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Zia Akhtar

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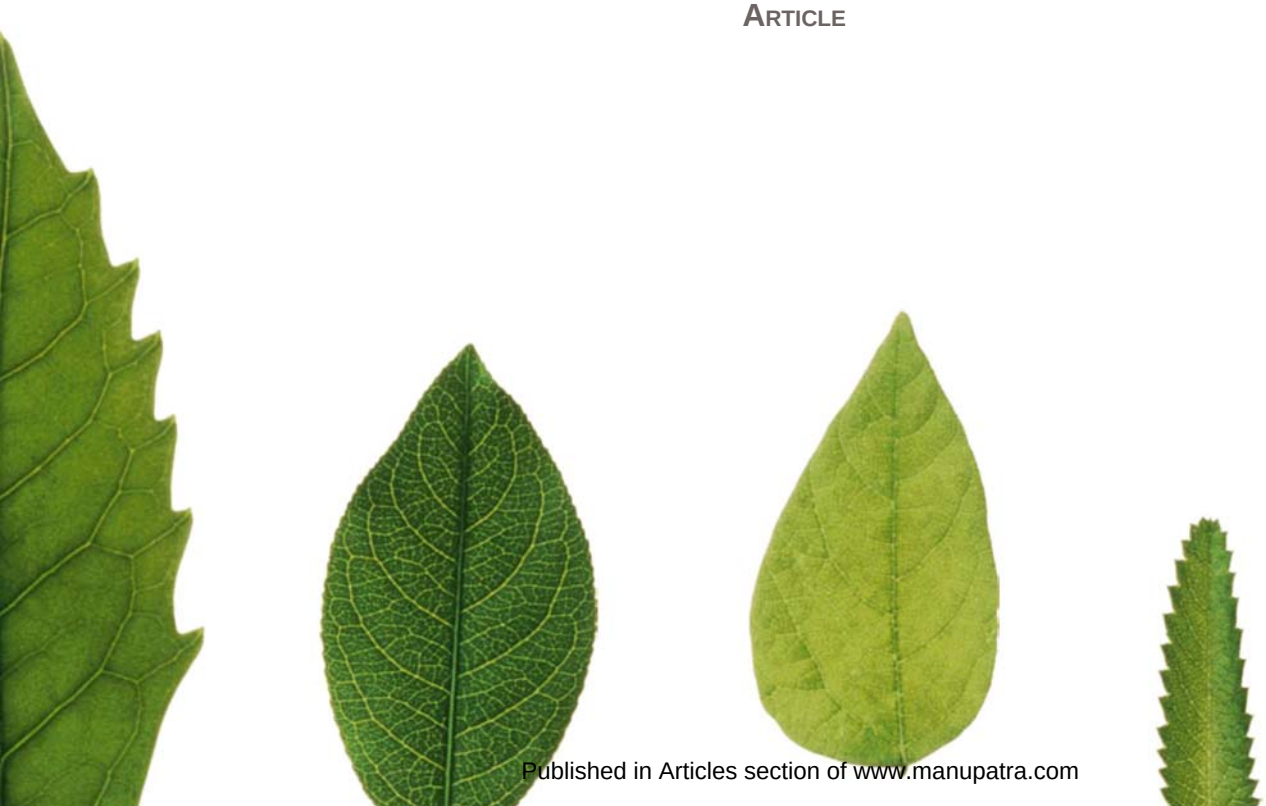

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1 INTRODUCTION

The right to self-determination of the Aboriginal peoples received a legal breakthrough with the Native Title Act 1993 that allowed for the emergence of a theory of aboriginal rights. However, its perimeters have been restricted by amendments and court judgments. The main issues in implementing the native title system are, first, the legislation and the case-law are divergent and, second, the framework for the grant of native title presents many anomalies. At the core is the lack of a preamble in the Constitution and a framework between the Aboriginal peoples and the Australian government that provides legal protection where the Commonwealth ordinances conflict with the rights of the Aboriginal peoples.[1]

There are currently several disputes over real estate ownership between the Australian government and the Aboriginal peoples, both on the federal level and at state levels. The importance of resolving these disputes has been underscored by the declaration of the Australian government that there will be a referendum on Aboriginal status in 2012. Consultations have begun and the outstanding issue is the extent of the Aboriginal peoples' sovereignty that had been abrogated when their land was deemed *terra nullius*.[2] Their claim to title has assumed international importance because of the passage of the United Nations Declaration of the Rights of the Indigenous People in 2007 that places a moral imperative on settler governments and tightens the obligations that exist in international conventions, such as the ILO Convention 169 and the International Covenant on Civil and Political Rights, that have the force of law.

The development of the rights of the Aboriginal peoples in Australia is dependent on case-law and statutes. The latter have not led to the determination of title by the courts as was envisaged by the legislation. The extinguishment of Aboriginal title upon the perfection of the colonial title was overturned in the landmark judgment in *Mabo v Queensland (2)*.[3] The judgment rejected the *terra nullius* doctrine for the Aboriginal peoples and Torres Islanders. There was a determination of title for the members of single island aboriginal communities and they were deemed to have rights in common.

Judge Brennan ruled that the indigenous population had 'a pre-existing claim in law, which remains in force except where specifically modified or extinguished by legislative or executive action'.[4] He repudiated the concept that on the acquisition of sovereignty, absolute beneficial ownership of all the lands inhabited by native Australians vested in the Crown. Therefore, the Crown 'acquired not an absolute but a qualified title, that would be subject to native title rights where those rights had not been validly extinguished'.

This did not change the presumption that Australia was a 'settled' region and fused the notion of an established colony with a 'conquered' colony. The judgment refuted the doctrine of tenure that was based on the Crown land owned in fee simple and substituted a radical title for an absolute title. By implication this land law theory ran parallel to the law of native title that was based on customary laws and traditions that was contingent upon the fact that if there had been a valid grant of absolute title by the Crown in a conveyance then the Aboriginal title would be extinguished.

1 Constitutional Centenary Foundation, Fact Sheet 8.1-The Indigenous Peoples of Australia and the Constitution, *in* 'Key issue 8 - The Constitutional Position of Indigenous Peoples' (2001), available at http://cccs.law.unimelb.edu.au/files/Fact8-1.doc.

2 On the concept of *terra nullius*, *see* Gareth Griffiths, Native Title Debate: Background and Current Issues (Sydney: New South Wales Parliamentary Library, Briefing Paper No 15/98, October 1998), available at http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/da2f5f5ed50f5d38ca256ecf000948cd/$FILE/15-98.pdf.

3 *See Mabo and Others v Queensland No 2*, High Court of Australia, Judgment of 3 June 1992, [1992] 175 CLR 1, available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/1992/23.html?query=title%28mabo+%20near+%20queensland%29.

4 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* 17 (Canberra: Aboriginal Studies Press, 2006), available at http://www.aiatsis.gov.au/asp/docs/Contents%20Sample%20Chaps%20Index/strelein/StreleinSamplechapter.pdf.

