision-making processes affecting them, but also the right to 'control the outcome of such processes.'<sup>4</sup> The Declaration contains more than 20 general provisions pertaining to Indigenous peoples and decision-making. This is because '[t]he right to full and effective participation in external decision-making is of fundamental importance to Indigenous peoples' enjoyment of other human rights.'<sup>5</sup>

Since its creation, the United Nations system has served as the supra-national institution to which subjugated and marginalised people turn when their own countries fail to accommodate their distinct cultural interests. The cross pollination of ideas between the 700 million Indigenous peoples of the world means we are aware of what works and does not work from the experiences of others. For that, contemporary Australian policy is an example of what not to do.

## DEMOCRATIC GOVERNANCE

In international law the putative right to democratic governance tells us that liberal democracies are distinguished by free, fair and periodic multi-party elections. This right to democratic governance is underpinned by the United Nations Charter and the International Covenant on Civil and Political Rights.

Contemporary liberal democracies are procedural democracies. That is to say, citizens' participation is more or less limited to a procedural right (the right to vote) and less scrutiny is paid to the quality of decision-making between elections. In this regard, Australia is not unique. There is voluminous literature on how

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to improve the quality of decision-making between the ballot boxes. Indeed this explains advocacy for a bill of rights or a federal corruption commission.

There are other opportunities for citizen participation outside the ballot box such as submissions to parliamentary inquiries, protests, letters to editors, lobbying politicians or a robust inquisitive media—but there are limitations to each of these. Certainly OECD testing of civics shows Australian students are close to the bottom of the table in terms of understanding basic tenets of democracy, unlike USA students who occupy the top, for example.

Procedural democracies like ours calibrate politics to become attuned to what political scientists call 'majoritarianism': a current of utilitarianism. This means that the eye is trained to the middle. It also means that small numbered groups or even large numbered groups distinguished by no power and no money fall outside the spectrum of what parliament—whose eyes are always attuned to the next election—is interested in.

Most liberal democracies temper majoritarianism in a variety of ways. These may include electoral systems that encourage more independent or minority voices, entrenching 'rights' in bills of rights or charters of rights or, in the case of Indigenous peoples, incorporating treaties, agreements or other constructive arrangements, reserved seats or Indigenous parliaments. Australia has resisted such structural accommodation of Indigenous peoples.

Section 116A<sup>6</sup> and the parliamentary body proposed by the Cape York Institute<sup>7</sup> are identified by Indigenous peoples as two ways in which a parliament attuned primarily to majoritarian democracy may be constrained. They are substantive and carefully considered proposals for law reform.

Australia's democratic culture, distinguished by an extreme form of parliamentary sovereignty, poses a problem for Indigenous peoples who constitute approximately two per cent of 22 million people. We are saying that the ballot box is not enough for us. We cannot influence the ballot box. So much of the trajectory of Indigenous advocacy over the decades, both before and after 1967, has been aimed at that.

We see this step on a long trajectory from first contact, to the conciliation phase, to the killing times or frontier wars, to the protection era, to assimilation, to self-determination and to the current phase of policy-making labelled by Prime Minister Tony Abbott as 'neo-paternalism'.

Underpinning this advocacy is the idea that communities know their own communities better than outsiders. And providing human beings with the freedom to participate in decision-making about their own lives, including the freedom to think and imagine and dream about their own version of the good life, is a good thing.

This is why there are internal decision-making processes within Indigenous communities. But these are virtually non-existent externally. Mechanisms enabling the participation of Indigenous peoples in external, non-Indigenous decision-making processes (such as parliament) allow for greater Indigenous influence over decisions in practice.

**Economic development is inextricably linked to self-determination. Self-determination is about freedom.**

#### **WHAT IS GOOD PRACTICE ON THE RIGHT TO SELF-DETERMINATION IN DEMOCRATIC PARTICIPATION INTERNATIONALLY?**

The Expert Mechanism on the Rights of Indigenous Peoples, a mechanism of the United Nations Human Rights Council, has conducted a study on this very topic:

Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society ... Decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages and their lands, territories and resources.<sup>8</sup>

The Expert Mechanism tells us that the most significant indicator of good practice is likely to be the extent to which Indigenous peoples were involved in designing the practice and their agreement to it. This is critical to Indigenous peoples given that:

Many remain vulnerable to top-down State interventions that take little or no account of their rights violations and circumstances. In many instances this is an underlying cause for land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods.<sup>9</sup>

One example adopted by the Expert Mechanism is education. The right of Indigenous peoples to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services is crucial for their enjoyment of the right to education. Truth and reconciliation commissions offer

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a model for improved relations between states and Indigenous peoples as well.

