

THE POLITICS OF INCLUSION: THE RIGHT OF SELF-DETERMINATION, STATUTORY BILLS OF RIGHTS AND INDIGENOUS PEOPLES

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[Two relatively recent and overlapping developments potentially offer a new direction for the Indigenous self-determination project, which has been marginalised by Australian governments in recent years: first, the trend towards the domestic protection of international human rights through statutory bills of rights in Australian jurisdictions; and second, the burgeoning recognition of the right of self-determination for Indigenous peoples at the level of international law. This paper critiques the right of self-determination as it would operate under the kind of statutory bill of rights that predominates in Australia. The central argument is that enshrining the right of self-determination in a statutory bill of rights would be an ineffective guarantee of Indigenous self-determination. After developing a normative account of Indigenous self-determination that emphasises the importance of the Indigenous–state relationship, this paper suggests that two things are problematic for Indigenous self-determination in the statutory bill of rights context. The first concerns the standard consultation processes leading up to the introduction of statutory bills of rights; the second concerns the unilateral state control that would exist over the right of self-determination under a statutory bill. This paper concludes with a discussion of the problem of ‘juridification’ in relation to Indigenous self-determination.]

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I INTRODUCTION

The concept of self-determination has for some years featured in the discourse and debate surrounding Indigenous affairs in Australia. From the early 1970s, the language of self-determination became part of the official lexicon in Indigenous policy settings and, under the self-determination rubric, some significant features were introduced into the legal and policy landscape in Indigenous affairs, including land rights, native title, and Indigenous representative structures and organisations.¹ It is fair to say that, within the government context, the fortunes of Indigenous self-determination have waned over the past decade or so,² displaced by new policy platforms and emphases, the most recent being the 'closing the gap' campaign.³ By contrast, in the context of advocacy by and on behalf of Aboriginal and Torres Strait Islander peoples, self-determination remains a prominent fixture, regularly forming a part of and shaping Indigenous peoples' political demands.

Two relatively recent developments have offered a new momentum to, and possibly a new direction for, the Indigenous self-determination project. The first is the trend towards the domestic protection of human rights through statutory bills of rights in Australian jurisdictions. The second development — which overlaps with the first — is the burgeoning recognition of the right of self-determination for Indigenous peoples at the level of international law, representing a significant shift in the way that right is conceptualised. Within this context, the inclusion of the right of self-determination in statutory bills of rights has been flagged as a potential means of securing self-determination for Aboriginal and Torres Strait Islander peoples.

This paper provides an evaluation of the right of self-determination as it would operate under the kind of statutory bills proposed and enacted in Australia. My central argument is that enshrining the right of self-determination in a statutory bill of rights would be an ineffective guarantee of Indigenous self-determination. To contextualise the discussion, I begin by providing an overview of developments in Australia in relation to statutory bills of rights, and a summary of the international law on the right of self-determination. Following this, I elaborate a normative account of Indigenous self-determination which emphasises the importance of the terms and dynamics of the Indigenous–state relationship. This model of Indigenous self-determination is then used to assess the inclusion of a right of self-determination in a statutory bill of rights. Two problems, I suggest, confront Indigenous self-determination in the statutory bill of rights context: the

¹ See Janet Hunt, 'Between a Rock and a Hard Place: Self-Determination, Mainstreaming and Indigenous Community Governance' in Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E Press, 2008) 27, 27–8.

² See *ibid* 31–3.

³ The 'closing the gap' policy emerged shortly after the 2007 election and is being pursued through the Council of Australian Governments: see Council of Australian Governments, *Communique* (20 December 2007) 2–3 <http://www.coag.gov.au/coag_meeting_outcomes/2007-12-20/coag20071220.pdf>; Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, *Closing the Gap: The Indigenous Reform Agenda* <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx>>.

standard consultation processes leading up to the introduction of statutory bills of rights; and the unilateral state control that would exist over the right of self-determination under a statutory bill. I conclude with a discussion of the problem of 'juridification' in relation to Indigenous self-determination.

II BACKGROUND

A Australian Developments in Statutory Rights Protection

In the past decade or so, there has been a trend in the Australian discourse on rights protection, and, to a lesser extent, in practice, in favour of statutory bills of rights. Since 2002, community consultation processes as to how human rights could be better protected have taken place in the Australian Capital Territory ('ACT'), Victoria, Tasmania, Western Australia and most recently at the Commonwealth level.⁴ In each of those jurisdictions, the relevant consultation committee recommended that a statutory bill of rights be introduced.⁵ To date, this has resulted in the enactment of statutory bills of rights in both the ACT and Victoria.⁶ The Tasmanian government announced its intention in June 2010 to pursue a legislated bill of rights and began community consultations on a proposed model for that bill in October 2010.⁷ In Western Australia, tentative initial support was given for additional human rights protection by the then State government.⁸ However, there has since been a change in government and the new government's position is unclear. At the Commonwealth level, the federal government rejected a statutory bill of rights in April 2010, but committed to reconsidering the issue in 2014.⁹

⁴ See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) ('ACT Consultation'); Human Rights Consultation Committee (Vic), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) ('Victorian Consultation'); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007) ('Tasmanian Consultation'); Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007) ('WA Consultation'); National Human Rights Consultation, *National Human Rights Consultation: Report* (2009) ('National Human Rights Consultation'). There was also a New South Wales parliamentary inquiry into the enactment of a bill of rights in 2001. The New South Wales committee recommended against the introduction of a statutory bill: Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights*, Report No 17 (2001).

⁵ *ACT Consultation*, above n 4, vi; *Victorian Consultation*, above n 4, 1; *Tasmanian Consultation*, above n 4; *WA Consultation*, above n 4; *National Human Rights Consultation*, above n 4.

⁶ See *Human Rights Act 2004* (ACT) ('HRA (ACT)'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter').

⁷ See Lara Giddings, 'Attorney-General Outlines Law Reform Agenda' (Press Release, 22 June 2010) <<http://www.media.tas.gov.au/print.php?id=29810>>; Department of Justice (Tas), *A Charter of Human Rights & Responsibilities for Tasmania* (2010).

⁸ See Attorney-General (WA), 'Human Rights Report Completed' (Media Statement, 20 December 2007) <http://acthra.anu.edu.au/articles/McGinty%20media_release_report.pdf>.

⁹ See generally Attorney-General's Department (Cth), *Australia's Human Rights Framework* (2010). It is worth noting that the Commonwealth government, while rejecting a statutory bill of rights, has committed to introducing certain measures that typically feature within statutory bills of rights. These include a parliamentary committee on human rights and a requirement that Bills introduced into Parliament be accompanied by statements of compatibility with human rights.