The ruling led to the enactment of the Native Title Act 1993 that sets out a framework for the protection and recognition of native title. In several instances, while the title is shared by members of several island communities, it has been interpreted as an aggregated claim by the islanders. It led to sympathetic judgments which were to the advantage of the Aboriginal peoples.

In *Western Australia v Ward*,[5] there was a native title application over areas of land that included two states. While the first instance decision stated that native title can be proven despite European impact, the Federal Court rejected the application. The matter then went to the High Court of Australia, which concentrated on the nature and principles of extinguishment on grounds of whether there can be partial extinguishment and the principles for determining extinguishment. The Court decided that the Native Title Act 1993 provided for the partial and permanent extinguishment of native title; these rights can co-exist with other interests in land and based on the *Mabo* precedent, these rights can be proven not by occupation but by traditional law and customs.

Subsequently, the judgment in *Wik Peoples v Queensland*[6] went further by implying that native rights can co-exist with pastoral leases. The question was whether statutory leases can extinguish native title rights and the Federal Court held that farming leases did not provide exclusive possession to leaseholders, but if there was a conflict of rights under the pastoral lease then that would extinguish the remaining native title rights. Justice Cooper decided the issue in accordance with the terms agreed by the parties in relation to *Wik Peoples* application under the Native Title Act 1993. These terms recognised the native title rights but they did not become effective until certain indigenous land agreements were registered.

This ruling caused the Parliament to enact the Native Title Amendment Act 1998 that created the National Native Title Tribunal with the power to award absolute authority over claims for recognition to the State governments. This tribunal was empowered to override native rights by asserting that they were Crown lands in matters of 'national interest' and they were exempt from Aboriginal title claims where they provided public amenities. Subsequent amendments have not changed the substantive balance of the Act which is tilted against the proof of title of the Aboriginal peoples.[7]

The Native Title Amendment Act was an impediment to the assertion of native title over land, as envisaged by the *Mabo* judgment.[8] It placed the settlers in an advantageous position. The Act created mechanisms for the "right to negotiate" provisions; validate use; "confirmation" of extinguishment provisions; and a framework for upgrading provisions.[9]

5 *Western Australia v Ward*, High Court of Australia, Judgment of 8 August 2002, [2002] 191 ALR 1, available at http://www.austlii.edu.au/au/cases/cth/HCA/2002/28.html.

6 *Wik Peoples v Queensland*, Federal Court of Australia, Judgment of 13 October 2004, [2004] FCA 1306, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1306.html.

7 The *Native Title Amendment Bill 2010* established a new native title process for the construction of public housing and infrastructure in indigenous communities through which there would be more consultation with native title parties about the delivery of accommodation. This was to ensure that if native title was extinguished by these projects then compensation will be offered. The bill received Royal Assent on 15 December 2010 and was effective on 16 December 2010. *See* http://www.comlaw.gov.au/Details/C2010A00144/Download.

8 In contrast to the 1993 Act, the Ten Point Plan and the resulting Native Title Amendment Bill were drawn up without the consent of, or consultation with, Indigenous people. The eventual passage of the Native Title Amendment Act 1998 was facilitated by a deal between the Howard Government without Indigenous involvement or consent. *See* Northern Land Council, '1998 – The Native Title Amendment Bill' (2003), available at http://www.nlc.org.au/html/land_native_amend.html.

9 The 1998 amendments were referred to by the UN Committee for the Elimination of Racial Discrimination (CERD) and found to be in breach of Australia's international human rights obligations. *See* Darren Dick and Margaret Donaldson, 'The compatibility of the amended *Native Title Act 1993* (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination', *in* Lisa Strelein ed, *Land, Rights, Laws: Issues of Native Title* (Canberra: Native Title Research Unit-Australian Institute of Aboriginal and Torres Strait Islanders Studies, Issue Paper 29, August 1999), available at http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip99n29.pdf.

This has caused the ongoing extinguishment of native title as a result of the doctrine of a bundle of rights that has been inherited from English common law that continues to diminish Aboriginal title when a prior right is asserted. This is the main obstacle to the recognition of title to land that has become extinct and the benefits of the Native Title Act have not been effected. The Act was introduced as an appendage to the Racial Discrimination Act 1975 and its failure to redress land entitlement issues means that it has been unsuccessful. A constitutional provision is necessary to change the *status quo.*

This paper reflects on the lack of a preamble in the Constitution granting Aboriginal rights; how the Native Title Act (as amended) has not borne fruit as the evidential test is very burdensome and there are excessive procedural hurdles; the courts' restrictive interpretation that disadvantages the Aboriginal claimants; and several anomalies that militate against backdating claims. This has had an adverse impact on Aboriginal claims to restore title and reversed the process of self-determination, which is a right in international law.

This has reversed the progress that was made when the doctrine stating that there was no Aboriginal ownership before the Europeans arrived was set aside. Prior to the 2012 referendum on the Constitution, this paper argues for a treaty framework to define the relationship that exists in other settler legal regimes in the Australian context.

2 CONSTITUTIONAL POSITION OF THE ABORIGINAL PEOPLES

The omission of the British Crown to effect a viable constitutional relationship can be discerned by the lack of any mention of the Aborigines other than a formal reference found in the 1901 Constitution. Section 127 provides: 'in reckoning the numbers of the people of the Commonwealth, or of a State, or other part of the Commonwealth, Aboriginal natives shall not be counted.[10] This principle was applied in section 25 of the Constitution that expounded why 'people of any race' might not be enumerated for estimating the members of Parliament to be elected from each State. As a result, until 1965, when Aboriginal peoples were finally granted the right to vote in the last State, Queensland, they could be excluded under this provision in the Constitution.

Section 51 (26) conferred power on the Commonwealth Parliament to pass laws about 'the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws'. This was because the framers of the Constitution did not comprehend that the Commonwealth had to legislate for indigenous peoples, who were subject solely to State law during this period. However, section 127 and the exclusion of the Aboriginal peoples in Section 51 (26) were removed from the Australian framework by a referendum to change the Constitution in 1967.

On the 30th anniversary of the 1967 referendum in May 1997, the outcome was a unanimous decision of 90.77 per cent in the form of a national vote in favour of the proposal. It was vindicated by passage in all the States. There is at present a groundswell of opinion among the Aboriginal peoples that constitutional recognition is the key to their future in the Australian Commonwealth.