International law and jurisprudence recognise that the 'duty to consult indigenous peoples applies whenever a measure or decision specifically affecting indigenous peoples is being considered (for example, affecting their lands or livelihood).'<sup>10</sup> This duty also applies in situations where the state considers decisions or measures that potentially affect the wider society but which affect Indigenous peoples, particularly in instances where decisions may have a disproportionately significant effect on Indigenous peoples.

How have different states dealt with this? In many varied ways. The following is an extract from the report of the Expert Mechanism on the Rights of Indigenous Peoples:

### **PANAMA**

The Kuna Yala Comarca is one of five special territorial units in Panama with administrative autonomy through general, traditional, regional and local councils. The Comarca is governed by Kuna traditions and customs and makes its own decisions within the framework stipulated by the Constitution and legislation. Indigenous peoples make the majority of decisions on cultural, economic and political matters affecting their populations and monitor Indigenous rights.<sup>11</sup>

### **SÁMI**

The Sámi Parliaments are representative advisory bodies that were established in Norway, Sweden and Finland in 1989, 1992 and 1995 respectively. Among other objectives, they facilitate consultation with the Sámi people on matters affecting them. The mandate and regulation of the parliaments differ from one country to the other.

### **SWEDEN**

In Sweden, the Sámi Parliament has been granted special responsibilities relating to participation in decision-making. For example, it decides on the distribution of state grants, Sámi schools and manages Sámi language projects. It is the administrative agency responsible for reindeer husbandry, participates in social planning and monitors compliance with Sámi needs, including the interests of the reindeer industry with regard to land and water. It also disseminates information on Sámi conditions.<sup>12</sup>

### **FINLAND**

In Finland, under section 9 of the Sámi Parliament Act 1995, the authorities are required to negotiate with the Sámi Parliament on all important measures that may directly affect the status of the Sámi as an Indigenous people.<sup>13</sup>

### **NORWAY**

The Government of Norway and the Sámi Parliament agreement on Procedures for Consultations recognises that the Sámi have the right to be consulted on matters that may affect them directly, and sets out procedures applicable to the government and its ministries, directorates and other subordinate state agencies or activities in matters that may affect Sámi interests directly. This includes legislation, regulation, specific or individual administrative decisions, guidelines, measures and decisions.<sup>14</sup>

### **NEW CALEDONIA**

In New Caledonia, Congress is legally required to consult with the Customary Senate, consisting of Kanak Senators from each of the New Caledonian customary areas, when considering any law or policy affecting Kanak identity. When the Customary Senate disagrees with the law or policy, Congress must reconsider its decision, after which the position of Congress applies.

While this practice preserves the supremacy of the New Caledonian Congress on matters that are of fundamental importance to the Kanak, it provides the opportunity for Kanak representatives to contribute to congressional deliberations.<sup>15</sup>

### **INUIT - REGIONAL INITIATIVES**

The Inuit Circumpolar Conference is a good example of regional cooperation between Indigenous peoples. The Conference holds quadrennial general assemblies at which issues such as resource development and climate change are discussed. The associated Inuit Leaders' Summit brings together Inuit leaders of the regional and national governments of Inuit nations.

### **NEW ZEALAND**

In New Zealand, the Maori have had guaranteed representation in parliament since 1867. Anyone of Maori descent can choose to be on either the Maori electoral roll or the general electoral roll. Since 1996, the number of Maori seats in the House of Representatives ('the House') varies according to the proportion of Maori registered on the Maori electoral roll compared to the general electoral roll.<sup>16</sup> Currently, there are seven Maori seats in the House. The House also has a Maori Affairs Select Committee, to which the House may refer any issue with implications for the Maori.