Following the so-called ‘dialogue model’ of rights protection, the statutory bills that dominate the agenda in the Australian context are not entrenched and instead seek to promote a rights ‘conversation’ between Parliament, the executive and the judiciary.¹⁰ This is seemingly in deference to the relatively high level of hostility in Australia to the strong-form legal protection of rights, such as constitutional protection.¹¹ Under the statutory dialogue model, which also exists in the United Kingdom and New Zealand,¹² a number of procedural safeguards are put in place to ensure that human rights are considered when laws are drafted,¹³ policies formulated,¹⁴ and administrative decisions taken.¹⁵ The courts also play several roles in the ‘dialogue’: they can hear matters involving alleged violations of rights by public authorities;¹⁶ they must as far as possible interpret legislation consistently with human rights;¹⁷ and they may make ‘declarations of incompatibility’ (‘declarations of inconsistent interpretation’ in Victoria) where legislation cannot be construed in accordance with human rights.¹⁸

Ultimately, however, Parliaments rather than the courts have the last word on rights protection under the dialogue model. First, the courts cannot invalidate laws on the basis that they are rights-inconsistent. By issuing declarations of incompatibility, courts simply draw rights-inconsistencies to the attention of the legislature, which then may opt to amend legislation accordingly or simply leave it as is. Secondly, the dialogue model does not mandate that legislation be compatible with human rights.¹⁹ What the dialogue model does require is, amongst other things, that a statement of compatibility with human rights be prepared and tabled for each Bill introduced into Parliament.²⁰ The legislation

¹⁰ See Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 51–4. Peter Hogg and Allison Bushnell first used the ‘dialogue’ metaphor in relation to the *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’), which is a constitutional bill of rights. However, in recent years the metaphor has become more closely associated with statutory bills of rights: see Peter W Hogg and Allison A Bushnell, ‘The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing after All)’ (1997) 35 *Osgoode Hall Law Journal* 75.

¹¹ Such hostility towards the constitutional protection of rights dates back to Federation: see Byrnes, Charlesworth and McKinnon, above n 10, 24–6.

¹² See *Human Rights Act 1998* (UK) c 42 (‘*HRA* (UK)’); *New Zealand Bill of Rights Act 1990* (NZ).

¹³ See *HRA* (ACT) ss 37–8; *Victorian Charter* ss 28, 30.

¹⁴ See *HRA* (ACT) s 40B; *Victorian Charter* s 38.

¹⁵ *Ibid.*

¹⁶ See *HRA* (ACT) s 40C; *Victorian Charter* s 39.

¹⁷ See *HRA* (ACT) s 30; *Victorian Charter* s 32.

¹⁸ See *HRA* (ACT) s 32; *Victorian Charter* s 36.

¹⁹ See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4247–8 (Jon Stanhope); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292–3 (Rob Hulls); Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008) 54 n 15.

²⁰ See, eg, *HRA* (ACT) s 37; *Victorian Charter* s 28; *HRA* (UK) c 42, s 19.

may be rights-consistent or rights-abrogating; legally, it does not matter either way so long as the legislation is accompanied by a statement of compatibility.²¹

In debates over which rights should be protected in statutory bills of rights, the right of self-determination has been raised for possible inclusion. All five Australian consultation committees were supportive of a right of self-determination, though only in the ACT and Tasmania was it recommended that the proposed statutory bill include such a right.²² Additionally, many submissions to the consultation committees recommended that the right be included.²³ This general level of support has not been reflected in either the *Human Rights Act 2004* (ACT) ('*HRA* (ACT)') or the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), both of which have omitted the right.²⁴ That being said, both Acts could still be amended to include the right of self-determination — in fact, the four-year review of the *Victorian Charter*, being conducted in 2011, must look specifically at whether incorporation of the right would be worthwhile.²⁵ In contrast to the *HRA* (ACT) and the *Victorian Charter*, the bill of rights proposed by the Tasmanian government has specifically included a general right of self-determination.²⁶ Whether this right will make it into Tasmanian legislation remains to be seen. Should the Western Australian or Commonwealth governments put forward a statutory bill of rights in the future, it

²¹ In fact, even if a statement of compatibility is not issued or does not accord with the procedural requirements, this will not affect the validity, operation or enforcement of the Act in question: see *HRA* (ACT) s 39; *Victorian Charter* s 29.

²² *ACT Consultation*, above n 4, 2–3; *Tasmanian Consultation*, above n 4, 2. See also *Victorian Consultation*, above n 4, vii, xii; *WA Consultation*, above n 4, xiv; *National Human Rights Consultation*, above n 4, 218–19.

²³ In relation to the most recent committee consultation process (the National Human Rights Consultation), see, eg, Amnesty International Australia, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 12 June 2009, 4–6; ANU National Centre for Indigenous Studies, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 15 June 2009, 2; Australian Human Rights Commission, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, June 2009, 44, 47–8; Foundation for Aboriginal and Islander Research Action, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 2009, 6; Law Council of Australia, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 6 May 2009, 7. Note that many of these submissions simply said that all articles of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') and/or the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*') should be included. These treaties necessarily incorporate the right of self-determination.

²⁴ In the ACT, the reasons given for omitting the right were that it is a collective (as opposed to an individual) right, that it is not justiciable before the Human Rights Committee (see below Part II(B)), and that it is still an evolving right in international law: Explanatory Statement, Human Rights Bill 2003 (ACT) 3. Similar reasons were given in Victoria: see Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

²⁵ See *Victorian Charter* s 44(2)(b). See also Victorian Equal Opportunity and Human Rights Commission, *Four-Year Review of the Charter* (2011) <http://www.humanrightscmission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1371&Itemid=147>; Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: Consulting with Victoria's Indigenous Community about the Right to Self-Determination and the Charter* (2011). I discuss this in below Part IV(A).

²⁶ See Department of Justice (Tas), above n 7, 25, 41.

is unlikely that a right of self-determination would be included, at least initially, given that the consultation committees in those jurisdictions recommended against its inclusion.²⁷

While the right of self-determination is a general right of all peoples under international law, it was most often (and sometimes exclusively) discussed by the different consultation committees in the Indigenous context.²⁸ This is, I think, a reflection of two things. First, as the discussion below of the position at international law demonstrates, self-determination can in effect be taken for granted by the (non-Indigenous) peoples of established, stable, liberal-democratic states like Australia — the right of self-determination would probably have little if any work to do in relation to Australia's non-Indigenous peoples. Secondly, by virtue of the self-determination policy era in Australia between the 1970s and mid-1990s, and the ongoing advocacy by and for Aboriginal and Torres Strait Islander peoples (including in submissions to the consultation committees), the concept of self-determination in Australian public debate is synonymous with the claims of Indigenous peoples.

B *The Right of Self-Determination at International Law*

Much has been written about the international law on the right of self-determination, including a number of very comprehensive studies on the topic.²⁹ As such, I propose here to offer only a thumbnail sketch of the right as it has developed and exists in international law. This will help to contextualise and inform the later discussion. Of course, international law plays a key role in statutory bills of rights — both as a source for the rights they contain³⁰ and as an interpretive guide to those rights.³¹

Before continuing, it is worth noting briefly that if the right of self-determination were included in a statutory bill of rights, international law would likely arise in a number of issues concerning statutory interpretation. These interpretive issues include whether Indigenous peoples would be considered beneficiaries of the right, and, if so, what the content of the right might be. Having flagged these issues, however, I will not pursue them here — my focus is more on the nature and machinery of statutory bills of rights rather than particu-

²⁷ See *WA Consultation*, above n 4, xiv; *National Human Rights Consultation*, above n 4, 217–19.

²⁸ See *ACT Consultation*, above n 4, 104–5; *Tasmanian Consultation*, above n 4, 134; *Victorian Consultation*, above n 4, 37–40; *WA Consultation*, above n 4, 95–7; *National Human Rights Consultation*, above n 4, 217–19.

²⁹ See, eg, Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff, 1982); Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995); Joshua Castellino, *International Law and Self-Determination* (Martinus Nijhoff, 2000).

³⁰ For example, the *ICCPR* is the main source of rights under both the *HRA* (ACT) and the *Victorian Charter*: see *HRA* (ACT) sch 1; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1. See also Jackie Hartley, 'Indigenous Rights under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2007) 11(3) *Australian Indigenous Law Review* 6, 9 n 58.