In August 2010, the new government announced the appointment of an expert panel of Members of Parliament, indigenous Australians and constitutional scholars to lead a national discussion on a referendum recognising indigenous people in the country's legal document. The panel was to

10 The framers of the Australian Constitution did not include the Aboriginal peoples in a census and they were not allowed any representation in the House of Representatives that had a mechanism for election from each State under section 24 of the Constitution Act 1901. The Aboriginal peoples were not enfranchised with a right to vote in Federal elections until the 1960s. *See* John Scott, A Political Dreaming: Our Place - Indigenous Aspirations for Constitutional Law Reform, August 1998, available at http://www.abc.net.au/civics/teach/articles/jscott/scotthome.htm#contents.

submit its report at the end of 2011, with a referendum a distinct possibility in 2012.[11] The national Aboriginal organisations are of the view that there should be constitutional guarantees. In a survey by the National Congress of Australia's First Peoples, the constitution was deemed to be the top priority for indigenous people. Out of the 600 members of the association, 88.6 per cent were convinced that it is very important that the Aboriginal peoples and Torres Strait Islanders received recognition in the Constitution. 77.9 per cent stated that the constitutional protection of Indigenous rights was important and 58.4 per cent highlighted this protection to be against racial discrimination.[12]

A draft paper issued by the Law Council of Australia argues for the constitutional recognition of Indigenous Australians.[13] Its most important proposals are that the Constitution should be altered to provide enforceable rights for the Aboriginal peoples; those rights should guarantee equality; race-based distinction should be removed from the Constitution and replaced with words describing Aborigines as having a special place in Australian history; and, most importantly, subject to indigenous peoples giving their free, prior and informed consent, a realistic approach should be adopted in relation to the timetable for amendments being put to referendum.

However, this draft document has faced criticism because the notion of equality underlying its constitutional reform approach does not deal with the dispossession, disempowerment and the isolation of the Aboriginal peoples (and Torres Strait Islanders). The position of Aboriginal representatives is that this concept of equality does not address the structural inequality that is based upon the illegitimacy of the relationship between Australia and the Aborigines whereby the former has the right to decide and the Aborigines are bound to comply with the policies.

They argue that there are two different approaches in dealing with injustice facing them as a group because as individuals they can seek equal access through the various anti-discrimination laws. However, it is not possible for them as a community to overcome discrimination in the absence of mechanisms such as a treaty addressing their collective rights. The legal framework does not take into account their right to self-determination based on the concept that they were the original inhabitants of the land.

If the Commonwealth legislature were to enter into a treaty relationship with the Aboriginal peoples, it would be in a better position to exercise its trust relationship with them as beneficiaries. This would provide a basis for judicial review of decisions such as the extinguishment of title that could then be invoked under the principle of *trustee qua trustee* and make the claims under the Native Title Act more applicant friendly. As the indigenous people have found in the United States, treaties can prevent the Congress from acting against the interests of the indigenous inhabitants by imposing a moral obligation on the Federal Government to intervene if the states act against them even at the expense of eroding tribal sovereignty.

This concept of a new constitutional arrangement requires an insight into the reasons as to why the Aborigines want a deal in which they can address the issues that confront them. It is only through such means that it can be understood why it is a necessary prerequisite for a fundamental overhaul of the arrangement between the Aboriginals and the Commonwealth of Australia.

11 The Australian panel met on 7 December 2011 to announce its findings on the referendum. *See* You Me Unity, 'Constitutional Recognition of Indigenous Australians – A Guide to the Issues', available at http://www.youmeunity.org.au/be-informed/discussion-paper.

12 This organisation was incorporated in April 2010 as a charitable association and it is based in Sydey. It represents Aboriginal peoples from all states and territorires. *See* 'Results of Online Survey of Congress Membership', *in* National Congress of Australia's First Peoples, *Building Our Foundations*, National Congress Report, 7-9 June 2011, Sydney Olympic Park Homebush New South Wales, available at http://nationalcongress.com.au/wp-content/uploads/2011/08/ReportPart1.pdf.

13 Law Council of Australia, 'Constitutional Recognition of Indigenous Australians', Discussion Paper, August 2011, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca.

The expectations raised by the *Mabo* judgment and the Native Title Act 1993 have not been met. The court decisions that enabled the land titles deeds to be reclaimed were overridden by the Native Title Amendment Act, and under the new regime it is very onerous for the Aboriginal peoples to prove title. There are excessive procedural hurdles and the competing claims of the settlers/Aborigines do not allow for a predictable determination.

3 SCOPE OF THE NATIVE TITLE ACT

There needs to be an examination of the Native Title Register and the building blocks of native title rights in the form of claiming entitlements and for the purpose of being justly compensated for any extinguishment of native title. The Native Title Act placed several limits. For instance in the case of conflict, the native title was construed as the lesser title, subordinate to all other claims. The National Native Title Tribunal created by the Native Title Amendment Act 1998 facilitated the existence of the Aboriginal title where the land was vacant (unallocated) Crown lands and in case of some state forests, national parks and public reserves.

The Aboriginal claim is based on appropriation by state or territory legislation and extends over parks and reserves, oceans, seas, reefs, lakes and inland waters. This challenges the non-exclusive pastoral and agricultural leases, which were devolved by the state or territory when the estates were established. Various criticisms have been levelled at the Tribunal's procedure. These are based on the fact that the Aboriginal peoples have to prove their ancestry. Further the procedural requirements for obtaining recognition of native title were weighed against the Aboriginal peoples proving their entitlement to title.

The requirements set out in the Native Title Register are contingent upon proving a connection to land, customary laws and residence. The system in place is slow and leads to a lapse between the time when the application is made and an outcome is reached.[14] There are certain criteria that need to be fulfilled. The Aboriginal peoples must satisfy them as native title holders in terms of the preamble, purpose and the main objects of the legislation.

A recent decision has a bearing on these important conditions and their likely interpretation. The concept of control and possession of the title holder is based on the territorial connection to land that allows the title holder to present an argument for title over the lands. In *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*,[15] the Federal Court considered the plaintiff's claim over the waters of the Torres Straits against the principal respondents - the State of Queensland, the Australian government and a large group of companies collectively described as The Commercial Fishing Parties. The judgment stated that the Torres Strait Islanders were distinctive in many respects and their laws and customs satisfied the sufficient 'connection' requirement of section 223(1)(b) of the Native Title Act.

The Court contrasted the land annexation of Aboriginal lands with the acquisition of the islands of the Strait that did not lead to the Islanders being dispossessed of their sea domains, or deprived of their traditional means of livelihood. Their continuing presence in the Strait was held to be 'self-evident' of their oral history, detailed knowledge and

14 The National Native Title Tribunal has reported findings that reveal a downward spiral in the native title system. The Annual Report 2005-2006 shows that there was a painfully slow rate at which the outstanding applications of the Indigenous Australians are being realised. The report states that the clients and stakeholders become frustrated at delays and the high cost of participation and these Native title determinations often deliver few direct benefits to Indigenous Australians and most determinations, in isolation, fall short of the claimants' aspirations. *See* 'Chapter 1 - Changes to the Native Title System' 9, *in* Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (Sydney: Human Rights and Equal Opportunity Commission, 2008), available at http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/pdf/ntr2007.pdf [hereafter Native Title Report 2007].

15 Federal Court of Australia, Judgment of 2 July 2010, [2010] FCA 643, available at http://www.austlii.edu.au/au/cases/cth/FCA/2010/643.html.

exploitation of the marine resources of the Strait. This extended the requirement of section of 223(1)(b) of the Native Title Act and provided the grounds for Aboriginal communities to assume territorial jurisdiction both in land and over sea.