### **BURUNDI**

Similarly, in Burundi, the Batwa have permanent seats in the National Assembly in both houses and there has been guaranteed Batwa representation on the National Land Commission.<sup>17</sup>

### **RUSSIAN FEDERATION**

In the Khanty-Mansiysky Autonomous Region of the Russian

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Federation, an Assembly of Indigenous Peoples is part of the structure of the regional Duma (parliament). The region has a legislated quota of Indigenous representation. Another positive solution at the provincial level is the additional guarantee of Nenetz direct representation in the relevant autonomous okrug (district).<sup>18</sup>

## NEPAL

Proportional representation electoral systems can assist in the election of Indigenous individuals to State parliaments, as seen under, for example, the Interim Constitution of Nepal.<sup>19</sup> However, measures may also be needed to ensure that the election of Indigenous individuals translates into influence in decision-making.

## SOUTH AFRICA

In South Africa, the Traditional Leadership and Governance Framework Act 2003 provides that any parliamentary bill pertaining to the customary law or customs of traditional communities must, before it is introduced and passed by the House of Parliament, be referred by the Secretary of Parliament to the National House of Traditional Leaders for its comments.<sup>20</sup>

## COLOMBIA

In Colombia, the Constitution reserves parliamentary seats for Indigenous peoples, chosen directly by Indigenous communities. Two (out of 102) seats in the upper Senate are elected by Indigenous communities and one (out of 166) is elected for the lower Chamber of Representatives.<sup>21</sup>

## CONCLUSION

I have first expounded on why accommodating the right to self-determination enhances liberal democratic governance. Second I have provided a very cursory survey of the ways in which liberal democracies grapple with Indigenous populations, based on the report of the Expert Mechanism on the Rights of Indigenous Peoples.

The examples provided by the Expert Mechanism on the Rights of Indigenous Peoples show us that many liberal democracies are grappling with the same questions as Australia. Each of the states referred to are working to better accommodate Indigenous voices into democratic decision-making and to improve the quality of decisions being made about the lives of Indigenous peoples.

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### Amala Groom

*Between the lines #1 Mein Kampf vs Idi Amin, 2014*

Acrylic on canvas

1240mm x 950mm

Image by Shayne Johnson

**The personification of the  
There is freedom of speech,  
devil as the symbol of all  
but I cannot guarantee  
evil assumes the living  
freedom after speech.  
shape of the Jew.**

With the recognition project now formally in its fifth year—since the work of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples began—section 116A and an Indigenous parliamentary body are identified by Indigenous peoples as two approaches to disciplining the majoritarian tendency of the parliament. These proposals for reform could also improve the quality of decision-making on matters pertaining to Indigenous peoples lives.

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*This article is based on a presentation by Megan Davis made at a symposium on constitutional reform at Sydney Law School on 12 June 2015.*

- 1 Megan Davis, 'NARRM Oration 2012 - Aboriginal Women: The Right to Self-Determination' (2012) 16(1) *Australian Indigenous Law Review* 78.
- 2 Ibid.
- 3 Ibid.
- 4 Expert Mechanism on the Rights of Indigenous People 'Indigenous peoples and the right to participate in decision-making' ('Expert Mechanism'), Advice No. 2, A/HRC/18/42 (2011) para 2.
- 5 Ibid para 13.
- 6 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, 2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Final Report (2015).
- 7 Cape York Institute, Submission Number 38 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014, 7 [3.1], 15 [6.1]; Cape York Institute, Submission Number 38.2 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015.
- 8 Expert Mechanism para 1.
- 9 Ibid para 15.
- 10 Ibid para 16.
- 11 Ibid para 20.
- 12 Sami Parliament Act 1992 (Sweden).
- 13 Sámi Parliament Act 1995(Finland) s 9.
- 14 Procedures for Consultations between State Authorities and the Sami Parliament 2005 (Norway); The Sami Act 1987 (Norway).
- 15 Department of Foreign Affairs and Trade, New Caledonia country brief (2015) Australian Government, Department of Foreign Affairs and Trade <<http://dfat.gov.au/geo/new-caledonia/Pages/new-caledonia-country-brief.aspx>>.

- 16 Electoral Act 1993 (New Zealand) s 78; Electoral Regulations 1996 (New Zealand) s 4.
- 17 Constitution of Burundi 2005, (Burundi) title vi.
- 18 Expert Mechanism para 42.
- 19 The Interim Constitution of Nepal, 2063 2007 (Nepal) art 63.
- 20 Traditional Leadership and Governance Framework Act 2003 (South Africa) s 18.
- 21 Constitution of Colombia 1991, (Colombia) art 17.



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