³¹ See, eg, *HRA* (ACT) s 31; *Victorian Charter* s 32(2).

lar interpretive choices that might be made (by legislators, executive decision-makers, policy-makers and the courts) in relation to a statutory right of self-determination. For the purposes of this paper, I will assume that Indigenous peoples *would* be considered to be beneficiaries of the right of self-determination, even though, as we shall see, the international law on this point is unclear.³²

Now to the international law. Self-determination has at its core the idea that peoples should collectively have control over, and be able to make decisions about, their own lives. Consequently, it has truck with a number of related concepts: group autonomy, self-government, independence, democracy and non-interference.³³ While the concept of self-determination has philosophical and political roots in the Enlightenment and the French and American Revolutions, it was not until the 20th century that the discourse of self-determination gained real currency.³⁴ As a *political principle*, self-determination came to be advocated by both Vladimir Lenin and Woodrow Wilson in the early 20th century, albeit with differing emphases and motivations.³⁵ As a *legal right* at international law, self-determination began to take hold after the Second World War. Proclaimed as a goal of international governance under art 1(2) of the *Charter of the United Nations*, self-determination soon came to be relied upon as the legal basis for decolonisation,³⁶ and was first expressed as a right in the *Declaration on Granting of Independence to Colonial Countries and Peoples* ('*Declaration on Colonial Independence*')³⁷ in 1960. In 1966, the right of self-determination was enshrined in common art 1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')³⁸ and the *International Covenant on Economic, Social and*

³² This assumption is, I think, a reasonable one because, from a political perspective, it is highly improbable that the inclusion of a statutory right of self-determination would be completely unconnected to Indigenous peoples during the course of parliamentary debates or in explanatory materials. Echoing an earlier point, this is because, in Australia, self-determination is in effect synonymous with Aboriginal and Torres Strait Islander peoples' claims. An additional factor likely to work in favour of a general right of self-determination being applied to Indigenous peoples are the preambular provisions in statutory bills — in the *HRA* (ACT) and the *Victorian Charter* reference is made to the 'special significance' or 'special importance' that human rights have for Indigenous people. Preambles can be taken into account where the meaning of a provision is ambiguous or unclear: LexisNexis, *Halsbury's Laws of Australia* (at 22 June 2009) 385 Statutes, '2 Interpretation and Construction' [385-200].

³³ Iris Marion Young, following Philip Pettit, suggests that self-determination ought to be about *non-domination* rather than non-interference: see Iris Marion Young, 'Two Concepts of Self-Determination' in Austin Sarat and Thomas R Kearns (eds), *Human Rights: Concepts, Contests, Contingencies* (University of Michigan Press, 2001) 25.

³⁴ See Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 3; James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press, 2001) 7, 14; Cassese, above n 29, 11–13.

³⁵ See Cassese, above n 29, 19–27.

³⁶ See *ibid* 65.

³⁷ Res 1514, UN GAOR, 15th sess, Supp No 16, 67, UN Doc A/L.323 and Add.1-6 (14 December 1960).

³⁸ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Note that *ICCPR art 4* did not enter into force until 28 March 1979.

Cultural Rights ('ICESCR')³⁹ (together, '*International Covenants*'), guaranteeing to all peoples a general right of self-determination:

All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁴⁰

Nowadays, the right of self-determination is generally considered to be part of customary international law, and some even see it as *jus cogens*.⁴¹

Despite the broad terms of the right of self-determination under the *International Covenants*, the manner in which the right has been applied in international law is much more limited and the right's legal effects much more specific.⁴² In the literature on the right of self-determination, a distinction is regularly made between *external* and *internal* aspects of the right, the former generally being conceived of as the right of a people to be free from external domination, the latter as the right of a people to freely choose their political regime and to be autonomous.⁴³

The right has predominantly operated in its external aspect, in the context of decolonisation in situations of 'classic colonialism', as distinct from the settler-colonialism of states like Australia.⁴⁴ For colonies, the right permits the whole people of a colony to declare independence and secede, or to integrate into or associate with the administering state.⁴⁵ Self-determination, according to Antonio Cassese, is firmly entrenched in international law only in two other respects, neither of which has particular relevance for Indigenous peoples: first, in its external aspect as a ban on foreign military occupation; and secondly, in its internal aspect as a standard requiring that racial groups denied equal access to government be given full access.⁴⁶ Though the latter may in theory be applicable to Indigenous peoples, it has only ever been applied in respect of extreme cases, such as apartheid-era South Africa.⁴⁷ Beyond these specific legal effects, the law

³⁹ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴⁰ This formulation of the right was first laid down in the *Declaration on Colonial Independence*.

⁴¹ See S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 97.

⁴² Anaya makes the distinction between 'substantive aspects' of the right, which he sees in general and broad terms, and 'remedial aspects', which follow violation of the right and are much more limited and context-specific (eg, decolonisation): see *ibid* 104–10.

⁴³ See Cassese, above n 29, 101–2. See also Gudmundur Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 41, 45–53. The internal versus external distinction was used by the ACT Parliament as a justification for excluding the right from the *HRA* (ACT): see Explanatory Statement, Human Rights Bill 2003 (ACT) 3.

⁴⁴ See Cassese, above n 29, 71–4; Christopher J Fromherz, 'Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations *Declaration on the Rights of Indigenous Peoples*' (2008) 156 *University of Pennsylvania Law Review* 1342, 1358–63.

⁴⁵ Crawford, above n 34, 17.

⁴⁶ See Cassese, above n 29, 319. See also at 90–9, 108–25. Other commentators are more circumspect about the law on self-determination. James Crawford, for instance, has referred to the right of self-determination as *lex obscura*, because '[n]o one is very clear as to what it means, at least outside the colonial context': *ibid* 10 (emphasis added).

⁴⁷ See Cassese, above n 29, 319.

on the right of self-determination is unclear and cannot be said to have crystallised into firm norms.

That being said, the law appears to be heading in a number of new directions — the *lex ferenda* on self-determination as opposed to the *lex lata*⁴⁸ — including towards a guarantee of pluralistic representative democracy in sovereign states.⁴⁹ Whether such a guarantee would have any practical implications for self-governing, established, liberal-democratic states such as Australia remains to be seen.

Significantly, one other area in which the law on self-determination is specifically developing is in relation to Indigenous peoples. Though self-determination *as a political principle* has long been applied to and invoked by Indigenous peoples, it is only in recent times that self-determination has gained some traction *as a legal right* of Indigenous peoples.⁵⁰ When the law on self-determination was developing in the 1960s, particularly in the context of the *International Covenants*, Indigenous peoples were expressly excluded from being beneficiaries of the right by the United Nations General Assembly, which considered that the right ought to be limited to the colonial situation.⁵¹ This stance is in stark contrast with the position adopted by the United Nations General Assembly in the *Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),⁵² which declares an Indigenous right of self-determination and was adopted by an overwhelming majority of states in 2007. One hundred and forty-three states adopted the *UNDRIP*, 11 states abstained, and four — Canada, Australia, New Zealand and the United States — voted against it.⁵³ Following a change in national government, Australia has now endorsed the *UNDRIP*.⁵⁴ New Zealand, Canada and the United States have followed suit.⁵⁵

⁴⁸ *Lex lata* refers to law that is settled or established, whereas *lex ferenda* refers to law that is in the process of development but remains as yet uncertain. For discussion of the distinction between *lex lata/lex ferenda* in relation to self-determination, see generally *ibid* 341–3; Crawford, above n 34, 10.