In his judgment, Finn J found that the claimant group had established their claim by demonstrating that under their traditional laws and customs, the native title rights extended over most of the waters of the Torres Strait. These rights were held to exist not only in the Australian territorial seas but also within Australia's Exclusive Economic Zone. It was a grant of a possession in aggregate by members of the claim group and it has given the claim to title in land or sea for the Aboriginal claimants and has a bearing on maritime law.

The issue of the customary assertion of a group claim as set out in the *Akiba* claim has been considered in a national survey of traditional Aboriginal owners of lands conducted by the Human Rights and Equal Opportunity Commission.[16] The survey revealed a number of findings that are important in the discussion of the native title system. These include:[17]

- The most important land priority for traditional owners is custodial responsibilities and capacity to either live on, or access, the land.

- A majority of traditional owners do not have a good understanding of the agreements on land.

The three main reasons preventing traditional owners from understanding land agreements (in descending order) are:

> lack of understanding of native title legal terminology and process;
>
> the process lacks indigenous perspective; and
>
> lack of information.

In the Native Title Report 2007, the Aboriginal and Torres Strait Islander Social Justice Commissioner observes that:

> *Native title is at the heart of recognition by Australian law of traditional owners' custodial responsibilities for land and waters. A system that is not delivering fully on recognition and protection of native title is failing the Indigenous people by not recognising the most important land priority of traditional owners.*
>
> *The findings from the survey, that traditional owners do not understand the agreements they are entering into primarily because they lack the knowledge of native title legal terminology and process, reinforce my concerns regarding the complexity of the Native Title Act and the processes established by it.*[18]

The Native Title Act has established a framework for the protection and recognition of native title. Therefore, the Australian legal system recognises that rights and interests are possessed under traditional laws and customs that continue to be acknowledged and observed by the relevant indigenous Australians. By virtue of those laws and customs, the relevant native people have a connection with the land or waters and their native title rights and interests are recognised by the common law of Australia.

4 BURDEN OF PROVING NATIVE TITLE

In assessing the impact of the Native Title Act 1993 as amended, the following factors must be considered: the preamble; the purpose and the main objects of the Act; and the reasons for its

16 The survey was known as the *National Survey on Land, Sea and Economic Development* 2006. *See* Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (Sydney: Human Rights and Equal Opportunity Commission, April 2006), available at http://www.hreoc.gov.au/social_justice/nt_report/ntreport06/pdf/ntr_full.pdf.

17 Native Title Report 2007, note 14 above, at 15.

18 *Ibid*, at 16.

promulgation by the Australian Parliament, that is, to give effect to the *Mabo* decision. This has to be viewed against the background of the land tenure doctrine which states that Australian public lands belong to the Crown and it includes estates which are reserved or owned for public purposes and those which are vacant.[19] It also comprises the lands set aside for Aborigines but under the control of state/territory government's Aboriginal affairs authorities. The freehold and leasehold lands belonging to the native people are held by designated Aboriginal communities with special conditions attached to the titles. It does not include land held privately by individual Aboriginal landowners.

Since the enactment of the Native Title Act, courts have considered the issue of determining the status of Aboriginal lands based on enquiring if the claimant community had substantially maintained its traditional connection with the grounds in accordance with traditional laws and customs, and whether entitlement to exclusive native title rights and interests had been extinguished. The second question is whether the courts can play a role in resolving intra-communal disputes concerning native title rights and interests.

This was considered in the case of *Rubibi Community v State of Western Australia*.[20] The case dealt with the determination of an application for native title lodged with the National Native Title Tribunal in 1998. The applicants claimed exclusive possession, occupation, use and enjoyment of an Aboriginal ground for ceremonial and ritual purposes. The initial applicants were elders of the Yawuru Law Men, who brought the claim on behalf of the Rubibi claimant group. This was a group claim comprising members of the Aboriginal communities defined as Yawuru, Djugan and Goolarabooloo and the applicants adopted the name Rubibi, which is generally associated with the Broome Aboriginal community.

The claim area had been used since time immemorial by the members of the Rubibi claimant group and their ancestors 'to conduct sacred rituals and ceremonies and as a repository for sacred objects.' The Rubibi applicants also claimed that they are responsible for the claim area under the traditional laws and customs of the claimant group. They applied for a determination that they held native title in relation to the claim area as they were the Aboriginal peoples connected to the original occupiers who held in common the body of traditional law and custom that prevailed in that area.

They also applied for a determination that the native title confers upon the claim group 'occupation, use, possession and enjoyment, as against the whole world, of the claim area, 'for ceremonial purposes''. The Court held that the Rubibi plaintiffs had established that native title exists in relation to the claim and that this conferred the right of occupation, use, possession and enjoyment upon them as against the whole world for their ceremonial purposes. Their rights were exclusive in the claim area. However, the rights and interests associated with native title did not include any utilities such as minerals, petroleum or gas which were absolutely owned by the Crown.

There was a caveat that there were no rights of possession, occupation, use and enjoyment solely where there was a previous non-exclusive possession granted by the statute attributable to the Commonwealth or the State of Western Australia. Judge Merkal J ruled that

> *it should be emphasised that the nature of those claims, the issues they raise, the parties and the evidence that I expect will be adduced in support of or in opposition to them will be different to the issues raised, the parties to and evidence adduced in the present claim. Thus, it should not be assumed or expected that any findings or conclusions in the present case can or will be*

19 Public lands comprise around 23 per cent of Australian land, of which the largest single category is vacant land belonging to the Crown, comprising 12.5 per cent of the land. The Crown land is held in the 'right of the Crown' of either an individual State or the Commonwealth of Australia; there is not a single 'Crown' (as a legal governmental entity) in Australia. The entire freehold land in the Australian Capital Territory has been reserved and vested in the Crown. This allows the Government to retain an interest over the leasehold estate, preventing its sale or disposal as freehold land. *See* Geoscience Australia, 'Land Tenure' (1993), available at *www.ga.gov.au/education/geoscience-basics/land-tenure.html.*

20 Federal Court of Australia, Judgment of 7 November 2001, [2001] FCA 1153, available at http://www.atns.net.au/agreement.asp?EntityID=2823.

> *carried over to the claims to "country" which are yet to be determined.*[21]

The case focussed upon the traditional Aboriginal society of the Rubibi whose applicants had claimed the unextinguished native title that has existed since prior to the European settlement of Australia. This exposition of title had the potential to show that the applicants were members of a society that existed since time immemorial and continued to exist until the present in order to meet the requirements of section 23 F of the Native Title Act. This was a condition of the claim to be valid and to substantiate the right of exclusive possession.

However, the interpretation of the Native Title Act has been found to be ambiguous in defining the term 'society' from which affiliations of the native people is drawn. In *Yorta Yorta Aboriginal Community v Victoria*,[22] the High Court considered the references to traditional laws and customs in section 223 of the Native Title Act that assert that the claimants must be members of a society which is united and acknowledges the laws and customs. Therefore, the claimants must show membership existing at sovereignty to satisfy this provision of the Act. If that society has ceased to exist at some point, then the laws and customs of a group will not be considered traditional.