⁴⁹ See Cassese, above n 29, 306. See also Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martin Nijhoff, 1993) 101; Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martin Nijhoff, 1993) 253.

⁵⁰ See Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 155–7.

⁵¹ See *ibid* 134. This was under the so-called 'saltwater' or 'blue water' doctrine, which held that a people could only be beneficiaries of the right of self-determination where they had a 'distinct territory separated by long global distance from a colonial power from which they claim[ed] independence': Young, 'Two Concepts of Self-Determination', above n 33, 26.

⁵² GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

⁵³ See UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 19.

⁵⁴ See Jenny Macklin, 'Statement on the *United Nations Declaration on the Rights of Indigenous Peoples*' (Media Release, 3 April 2009) <http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>.

⁵⁵ See Pita Sharples, 'Supporting UN Declaration Restores NZ's Mana' (Press Release, 20 April 2010) <<http://www.beehive.govt.nz/release/supporting+un+declaration+restores+nz039s+mana>>; Aboriginal Affairs and Northern Development Canada, *Canada's Statement of Support*

We might draw an analogy here with the development of the right of self-determination for colonial peoples. The colonial powers abstained from voting on the *Declaration on Colonial Independence* in 1960. Six years later, almost unanimous support was given to the *International Covenants*, which enshrined the right of self-determination in common art 1, although a few Western states entered some reservations to that article. Then, in 1970, the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*,⁵⁶ which enshrined the principle of self-determination in the context of decolonisation, drew no objections from any member states.⁵⁷ With the positions of Australia, New Zealand, Canada and the United States on the *UNDRIP* shifting from objection to endorsement, we appear to be witnessing a similar progression in international law towards recognition of an Indigenous right of self-determination.

Article 3 of the *UNDRIP* proclaims the right of self-determination as it is articulated in the *International Covenants* but expressly applies it to 'Indigenous peoples' (whereas the *Covenants* apply it to 'all peoples'). It is evident from art 46 of the *UNDRIP*, which preserves the territorial integrity of independent states and thereby excludes the possibility of secession, that the right of self-determination elaborated under the *UNDRIP* is an 'internal' one.⁵⁸ The *UNDRIP* creates no binding legal obligations in domestic legal systems but is, rather, aspirational, recognising 'putative international norms as well as evolving human rights standards pertaining to indigenous peoples.'⁵⁹

Beyond the *UNDRIP*, the practice of the Human Rights Committee in applying art 1 of the *ICCPR* indicates some support for an Indigenous right of self-determination. As part of its ongoing reporting procedures, the Committee has addressed Indigenous issues within the framework of the right to self-determination, including in relation to Australia.⁶⁰ Additionally, in the context of complaints made to the Committee, while the right of self-determination under

on the United Nations Declaration on the Rights of Indigenous Peoples (12 November 2010) <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>>; Barack Obama, 'Remarks by the President at the White House Tribal Nations Conference' (Speech delivered at the White House Tribal Nations Conference, Washington DC, 16 December 2010) <<http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>>.

⁵⁶ GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Supp No 28, UN Doc A/8028 (24 October 1970) 121.

⁵⁷ See Christian Tomuschat, 'Self-Determination in a Post-Colonial World' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 1, 1–2.

⁵⁸ See S James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (2008) 12 [37] ('*Report of the Special Rapporteur*'); Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press, 2001) 69, 93–5.

⁵⁹ Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9 *Melbourne Journal of International Law* 439, 465. See also Fromherz, above n 44, 1343.

⁶⁰ See Anaya, *Indigenous Peoples in International Law*, above n 41, 113. See also Benedict Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000) 19, 31.

art 1 has been treated as non-justiciable (including for Indigenous peoples), self-determination *has* been used to inform complaints made in respect of other *ICCPR* rights, such as cultural rights under art 27.⁶¹

As for the *content* of the right of self-determination in the Indigenous context, the international law remains relatively ambiguous. What seems clear is that secession and independent statehood are off the table — self-determination, as far as Indigenous peoples are concerned, must be exercised in its internal aspect.⁶² Some have argued that the *UNDRIP* in its entirety represents an elaboration of what an Indigenous right of self-determination means in practice.⁶³ On this view, not only would an Indigenous right of self-determination entail rights of autonomy, self-governance and political participation⁶⁴ — rights conventionally associated with the concept of self-determination — but also rights in relation to lands, territories and resources,⁶⁵ and numerous economic, social and cultural rights.⁶⁶

Again, it must be recalled that the *UNDRIP* is non-binding, though it is likely to contribute to the development of customary international law⁶⁷ — in fact, some have even suggested that elements of the *UNDRIP* already constitute part of customary international law.⁶⁸ For James Anaya, emerging international practice in relation to the Indigenous right of self-determination suggests that its content is elaborated by a number of specific norms. These norms are fairly similar to the *UNDRIP*'s content: again, self-government, autonomy and participation; non-discrimination; the right to cultural integrity; rights to land and

⁶¹ See Anaya, *Indigenous Peoples in International Law*, above n 41, 254–5. See also Xanthaki, above n 50, 134; Crawford, above n 34, 18–26.

⁶² See *UNDRIP* art 46; Davis, 'Indigenous Struggles in Standard-Setting', above n 59, 460–2; *Report of the Special Rapporteur*, above n 58, 12 [37], [39].

⁶³ See Davis, 'Indigenous Struggles in Standard-Setting', above n 59, 461. See also Kingsbury, 'Reconstructing Self-Determination', above n 60, 27–31. In some ways this is consistent with the claim made by Anaya, in his capacity as Special Rapporteur on Indigenous rights, in *Report of the Special Rapporteur*, above n 58, 13 [40], that:

The *Declaration* does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.

That being said, Anaya also emphasises that the *Declaration* elaborates on human rights norms *other than* self-determination (eg, non-discrimination): at [40].

⁶⁴ See *UNDRIP* arts 4–5, 18–20, 34.

⁶⁵ See, eg, *ibid* arts 24–30.

⁶⁶ See, eg, *ibid* arts 21–3.

⁶⁷ See Megan Davis, 'The United Nations *Declaration on the Rights of Indigenous Peoples*' (2007) 11(3) *Australian Indigenous Law Review* 55, 59.

⁶⁸ See *Report of the Special Rapporteur*, above n 58, 13 [41]. The *Declaration* has been cited in several cases internationally in respect of land rights, including in a dissenting judgment of Kirby J in the High Court of Australia: see *Wurridjal v Commonwealth* (2009) 237 CLR 309, 411. See also *Cal v A-G (Belize)* (Unreported, Claim 121/2007, Supreme Court of Belize, 18 October 2007) [131]–[133]. Additionally, the *Declaration*'s standards have informed constitutional reform processes in several nation states: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *2008 Social Justice Report*, Report No 1/2009 (2009) 36.

natural resources; and entitlements to social welfare and development.⁶⁹ Christopher Fromherz takes a narrower view of the right, positing autonomy or self-government as the ‘core meaning of self-determination’.⁷⁰ Still others suggest alternative ways of thinking about the right’s content.⁷¹ These issues are by no means settled or even particularly clear at this point.

Ultimately, we can draw several conclusions about self-determination in international law. First, the established international law is very specific, entailing a limited number of legal remedies, for example decolonisation, that have no applicability to Indigenous peoples in settler-colonial states like Australia. Second, despite the presently limited nature of the established law on self-determination, the law is continuing to develop. It is true that legal rules applying the right of self-determination to Indigenous peoples are yet to crystallise into a clear and cogent body of law, but there is certainly a space in international law — especially post-*UNDRIP* — in which to flesh out an Indigenous right of self-determination. Third, the direction in which the nascent law on Indigenous self-determination is developing is moving away from secession and independence and towards internal, intra-state configurations.

III A NORMATIVE MODEL OF INDIGENOUS SELF-DETERMINATION

While the international law on the right of self-determination for Indigenous peoples remains in its infancy, this has not stopped normative models of Indigenous self-determination from being advanced. Here I propose to introduce a number of concepts and to provide an account of Indigenous self-determination — more political than legal, and more a principle than a right⁷² — against which a right of self-determination under a statutory bill of rights can be measured.

Before continuing, I must make a few things clear. While I am not an Indigenous person and am, at any rate, only one person unable to speak for others, I am not a relativist about Indigenous self-determination. That is to say, I think certain normative claims can be made about Indigenous self-determination and about the conditions under which it can best be realised. Nonetheless, I will try to avoid articulating an overly specific and detailed list of ‘must-have’ components of Indigenous self-determination (for example, autonomous institutions, land rights, rights to culture and so on). To do otherwise would be to engage in a kind of foreclosure at odds with the notion that self-determination is about peoples making meaningful choices about their own lives. Rather than itemising essential features of Indigenous self-determination, then, I will try to elaborate on the

⁶⁹ See Anaya, *Indigenous Peoples in International Law*, above n 41, ch 4. See also Melissa Castan and David Yarrow, ‘Charter Rights: Self-Determination for Indigenous Victorians’ (2008) 7(9) *Indigenous Law Bulletin* 9.

⁷⁰ Fromherz, above n 44, 1371–2.

⁷¹ See, eg, Xanthaki, above n 50, 152–4, 160–73.

⁷² In positioning self-determination as a principle rather than a right, I seek to step back from the specific (and limited) legal consequences prescribed by the right of self-determination under international law and instead move towards a more flexible and inclusive conception of self-determination. For an excellent discussion of the distinction between rules (rights) and principles, see *ibid* 155–9.

optimal conditions under which Indigenous self-determination can be achieved in the context of settler-colonial states.

To begin, it will be useful to borrow from Anaya the distinction between *constitutive* and *ongoing* aspects of self-determination. *Constitutive self-determination* ‘requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed.’⁷³ Related to the idea under common art 1 of the *International Covenants* that peoples ought to ‘freely determine their political status’, constitutive self-determination ‘imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned.’⁷⁴ Logically speaking, this makes sense. If self-determination is, at its core, about people being in control of their own destinies, self-determination cannot be imposed from above; it must emerge from and reflect the wishes of the people themselves. Operating as a threshold principle that must be satisfied, constitutive self-determination is relevant at times of institutional birth and change.⁷⁵

Where the constitutive threshold has been met, *self-determination in its ongoing aspect* becomes a centrally important and discrete concern, requiring that ‘the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.’⁷⁶ Anaya relates this to the language of common art 1 of the *International Covenants*, guaranteeing peoples the right to ‘freely pursue their economic, social and cultural development’.⁷⁷ In essence, ongoing self-determination requires the establishment and maintenance of institutions ‘under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis.’⁷⁸ I return to and expand on these concepts throughout the discussion below.

As with the burgeoning international law on self-determination for Indigenous peoples, most normative proposals for Indigenous self-determination emphasise that the self-determination project must take place within the confines of existing states. This is for a variety of reasons, only some of which I will list here.⁷⁹ To begin with, it is extremely unlikely that settler-colonial states would ever countenance Indigenous secession,⁸⁰ something made clear by Australia when voting against the *UNDRIP* in the United Nations General Assembly.⁸¹ Secondly,

⁷³ Anaya, *Indigenous Peoples in International Law*, above n 41, 104–5.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* 106.

⁷⁸ *Ibid.*

⁷⁹ For a good discussion of a number of other issues relating to Indigenous secession, see Emmanuel Spiry, ‘From “Self-Determination” to a Right to “Self-Development” for Indigenous Peoples’ (1995) 38 *German Yearbook of International Law* 129, 142–4.

⁸⁰ See Kingsbury, ‘Reconstructing Self-Determination’, above n 60, 26.

⁸¹ See the speech of Robert Hill in UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (2007) 11. A related point made by Christian Tomuschat is that ‘international law is essentially framed by States’, and ‘they are reluctant to give their approval to new rules which might

in many contexts, including the Australian one, it would be difficult or even impossible for independent Indigenous states to be established and maintained: the lack of resources and institutional capacity necessary for Indigenous statehood, and demographic and geographic realities in existing states⁸² are just some of the practical obstacles militating against the possibility of separate Indigenous states. Thirdly, secession in the Indigenous context would almost always fail to do justice to Indigenous claims. In fact, secession would probably wreak further injustice against Indigenous peoples and the non-Indigenous settler populations involved,⁸³ and would threaten internal and international peace and security.⁸⁴ Fourthly, as Iris Marion Young makes clear, the notion of total independence and autonomy ignores ontological realities of interdependence and association in relationships between Indigenous peoples and settler-colonial states.⁸⁵ Finally — and perhaps most importantly — complete independence from their administering states does not, for the most part, correspond with the wishes of Indigenous peoples themselves.⁸⁶ In this respect, we can say that secession will generally be unable to satisfy the constitutive aspect of self-determination for Indigenous peoples, for, in most cases, it cannot be said that secession reflects the collective will of the Indigenous peoples concerned.

All of that being said, a strong case can be made for preserving the possibility of secession within Indigenous self-determination. First of all, as Alexandra Xanthaki has observed, qualifying self-determination in the Indigenous context so that it does not extend to secession serves to maintain discrimination against Indigenous peoples by denying them enjoyment of self-determination equal to that enjoyed by all other ‘peoples’.⁸⁷ Accordingly, secession ought to be retained as an option for Indigenous self-determination, though only where ‘the state grossly, continuously and irrevocably fails to fulfil the minimum of its obligations towards the group.’⁸⁸ Secondly, preserving the possibility of Indigenous secession in extreme cases helps to shore up the bargaining power of Indigenous peoples relative to the state. Steven Curry articulates the point well:

Once we recognize that neither [Indigenous peoples nor the state] wants secession, but also commit ourselves to facilitating it if necessary, we will be able to

threaten their existence’: Tomuschat, ‘Self-Determination in a Post-Colonial World’, above n 57, 10.

⁸² One demographic and geographic reality in Australia is the fact that the vast majority of Indigenous people live in the same (urban) territory where non-Indigenous people live: see Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004) 37–8.

⁸³ See *ibid* 37–8, 168–9; Anaya, *Indigenous Peoples in International Law*, above n 41, 109.

⁸⁴ See Spiry, above n 79, 143.

⁸⁵ Young, ‘Two Concepts of Self-Determination’, above n 33, 31–5.

⁸⁶ In Australia, some Indigenous people and organisations (notably the Aboriginal Provisional Government) are in favour of independent Indigenous statehood, but this does not appear to reflect the majority of Indigenous opinion on the subject. A recent (though imperfect) indication can be found in the 2009 Australian Reconciliation Barometer survey, in which 100 per cent of the Indigenous respondents considered the relationship between Indigenous and other Australians as ‘important’ to the nation: Reconciliation Australia, *Australian Reconciliation Barometer: Comparative Report 2008* (2009) 35.