It is not necessary that the 'society' constitute a community in the sense of all its members possessing knowledge of each other and living together.[23] If that element was required, it would constitute an additional hurdle for native title applicants, which they would find arduous to overcome. It would be difficult to show the existence of a common normative system nearly 200 years ago and it would be even harder to prove the extent of mutual knowledge and acknowledgment of those who lived under that normative system, keeping in view the fact that there was no Aboriginal script at that time.

There are further obstacles for the Aboriginals to prove that the lands belonged to them when the titles have been extinguished. This is particularly the case when there have been several overlapping claimant applications before the Federal Court for determination of native title. This question has been considered on the basis of the creation of expectations for the Aboriginal peoples that may be difficult to meet, such as the appearance of unequal treatment between different groups of indigenous people which arises because each claim depends on its own circumstances. These entitlements are based not only on the difficulty of applying the laws of evidence but also on the difference between the date of sovereignty and the date of European settlement that may make it more onerous to prove the native laws and customs as they existed since time immemorial.

There were eight overlapping claimant applications for determination of native title, the first of which was initiated in 1994 by the Wajlen people in *Harrington-Smith and Others on behalf of the Wongatha People v State of Western Australia (No 9)*,[24] the highest ever in one legal proceeding before a Federal Court. The Wongatha claim had seven applications related to approximately 160,000 square kilometres of land that was divided between mineral rich and farming country of Kalgoorlie. The other seven applications overlapped the area of the Wongatha claim to some extent.

The Federal Court had to address the manner in which the claim groups were constituted; the complexity of Western Desert society and its

21 *Id.*

22 *Rubibi Community v State of Western Australia No 6*, Federal Court of Australia, Judgment of 13 February 2006, [2006] FCA 82, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2006/2007.html?stem=0&synonyms=0&query=title(rubibi%20community%20).

23 In *Bennell v Western Australia*, Federal Court of Australia, Judgment of 19 September 2006, [2006] FCA 1243, it was ruled that the test for community was satisfied on the basis of the continuity of customary laws and traditions from 1829 until present despite the fact that there was no proof that individuals in the community in the south-west were aware of the existence of all the other people in the same region. It was held that the 'society' required by s 223 (1) of the Native Title Act does not require it to constitute a community, in the sense of all its members knowing each other and living together. *See* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2006/1243.html?stem=0 &synonyms=0&query=bennell.

24 Federal Court of Australia, Judgment of 5 February 2007, [2007] FCA 231, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/31.html.

landholding arrangements; and the number of parties involved in the litigation. Justice Lindgren found that seven of the eight claims, including the Wongatha peoples' application, were not authorised as required by sections 61(1) and 61(4) of the Native Title Act. He refused to hear the claims when the Commonwealth pleaded procedural irregularity. The dismissal was based on the finding that seven of the claims were not properly authorised by the native title claimants. The Court did not decide whether the application would be recognised if the native title claimants were grouped differently and while it considered all the claims on their merits, they were not determined.

The Court acknowledged that the resolution of the claim is inherently a political question. This is because the issues would create unrealistic expectations for the Aboriginal peoples; and a disparity in the treatment of their various groups. The latter would arise because of subjective criteria such as migration of different Aboriginal communities and the difference between the date of sovereignty and the date of European settlement that may result in the absence of substantial written records. The date of sovereignty in the disputed area in Western Australia was held to be 1829 in Aboriginal records while that of the European settlement was 1869.[25]

Justice Lindgren's ruling added another anomaly by stating that the Aboriginal Western Desert Cultural Bloc (WDCB) society which was submitted to be in existence in 1829 and was still present today would not give rise to native title rights and interests in relation to land and waters. The judge declined to consider the notion of a single overarching society with regional branches that could be evidence of practicing local laws and customs, seemingly against the ratio in *Yorta Yorta HCA*. The ruling interpreted the society's framework as not permitting its members to claim title in the Wongatha area as it was deemed not to have its own separate customs and laws.[26]

In a penetrating analysis, Kent McNeil states as follows:[27]

> *In Australia reliance on traditional laws and customs and the doctrine of continuity has had a very negative impact on indigenous land rights. Contrary to the all encompassing native title of the Meriam people declared by the High Court in Mabo, in subsequent cases indigenous claimant have had to prove rights in relation to land by reference to specific laws and customs at the time of Crown acquisition of sovereignty.*
>
> *The content of those rights is therefore defined by their laws and customs. So even if they were in exclusive possession of land at that time, they would not, for example, have any rights to minerals if they did not have laws and customs in relation to these resources. Post-Mabo, the High Court have thus taken a particularlised approach to native title, treating it as a divisible bundle of rights each arising from specific laws and customs.*

The implication is that the legal precedent before *Mabo* was based upon the colonial concept that the British held the land in fee simple. The legal position changed after that decision and aboriginal rights by way of interests in use and enjoyment of land were recognised. These rights could arise with a severance from the interests of the settlers who could hold the title in land that was not conveyed to the Aboriginal peoples.

25 The date of 'sovereignty' varies across Australia. In Western Australia and the Northern Territory this date is taken to be 1829, for the Eastern Australian states, it is taken to be 1788 and for the Torres Strait it is taken to be 1879. *See* 'Chapter 7 - Selected Native Title Cases 2006-07' 139, *in* Native Title Report 2007, note 14 above.

26 A few months after the Wongatha decision, the Native Title Act was amended to include Section 84D. This section provides that applicants may be required to provide greater evidence that they have been authorised to make a claim on behalf of the claim group; and where an applicant has not satisfied the Section 61 authorisation requirements, the court may still determine native title (or make any other order it considers appropriate) if it decides it is appropriate 'after balancing the need for due prosecution of the application and the interests of justice'. *See* 'Chapter 7 - Selected Native Title Cases 2006-07' 158-59, *in* Native Title Report 2007, note 14 above.

27 K. McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World', *in* B.J. Richardson, S. Imai and K. McNeil eds, *Indigenous Peoples and the Law: Comparative and Critical Perspective* (Oxford: Hart Publishing, 2009).

5
AMBIT OF THE RACIAL DISCRIMINATION ACT 1975

The Australian Government promulgated the Native Title Act in 1993 to acknowledge its obligation under Racial Discrimination Act 1975 (hereafter RDA) and to achieve the objectives of the International Covenant on Civil and Political Rights 1966. The Native Title Act states in its preamble that it is a special measure under the RDA for the benefit of the Aboriginal peoples and Torres Strait Islander.[28] It outlaws racial discrimination in Australia and it overrides inconsistent state and Territory legislation making such legislation ineffective to the extent that it is incompatible with the Native Title Act.

The various enabling clauses of the RDA cover the Aboriginal peoples in the case of illegal discrimination in employment opportunities (section 15); granting land, housing or accommodation (section 12); provision of goods and services (section 13); access to public places (section 11); advertising for job opportunities (section 16); and the ban on joining a trade union (section 14).

Under RDA, racial discrimination is deemed to occur when a person is treated less fairly than a comparator in similar circumstances because of their race, colour, descent or national or ethnic origin. Racial discrimination also occurs when a policy or rule ostensibly appears to treat everyone equally but actually has an unfair effect on more people of a particular race, colour, descent or national or ethnic origin than others. RDA is administered by the Australian Human Rights Commission, the country's human rights and equal opportunities watchdog, and a Human Rights Commissioner is responsible for investigating any complaints relating to breaches of the statute.[29]

However, the enactment of RDA has not absolved the Australian government from censure of the United Nations Committee on the Elimination of Racial Discrimination (hereafter the Committee). The Australian government was criticised in March 2000, and the Committee raised a concern that in amending the Native Title Act, Australia was not acting in accordance with Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination 1966. The Committee recommended that there should be substantive equality and not merely procedural equality in the Australian government's dealings with indigenous peoples.

The Committee cited many other issues of concern regarding Australia's treatment of the Aboriginal peoples and their rights. It began by highlighting the absence of any entrenched guarantee against racial discrimination. There was vehement criticism of the Howard Government's actions from 1996, including the discriminatory Native Title Act amendments; the lack of compensation for the Stolen Generations; the rate of incarceration of indigenous people; and the dramatic disparities between indigenous and non-indigenous peoples' access to economic, social and cultural rights.[30]

The Committee's dissatisfaction increased when the Australian Government suspended the RDA under the provisions of the Northern Territory National Emergency Response Act 2007 (hereafter NTNER Act), which was a bill designed to address issues that were not related to land, such as crime and underage

28 The Preamble of the Native Title Act states that the 'Commonwealth has acted to ensure recognition of international human rights standards by its ratification of international human rights instruments'. It then goes on to mention them and inclusive in that list is the RDA and the Mabo case references. *See* Native Title Act 1993 - Preamble, available at http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/preamble.html.

29 The Human Rights and Equal Opportunity Commission was established by an Australian Act of Parliament in 1986. *See* Human Rights and Equal Opportunity Commission, *Human Rights: Everyone, Everyday* (Sydney: HREOC, 2007), available at http://www.hreoc.gov.au/pdf/about/publications/hreoc21/hreoc21_booklet.pdf.

30 On 13 February 2008, the Rudd Government offered a National Apology to the Stolen Generations of children who had been forced to relocate to residential schools. *See* 'Apology to Australia's Indigenous peoples', available at http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples.

abuse in the Aboriginal lands of the Northern Territory.[31]

The NTNER Act had an impact on lands held by Aboriginal communities in the form of compulsory acquisition of townships currently held under the title provisions of the Native Title Act 1993. These provisions included appropriation of lands with five year leases and the removal of customary law and cultural practice considerations in denying title. The permit system was suspended which meant that the ordinary trespass provisions on Aboriginal lands could not be applied.[32]

The NTNER Act intensified the debate over the future of federalism in Australia, in particular the proper extent of federal control into areas of government that are traditionally managed by states and territories. The criticism was based upon the nature of the issue and the fact that the national Parliament faced no constitutional barriers to overruling the Northern Territory government, unlike the governments of Australia's states. In settling out this panoply of measures, the NTNER Act could override Aboriginal rights on a whim and the indigenous communities' title provisions could be compromised.

After intense criticism from the Human Rights and Equality Opportunity Commission and several Aboriginal leaders, the NTNER Act was revoked on 31 December 2010 by means of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009. This measure repealed all Northern Territory Emergency Response (hereafter NTER) laws that suspended the operation of the RDA. However, dissatisfaction with the practice has been reinforced recently after 10 years by the finding of the Committee that Australia needs to take urgent measures to reverse racist or 'racial' discrimination and inequality.[33]

It appears that the Australian government has been unsuccessful in giving effect to the Native Title Act 1993 in the spirit of RDA that was promulgated 18 years earlier. The preamble states that the Native Title Act complies with international conventions but this is not true. The settlers' have been granted precedence over the claims of the Aboriginal peoples. The NTER laws had also derogated overriding powers to the state government that disenfranchised the Aboriginal peoples and prevented them from asserting claims and defending their existing land rights.

6 NON-COMPLIANCE WITH INTERNATIONAL CONVENTIONS

Australia has subscribed to international conventions, such as the International Convention on Elimination of All Forms of Discrimination 1966 (hereafter ICERD), the International Covenant on Civil and Political Rights 1966 (hereafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (hereafter ICESCR). These legal instruments identify a number of fundamental rights that can be summed up as the right to outcomes based on substantive equality that is not simply restricted to equal opportunities for the Aboriginal peoples. In March 2000, the Committee which monitors the conduct of signatory countries, expressed concern about the Australian

31 The intervention was conducted through Operation Outreach by a logistical operation of 600 soldiers and detachments from the Australian Defence Force. The initiative was implemented under the *Little Children are Sacred* report on the pretext of stopping pornography and alcoholism, but only two of the report's ninety-seven recommendations were effected. *See* 'Chapter 3: The Northern Territory 'Emergency Response' intervention – A human rights analysis', *in* Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (Sydney: HREOC, Report No. 1/2008, 2008), available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf.

32 *Ibid*.

33 Human Rights Law Resource Centre, 'Race Discrimination: UN Committee Releases Report and Recommendations on Australia', 28 August 2010, available at http://www.hrlrc.org.au/content/topics/business/race-discrimination-un-committee-releases-report-and-recommendations-on-australia-28-august-2010/#more-5311.

Commonwealth Government's amendments to the Native Title Act 1993.[34]

The amendments were deemed to be not in accordance with Articles 2 (1)(a) of the ICERD: States not to engage in discrimination against a particular group; Article 2(1)(c): States to repeal all laws that discriminate against a particular group; and Article 5: Equality before the law. The Committee emphasised the need for more than mere procedural equality in the Australian Government's dealings with the Aboriginal peoples.

Even in the post-Howard era, the Australian government has lacked means to achieve the prior informed consent of the Aboriginal peoples before taking decisions that affect them. This would entail granting them a right to self-determination and recognising them as a nation and entering into a treaty relationship with them. If the government sets out a definition in a constitutional preamble, it would also have to recognise the Aboriginal peoples as a distinct people worthy of national respect.

The need for Aboriginal self-determination has to be seen in the light of the United Nations Declaration of Rights of the Indigenous Peoples 2007 (hereafter the Declaration) that was endorsed by Australia on 3 April 2009. Whilst an international 'declaration' adopted in the United Nations is technically a non-binding instrument, indigenous peoples and legal experts have stressed that the Declaration is grounded in existing human rights treaties that are legally binding on States that have ratified them. These include but are not limited to ICCPR, ICESCR and ICERD.

The Declaration is intended to guide States on how to give effect to their human rights obligations as they relate to indigenous peoples. This value-added role of the Declaration has been recognized by the United Nations treaty adoption system, which has also set out that regardless of whether a State supports the Declaration, the United Nations human rights monitoring bodies will assess all States parties' records on protecting and promoting the rights of the world's 370 million indigenous peoples.[35]

The Declaration is a moral victory for the Aboriginal peoples. It asserts that the Aboriginal peoples have been discriminated against and then invites the signing of bilateral agreements and substantive arrangements to grant the rights that were previously denied. Article 3 states that 'the native peoples have a right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Articles 10, 26 and 27 of the Declaration deal with dispossession of land. Article 27 is framed as imposing a positive duty on the State to return ownership of lands or pay compensation where it is not practical.