⁸⁷ See Xanthaki, above n 50, 167–8.

⁸⁸ *Ibid* 168–9.

strike the balance in the right place. To do otherwise is to ensure that the party already enjoying sovereign power will be able to force a 'bargain' to its own advantage simply by being intransigent on key issues.⁸⁹

The significance of this point will become apparent below.

Extreme cases aside, however, if Indigenous self-determination ought not, generally speaking, involve secession, what is the alternative? Drawing on a growing corpus of literature in the field, I want to suggest that *relational self-determination* is the best way to theorise self-determination for Indigenous peoples.⁹⁰ Recognising the need for Indigenous self-determination to be conducted within existing states, relational self-determination holds that '[Indigenous] autonomy is not simply freedom — it is a relationship.'⁹¹ Clearly, the cardinal principles of self-determination — self-government, autonomy, non-domination⁹² — remain as central precepts. Moreover, the governing institutional arrangements must, as Anaya argues, represent the collective will of the peoples governed and ensure that Indigenous individuals and peoples are able to make meaningful choices about their lives on an ongoing basis. But it is the *context* in which these precepts are to operate — namely, within the limits of existing states, where the actions of Indigenous and non-Indigenous peoples will continue to impact on one another⁹³ — that comes to define the operation of relational self-determination.

Once it is recognised that Indigenous self-determination is about a relationship between Indigenous peoples and the state, it becomes much less important for us to define and enumerate here the specific individual features of Indigenous self-determination. In any event, that would be to pre-empt the context-specific discussions and negotiations which define self-determination in its constitutive aspect. Moreover, given the extraordinary diversity and distinct social, historical and demographic circumstances of Indigenous peoples, both within and between

⁸⁹ Curry, above n 82, 169.

⁹⁰ See especially Kingsbury, 'Reconstructing Self-Determination', above n 60; Young, 'Two Concepts of Self-Determination', above n 33; Iris Marion Young, 'Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel' (2005) 5 *Ethnicities* 139. See also Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples', above n 58, 87–100; Iris Marion Young, 'Hybrid Democracy: Iroquois Federalism and the Postcolonial Project' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 237; Craig Scott, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea' (1996) 18 *Human Rights Quarterly* 814; Michael Murphy, 'Relational Self-Determination and Federal Reform' in Michael Murphy (ed), *Canada: The State of the Federation 2003: Reconfiguring Aboriginal–State Relations* (McGill-Queen's University Press, 2005) 3; Joyce Green, 'Self-Determination, Citizenship, and Federalism: Indigenous and Canadian Palimpsest' in Michael Murphy (ed), *Canada: The State of the Federation 2003: Reconfiguring Aboriginal–State Relations* (McGill-Queen's University Press, 2005) 329, 340–1; Michael A Murphy, 'Representing Indigenous Self-Determination' (2008) 58 *University of Toronto Law Journal* 185.

⁹¹ Kingsbury, 'Reconstructing Self-Determination', above n 60, 29. See also Young, 'Two Concepts of Self-Determination', above n 33, 25 (discussing self-determination as 'relationship'); Scott, above n 90, 819 (on the need to 'think of self-determination in terms of peoples existing in relationship with each other').

⁹² On non-domination, see Young, 'Two Concepts of Self-Determination', above n 33, in which Young borrows the concept from Philip Pettit.

⁹³ See *ibid.*

states around the world, the specific arrangements for Indigenous self-determination will inevitably vary from context to context. Of course, we can imagine arrangements that may be consistent with this relational understanding of Indigenous self-determination, from local measures of Indigenous participation in governance to fundamental constitutional reforms (for instance, the negotiation of a treaty or treaties). But above all it must be remembered that, under a model of relational self-determination, what becomes most important are the terms and dynamics of the relationship between Indigenous peoples and the state.⁹⁴

As for these terms and dynamics of the Indigenous–state relationship, we know that the relationship, in both Australia and other settler-colonial states, has predominantly been one of state domination. Duncan Ivison provides a useful definition of domination, which he says consists of

a set of conditions in which people, whether individually or collectively, are prevented from acting in such a way so as to modify the actions that act on them. Relations of domination exist when relations of power become fixed or stable such that, whether directly or indirectly, some are able to control — arbitrarily, and with relative certainty and without reciprocation — the conduct of others.⁹⁵

In the past, the state domination of Australia's Indigenous peoples was most clearly manifested through forms of physical coercion, even violence. The dynamic of domination continues today, albeit usually in subtler and less direct forms than in previous eras. In particular, while Aboriginal and Torres Strait Islander people may have attained formal equality in voting and political participation rights, by dint of their small numbers as a percentage of the wider population the possibility of their effectively participating in mainstream governance as a distinct group is severely limited. In effect, Indigenous peoples can be, and often are, governed and dominated by Australia's non-Indigenous majority.

In the context of relational self-determination, then, the Indigenous–state relationship needs to be recalibrated around terms and dynamics of *non-domination*, so that Indigenous peoples cannot be unilaterally controlled by the state (or vice versa).⁹⁶ We can see that this accords with Anaya's definitions of constitutive and ongoing self-determination. First, if, as constitutive self-determination dictates, the governing institutional order is established through participation by and the consent of the Indigenous peoples governed, then those peoples will not have been dominated. Secondly, if ongoing self-determination demands that Indigenous peoples be freely able to make meaningful choices about their lives, this will require that those peoples not be dominated or coerced by the state. Where relational self-determination is concerned, central to the idea of non-domination are processes of negotiation between Indigenous peoples and

⁹⁴ See Kingsbury, 'Reconstructing Self-Determination', above n 60, 29.

⁹⁵ Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press, 2002) 11 n 28.

⁹⁶ See Young, 'Two Concepts of Self-Determination', above n 33.

the state. As Young makes clear, '[i]nsofar as their activities affect one another, peoples are in relationship and ought to negotiate the terms and effects of the relationship.'⁹⁷ That is to say: (1) both non-Indigenous peoples (represented by the settler-colonial state) and Indigenous peoples are self-determining and therefore ought not dominate one another; yet (2) the actions of each affects the other; so (3) rather than one side unilaterally determining outcomes for both, Indigenous peoples and the state ought to negotiate in good faith in order to arrive at mutually acceptable outcomes.⁹⁸ An oft-quoted statement from former Chairperson of the United Nations Working Group on Indigenous Populations, Erica-Irene Daes, is salient here. Daes describes Indigenous self-determination as 'a kind of belated State-building, through which indigenous peoples are able to join with all other peoples that make up the State on mutually-agreed upon and just terms'.⁹⁹ This imposes obligations not only on states, but also on Indigenous peoples, 'who have the duty to try to reach an agreement, in good faith, on sharing power within the existing State'.¹⁰⁰

In emphasising negotiation as the best strategy for achieving non-domination in the context of relational self-determination, I acknowledge that negotiation does not automatically enshrine a relationship of non-domination. In fact, imbalances in bargaining power, such as those that characterise the Indigenous-state dichotomy, as well as other factors, can render processes of negotiation profoundly unequal.¹⁰¹ I think, however, that such unequal relations can, to a significant extent, be avoided, provided that measures are put in place to rebalance bargaining power.¹⁰² This is where the prospect of Indigenous secession, as discussed above, could offer leverage to Indigenous negotiators and improve their bargaining position. Admittedly, however, the point is, at least in the Australian context, largely an academic one, given that the prospect of

⁹⁷ Ibid 38.