The concern that the recognition of the Aboriginal peoples' right to self-determination will inevitably threaten the territorial integrity of Australia is misplaced. The direction of Aboriginal self-determination will be towards autonomous nationhood rather than severance from the Commonwealth of Australia.[36] The Declaration lends support to the United Nations' non-binding conception of 'non-self-dismemberment'. Article 46 of the Declaration states '(t)he Declaration does not

34 United Nations General Assembly, Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Records, Fifty-fifth session Supplement No. 18 (A/55/18), 17 October 2000, available at, http://www.un.org/documents/ga/docs/55/a5518.pdf.

35 The preamble states that '*indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.*

That treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States'. See United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007) paras 6-7, available at http://www.un.org/esa/socdev/unpfii/en/drip.html.

36 In its final report, the Council for Aboriginal Reconciliation acknowledged the right to self determination as 'within the life of the nation'. *See* 'Appendix 1 – National Reconciliation Documents', *in* Council for Aboriginal Reconciliation, *Reconciliation – Australia's Challenge*, Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament, December 2000, available at http://www.austlii.edu.au/au/orgs/car/finalreport/appendices01.htm.

imply any right to take any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[37] It does not impose a restriction but emphasizes 'any activity or to perform any act contrary to the Charter of the United Nations'.

However, there is no condition that there must be dismemberment or impairing of the territorial integrity of a sovereign and independent State if the people choose independence, free association or autonomy in accordance with the United Nations Charter. This definition has come under focus because the Obama administration has lent only qualified support to the Declaration and questioned it on the basis that its absolute acceptance would undermine territorial unity. Rudolph Ryser of the Fourth World Eye Centre for World Indigenous Studies comments on the American stand as follows:

> *The Declaration simply does not "authorize" dismemberment of existing states. That is reasonable, but it is equally reasonable to understand that freely choosing a political status can and indeed is encouraged if done within the framework of the UN Charter. Freely choosing a political status is the most basic of concepts built into the principle of self-determination. Without that right, there is no "self-determination." The US position is to essentially nullify the right of indigenous peoples to freely make decisions about how they will organize as a political community.*[38]
>
> *The US State Department has contemplated that the Declaration's principle of "free, prior and informed consent" set out in Article 19 does not provide it sufficient leeway and that it would be bound to the decision made by the indigenous people as part of their exercise of self determination. Its basic objection is that it cannot seek the consent of the indigenous people but would be ready to accept a "meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken".*[39]

There is a strong presumption against secession or independence flowing from the right of self-determination in the colonial setting of Australia. Article 27 of the ICCPR refers to self- determination and has been held not to prejudice the sovereignty and territorial integrity of a State party.[40] The Committee on the Elimination of Racial Discrimination, in a general recommendation on the

37 On 3 April 2009, the Australian Minister for Indigenous Affairs Hon J Macklin while endorsing the Declaration stated that whatever the meaning of free, prior consent, the government will interpret it in accordance with Article 46. *See* Indigenous Portal, 'Australia Government endorses UN Declaration on the Rights on Indigenous Peoples', 3 April 2009, available at http://www.indigenousportal.com/World/Australia-Government-endorses-UN-Declaration-on-the-Rights-of-Indigenous-Peoples.html.

38 The author argues that the US position invalidates Article 19 of the Declaration which is founded on the "requirement of consent" because it advocates a course of action that must lead to the promulgation of legal acts. The US position is a contradiction from its stand that "Consultation" satisfies this requirement even if consent is not secured. Ryser's argument implies that the US government has chosen to possess the 'capacity and the power' to decide for the indigenous people without obtaining their 'free, prior and informed consent'. *See* Rudolph Ryser, 'US Government on UNDRIP: Yes, but No', Fourth World Eye, Center for World Indigenous Studies, 18 December 2010, available at http://cwis.org/publications/FWE/2010/12/18/us-government-on-undrip-yes-but-no/.

39 'Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples - Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples', Press Release, 16 December 2010, available at http://www.state.gov/documents/organization/153223.pdf.

40 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. *See General Comment No. 23: The Rights of Minorities (Art. 27):. 04/08/1994. CCPR/C/21/Rev.1/Add.5*, available at http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument.

right to self-determination under Article 27 of the ICCPR, has emphasized that self-determination is not an absolute right.[41] It mentions a caveat which is an acknowledgment that some manifestations of the rights of individuals protected under Article 27, for example, to enjoy a particular culture, may consist in a way of life that is closely associated with territory and use of its resources. This is an inference that relates to the status that native communities may seek to attain to achieve their autonomy.

The United Nations' Special Rapporteur on Minorities, Asjboern Eide, has supported the basic premise of Article 27 of the ICCPR's implication of the importance of indigenous peoples' relationship to land that must lead to the distinction between 'territorial autonomy' and 'cultural autonomy' when discussing the importance of self-determination. In summary he does not challenge the territorial autonomy of nations but adds that it was preconditioned on the preservation of 'cultural autonomy' by maintaining group identity. The notion of self- determination 'requires a considerable degree of self-management and control over land and other natural resources' and would logically also require some degree of territorial control.

The Eide report distinguished minorities who could be integrated into wider society such as those who were practitioners of a different creed but who were not confined to territorial units or reserves. This second category comprised groups deemed capable of integration and implied to have a different set of aspirations as follows:

> *Are they "peoples" in the sense of Article 1 common to the two International Covenants? If they are, they should be entitled freely to determine their political status and freely to pursue their economic, social and cultural development, and for their own ends freely to dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.*[42]

However, the principle of self-determination has been acknowledged as more than simply an assertion of cultural rights. The United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights (hereafter CESCR) has defined self-determination as a right held by indigenous peoples of Australia that consists of achieving a representative aspect that allows them to make their own decisions. In United Nation Documents interpreting the Convention on Civil and Political Rights and its impact on Australia, this is noted in CCPR/C/69/AUS issued on 25 March 2000. Article 1 para 10, entitled 'Concluding observations on Australia', states there was an obligation that the *'(T)he State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources*'. CESCR issued a list of issues that it considered pertinent in dealing with the right to self-determination of the Aboriginal peoples.[43]

41 The CERD statement went on to assert that there was no unqualified right to self determination. It reads:
[I]n accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing 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 and possessing a government representing the whole people belonging to the territory, without distinction as to race, creed or colour. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State.
See Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 21: Right to Self-determination*, UN Doc. CERD/48/Misc.7/Rev.3 (1996) para 6, available at http://www.unhchr.ch/tbs/doc.nsf/0/dc598941c9e68a1a8025651e004d31d0?Opendocument.

42 A. Eide and E. Daes, 'Prevention of Discrimination Against and the Protection of Minorities', Economic and Social Council, UN Doc: E/CN.4/Sub.2/2000/10, 2000, para 11, available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.10.En?Opendocument.

43 CESCR raised two main issues. Issue 3 raised the question: 'What are the issues relating to the rights of indigenous Australians to self-determination, and how have these issues impeded the full realization of their economic, social and cultural rights?' Issue 4 posed the question: 'What is the policy of Australia in relation to the applicability to the Indigenous peoples in Australia of the right to self determination of all peoples?'. *See* William Jones, 'An Australian Perspective on Self-determination', Working paper submitted to the Commission of Human Rights at the 8th session, 2-13 December 2002, available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/cf03e35f75a32a36c1256c68004df6ce/$FILE/G0215340.

Therefore, the right to self-determination is undisputed and the only real issue is how it must be interpreted. The nature of this debate relates to the content of self-determination, and whether it can be restricted to the 'internal' situations that arise in nation states. This will have to take into consideration the demands of the marginalised communities and would have to abide by international covenants such as ICCPR and ICESCR. The United Nations Declaration of Rights is also a significant step for the Aboriginal peoples in charting their own way forward for the realisation of the concept of self-determination.

There has been extensive debate on the letter and spirit of the term self-determination. The priority for the indigenous people in furthering the aim of self–determination is the protection of their cultural rights and to save their communities from extinction. According to Siegfried Weissner:[44]

> *As far as the indigenous peoples' claim to self-determination is concerned, article 3 of* UNDRIP recognizes it broadly as the right to "freely determine their political status and *freely pursue their economic, social and cultural development," while article 4 guarantees their "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." Also, in reaction to various States' articulated fears of the spectre of secession, article 46(1) clarifies that "[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.*

The issue must be addressed by noting that the indigenous people are generally integrated within the settler states. This is the result of the cultural policy assimilation programmes such as those practiced at the end of the 19th century that led to the residential school movement. The policy of forced adoption of Western norms may have been terminated for the indigenous peoples in the United States, Canada, Australia and New Zealand but it has left a legacy of dependence. The only option for the indigenous people is to preserve what is left in terms of distinct institutions upon which their sovereignty is premised.

This concept is anticipated in the fundamental policy of United Nation Declaration of Rights of Indigenous Peoples. Article 5 states that '[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.'

7 CONCLUSION

The extinguishment of the Aboriginal peoples' title to land has been the cause of disaffection, cultural isolation and lack of equality as a community. The *Mabo* case was a landmark judgment that led to the recognition that the Torres Islanders had a pre-existing system of customs that gave them rights in land. The Australian High Court rejected the concept of *terra nullius* that was based on the notion that the Aboriginal peoples had no prior legal title before the arrival of the Europeans on the mainland. The Court held that title was not extinguished upon conquest and that the customary laws and traditions of the Aborigines would be protective of native title which could be claimed if certain conditions are satisfied.

The enactment of the Native Title Act 1993 set out a framework for an aggregated claim if native people can satisfy the connection based on their original ties since time immemorial. This denied beneficial and legal ownership to the lands for the settlers and brought to the surface the notion of a bundle of

44 Siegfried Wiessner, 'UN Declaration on the Rights of the Indigenous Peoples', United Nations Audiovisual Library of International Law, 2009, available at http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf.

rights in land. The Native Title Act was a broad framework for recognising statutory leases upon which there could be a grant of Aboriginal rights on land, but this was usurped by the Native Title Amendment Act 1997 that reversed the gains of the previous legislation.

By dint of the procedural obstacles that have been placed since the Native Title Amendment Act, there has been a reversal in the notion that there was Aboriginal ownership before the arrival of the Europeans. The Native Title Tribunals have enhanced the power of State governments to exercise authority over Aboriginal claimants. They were discretionary in effect because land grants could be withheld in 'national interest', such as where the estates provided public amenities. A stringent registration test was imposed on all claimants with very strict time limits for submission of all claims and a system of Indigenous Land Use Agreement was created for shared use of lands.

The courts have been proactive in continuing to develop Aboriginal rights in land by rejecting the theory that the land had to be occupied for these claims to be asserted. A long line of cases have affirmed that rights exist on the land and in *Akiba*, the right was extended to the seas overlapping an international ocean. While this has established the principles for determining title, there have been criticisms based on the fact that that the Aboriginal peoples are forced to prove their own ancestry and discharge an onerous burden of proof.

It has proven more difficult to admit native claimants under the Native Title Act because the courts have to determine what constitutes the traditional connection to determine if there is a valid title claim. In cases where there are intra-communal disputes, the courts are presented with a second question: whether there is sufficient linkage, and if the courts can solve the multi-lateral disputes concerning native title. As many of the contested lands are claimed under the doctrine of bundle of rights, the courts have held that they will be adjudged on a case-by-case basis.

There are anomalies in circumstances where there are several overlapping claimants and the courts are reluctant to exercise jurisdiction because of procedural omissions. In the *Wongatha* case, the court refused to enter a determination because there was no due process in accordance with section 61 of the Native Title Act. The court also stated that the title claims suffered from two defects: the Aboriginal peoples and the settlers followed different calendars for succession and the titular process was essentially a political question and not a legal determination.

It is clear that the courts have developed a doctrine of Aboriginal rights which seems to contradict the intention of the statutes. The Native Title Act seems to have failed in its purpose of determining title to land by reference to the Racial Discrimination Act. The evidence is that the Australian government has not abided by the Racial Discrimination Act, which included the incorporation of the ICCPR in its preamble.

The Aboriginal peoples need to be empowered if they are to successfully litigate their land title claims. This means that the United Nations Declaration on Rights of Indigenous Peoples and the international conventions must be applied in their entirety to determine whether the Commonwealth government is making progress in granting land claims to the satisfaction of the Aboriginal peoples. These claims are very broad and include the grant of cultural, social, political and legal rights. The findings of the Committee on the Elimination of Racial Discrimination in 2010 have criticised Australia's lack of progress in addressing the claims of the Aboriginal peoples and in particular the right to self-determination.

However, along with the governments opposed to the passage of the Declaration at its inception, Australia has expressed reservations about the interpretation of the term self-determination. Article 27 of the ICCPR defines this concept as autonomy and not dismemberment of the nation state. The Aboriginal peoples are not seeking succession from Australia, as the Council for Aboriginal Reconciliation has shown and the vote in the Northern Territory Referendum of 1998 has confirmed. Their demand is for conferral of the right of being a 'part of the life of a nation' which is a restricted right but based on substantive equality and mutual self-respect.

This can be achieved if the Constitution recognises the Aboriginal peoples as a distinct minority that deserve protection and a treaty relationship is enshrined in the constitutional framework. The recommendations of the Torres Islander Commission invite the consideration of a treaty framework and this can serve as the legal basis for devolution of the Aboriginal peoples that satisfies the demand for self-determination.

The upshot of legal protection in the Constitution and a treaty would be to facilitate the ability of the Aboriginal claimants to litigate more effectively for their title claims. This will provide them with the *locus standi* to claim title as a national entity. In order to be given a legal foundation for their rights, the Aboriginal peoples should be defined as a minority in the Constitution. The 2012 referendum provides the opportunity to achieve the framework for a bilateral relationship that will lead to sovereignty.

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