⁹⁸ Ibid.

⁹⁹ Erica-Irene A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 *Transnational Law & Contemporary Problems* 1, 9. See also Anaya, *Indigenous Peoples in International Law*, above n 41, 113–15, 187.

¹⁰⁰ Ibid.

¹⁰¹ There is a vast literature on this topic in general, as well as numerous analyses of power asymmetries in negotiations between Indigenous groups and other parties. For instance, Ruth McCausland and Marc Levy have critiqued the unequal power between Indigenous peoples and the federal government in the negotiation of 'shared responsibility agreements': Ruth McCausland and Marc Levy, 'Indigenous Policy and Mutual Obligation: Shared or Shifting Responsibility Agreements?' (2006) 41 *Australian Journal of Social Issues* 277, 286–7. In the context of negotiations between Indigenous peoples and resource companies over the use of native title land, see, eg, Ciaran O'Faircheallaigh, "'Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Review* 28. In the Canadian context, where negotiations for land claims settlements between Indigenous groups and the state are common, see, eg, Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 96–8.

¹⁰² While my focus here is on legal and structural changes to redress power asymmetries, this is not to discount the steps that Indigenous groups themselves can take to improve their bargaining position. For some examples in the 'shared responsibility agreement' context, see Ruth McCausland, 'Negotiating Shared Responsibility Agreements: A Toolkit' (Report, Jumbunna Research Unit, Jumbunna Indigenous House of Learning, University of Technology, Sydney, 2005) 11.

secession ought only to arise in situations of continuous and egregious violations of Indigenous peoples' rights. In less extreme circumstances, there are other arrangements that could help to structure and equalise negotiations. These might include legal guarantees of good faith, so that neither party could abuse its position; an Indigenous right to (withhold) consent to proposed legislative or administrative action affecting Indigenous people; and the provision of adequate funding and resources to the Indigenous negotiating parties.

Bargaining power being relatively equal, then, negotiation is a central component of self-determination both in its constitutive aspect and in its ongoing aspect. This means that, first, the precise terms and dynamics of the Indigenous–state relationship ought to be worked out by negotiation; and second, whatever is decided as to the specifics of the Indigenous–state relationship, negotiation ought to be enshrined as the *modus operandi* for working out problems throughout the course of the relationship. For constitutive self-determination, processes of negotiation are clearly implied in the requirement that the governing institutional order can only be established or changed with the participation and consent of the Indigenous peoples governed. For ongoing self-determination, good faith negotiation between Indigenous peoples and the state is the best way to allow individuals and groups, both Indigenous and non-Indigenous, to make meaningful choices on a continuous basis in matters touching upon all spheres of life. Ongoing self-determination in the Indigenous–state relational context requires, as Young notes, 'settled procedures of discussion and negotiations about conflicts, side effects of their activities, and shared problems.'¹⁰³ This echoes Benedict Kingsbury's emphasis on a 'complex governance framework' embodied in a formal agreement, a constitution or in legislation.¹⁰⁴

To summarise, the model of Indigenous self-determination that I have proposed recognises that self-determination has both constitutive and ongoing aspects. Moreover, the model is relational. Rather than enshrining total Indigenous autonomy, relational self-determination emphasises that it is the relationships between Indigenous peoples and the state that are of the utmost importance. It is the quality of these relationships that will in large part determine the quality of Indigenous self-determination. So that neither side of the Indigenous–state dichotomy can unilaterally determine outcomes, negotiation ought to be the *modus operandi* when establishing the terms of the Indigenous–state relationship and when dealing with conflicts and issues throughout the course of the relationship.

¹⁰³ Young, 'Two Concepts of Self-Determination', above n 33, 43.

¹⁰⁴ Kingsbury, 'Reconstructing Self-Determination', above n 60, 28.

IV EVALUATING A STATUTORY RIGHT OF SELF-DETERMINATION AGAINST THE NORMATIVE MODEL

A *Committee Processes and the Constitutive Aspect of Indigenous Self-Determination*

Though there has been no enshrinement of a right of self-determination in existing Australian bills of rights to date, the issue was considered by all of the Australian human rights consultation committees. It is therefore worthwhile to reflect on the committees' processes generally in order to assess whether the constitutive aspect of Indigenous self-determination could be said to have been satisfied in any case. Constitutive self-determination, it will be recalled, imposes requirements of participation and consent at times of institutional birth, such that the institutional arrangements can be said to reflect the collective will of the peoples governed by those arrangements. I also suggested that negotiation between Indigenous stakeholders and the state should be the means by which the features of those arrangements are worked out.

Turning to the work of the consultation committees, there are difficulties in saying that the Indigenous participation and consent requirements regarding inclusion of the right of self-determination were satisfied by any of the committees. Though all consultation committees endeavoured to specifically consult and engage with Indigenous individuals, groups and organisations,¹⁰⁵ there were nevertheless inadequacies in their processes. To be fair, these cannot be said to be the fault of the committees themselves. In many ways, the deficiencies are inherent in the committee process, which is necessarily limited by time, resources, terms of reference, and the mandate to consult multiple sectors of the community, not just Indigenous stakeholders. Indeed, the committees were sometimes the ones to acknowledge deficiencies in their consultation processes with respect to Indigenous people.¹⁰⁶

A key problem, as the ACT committee recognised, is the fairly limited time allowed for consultation, which can be at odds with Aboriginal cultural protocols surrounding consultation and the obtaining of community consent.¹⁰⁷ More generally, there may simply be too little time to establish relationships of trust between the committee and Indigenous people.¹⁰⁸ These relationships are particularly important given the historical antagonism in Indigenous–state interaction and the bureaucratic disengagement that often characterises Indige-

¹⁰⁵ See *ACT Consultation*, above n 4, 15, 101, app 2; *Victorian Consultation*, above n 4, 140, 143, 147, app C; *Tasmanian Consultation*, above n 4, 152–3; *WA Consultation*, above n 4, 14, app C; *National Human Rights Consultation*, above n 4, 4.

¹⁰⁶ See *ACT Consultation*, above n 4, 101; *Victorian Consultation*, above n 4, 143.

¹⁰⁷ See *ACT Consultation*, above n 4, 101. This issue was encountered during the treaty debate of the 1980s, with the Central Australian Aboriginal Congress arguing that at least five years of consultation would be required before the necessary level of consensus among Indigenous people could be attained: see Tim Rowse, *Obliged to Be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge University Press, 2000) 181.

¹⁰⁸ See *National Human Rights Consultation*, above n 4, 20–1.

nous affairs.¹⁰⁹ In some contexts (such as in relation to the Western Australian and national committees), demographic and logistical factors — particularly the sheer size of the Aboriginal and Torres Strait Islander population concerned and the remoteness of a significant number of people — make the participation and consent requirements even more difficult to meet.¹¹⁰ Furthermore, in the absence of an established Indigenous representative structure, advocacy in favour of Indigenous interests often comes from Indigenous organisations or service providers,¹¹¹ whose views cannot necessarily be said to be representative.

On the issue of self-determination specifically, both the Victorian and Western Australian committees recognised that much more involved consultation and discussion with Indigenous peoples would be required in order to ascertain whether Indigenous peoples are in favour of a statutory right of self-determination and, if so, their views on its proper definition and scope.¹¹² Such an approach is the most congruent with the imperatives of participation and consent inherent in the constitutive aspect of self-determination. Yet, given the requirement in such committees' terms of reference that they consult widely with all sectors of the community — and the political imperative that they be seen to do so in a manner that does not privilege the interests of one group over another — this task may be difficult to reconcile with the involved process of consultation and participation flagged above in respect of Indigenous peoples and the right of self-determination. In short, the need for Indigenous ownership of the process in relation to the right of self-determination may come at the expense of a broader community sense of ownership over the bill of rights consultation in general. As the Victorian committee made clear:

The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a *Charter* that must be general in its terms and operate across all of the varied communities in Victoria.¹¹³

¹⁰⁹ The National Human Rights Consultation Committee spoke of Aboriginal people experiencing 'consultation fatigue', which was the result of '[t]he cycle of consultations followed by lack of action or the implementation of ineffective policies': *ibid* 25. Tellingly, at the end of a community consultation on Thursday Island by the Committee, an elder stood up and said, '[t]hank you for coming all of this way to hear our concerns, but the truth is it has been a waste of our time and a waste of yours': at 25–6. On government disengagement in Indigenous affairs, see generally Michael C Dillon and Neil D Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (Seaview Press, 2007).

¹¹⁰ In this respect, it can be acknowledged that the two committees that recommended the inclusion of a statutory right of self-determination were in jurisdictions (the ACT and Tasmania) with relatively small Aboriginal populations, significant proportions of which live in urban or semi-urban areas. See Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians* (ABS Catalogue No 705.0, Australian Bureau of Statistics, 2006).

¹¹¹ The Consultation Committee for a Proposed WA Human Rights Act, for example, recognising the difficulties of adequately consulting Indigenous Western Australians, engaged in consultations with the Aboriginal Legal Service of Western Australia, which has an Aboriginal Executive Committee whose members are elected from local regions: see *WA Consultation*, above n 4, 95.

¹¹² *Victorian Consultation*, above n 4, 39–40; *WA Consultation*, above n 4, 95–7.

¹¹³ *Victorian Consultation*, above n 4, 39.

Additionally, if such an intensive process of Indigenous consultation and participation were pursued in the context of a bill of rights inquiry, other marginalised groups who have their own specific rights claims may feel that their demands have not been treated with equal attention and respect.

This raises the question of whether the standard bill of rights consultation process is the most appropriate forum in which to discuss and negotiate options for promoting Indigenous self-determination. Partly in recognition of some of these problems, the Victorian and Western Australian committees recommended that the self-determination issue be revisited at a later date, outside of the general bill of rights consultation process.¹¹⁴ In the Victorian case, this recommendation was enacted in the *Victorian Charter*. The *Victorian Charter* requires the Attorney-General, with assistance from the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), to conduct a review of it after four years of its operation and to table a report in Parliament by 1 October 2011.¹¹⁵ The review specifically required reconsideration of whether a right of self-determination should be included in the *Victorian Charter*.¹¹⁶ In this regard, some promising work has been undertaken by VEOHRC to consult and engage with Victorian Indigenous communities about recognising the right of self-determination in the *Victorian Charter*. A report published by VEOHRC in March 2011 found that Indigenous Victorians who participated in the consultations were generally in support of including the right in the *Victorian Charter*.¹¹⁷ Yet it is clear that VEOHRC's consultation encountered some of the problems that have beset the human rights consultation commissions: the limited time available to discuss and consult, difficulties with the level of attendance and overall community participation, and related issues of obtaining community consent.¹¹⁸ There is no doubt that VEOHRC's consultations are an advance on those conducted by the original committees. But, as recognised by the Indigenous people consulted and VEOHRC's report, much more engagement with Indigenous individuals and groups is needed to determine whether the right of self-determination should be included in the *Victorian Charter*.¹¹⁹ Whether this further work will occur, or indeed can be achieved within the limited timeframe of the four-year review, remains to be seen.

Beyond these issues of process, the discursive frame of a 'human rights' or 'bill of rights' consultation itself is problematic. In the context of general bill of rights consultations, the issue of Indigenous rights is posed as a relatively minor concern within the much larger context of protecting human rights, and generally within the framework of statutory bills of rights. This substantially limits the options available for discussion and negotiation, and ultimately relegates the extremely important issue of Indigenous self-determination to, at best, a few

¹¹⁴ Ibid 39–40; *WA Consultation*, above n 4, 97.

¹¹⁵ *Victorian Charter* ss 41(e), 44.

¹¹⁶ *Victorian Charter* s 44(2)(e).

¹¹⁷ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights*, above n 25, 25.

¹¹⁸ Ibid 11, 25–7.

¹¹⁹ Ibid 24–7.

paragraphs in a voluminous report. Notoriously, the terms of reference provided to the Commonwealth committee by the government excluded the possibility of constitutional reform¹²⁰ — a limitation at odds with the views of most Indigenous people who spoke to the committee, who saw the need for enshrinement of their rights in the *Constitution* or in a treaty.¹²¹ In the context of the targeted consultations on the right of self-determination that have occurred in Victoria, the narrowing of the focus to self-determination is an important addition to the general consultation process. However, discussions remain centred upon the Victorian statutory bill of rights, with limited scope to consider other possibilities for Indigenous self-determination.

A more appropriate process, normatively speaking, would be one in which the issue of Indigenous self-determination is made the central concern in the context of widespread, unhurried, culturally sensitive consultations and negotiations with Indigenous individuals and groups. Various options for the realisation of self-determination, one of which may be the statutory enshrinement of a right of self-determination, could then be considered and negotiated by Indigenous peoples and the state so that a mutually acceptable outcome could be reached. Such a process would necessarily be discrete from, although probably subsidiary to, the human rights consultation process.

B *The Indigenous–State Relationship and State Control over a Statutory Right of Self-Determination*

Though I have just suggested that a statutory right of self-determination may be one option by which to realise Indigenous self-determination, here I want to problematise that notion. The concern (and it is a significant one) is that in practice a right of self-determination in a statutory bill of rights would actually function to deprive Indigenous peoples of control over their lives and affairs. We can also say that, measured against a relational conceptualisation of self-determination, a statutory right of self-determination generally fails to pay attention to the relationship between Indigenous peoples and the state. In doing so, it implicitly preserves a balance of power that strongly favours the state.

The chief difficulty presented by including a right of self-determination in a statutory bill of rights is that it ultimately vests discretionary control of the right in legislators, executive decision-makers, policy-makers and the courts — in short, in the state. This control manifests itself in a number of different ways. To begin with, actors within all arms of government — the legislature, executive and judiciary — are the primary agents charged with interpreting bills of rights, defining their content and operationalising their provisions. Critics of bills of rights often denounce the prospect of ‘unelected judges’ making interpretive decisions about the content of vaguely worded rights,¹²² but my point here is a

¹²⁰ See *National Human Rights Consultation*, above n 4, 383, app A.

¹²¹ See *ibid* 25.

¹²² See, eg, James Allan, ‘A Defence of the Status Quo’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 175; James Allan, ‘The Victorian *Charter of Human Rights and Responsibilities*:

broader one. Though the courts ultimately have the final say over statutory interpretation, many other government agents also need to apply and comply with the provisions of a bill of rights. In lieu of litigation, the interpretive burden falls upon those who must draft legislation, formulate policy and make executive decisions in compliance with human rights standards.

Ultimately, no matter who is interpreting human rights, the fact remains that the interpreter is generally going to be an agent of the state. As I mentioned earlier, under statutory bills of rights, interpreters of human rights may have regard to international law for guidance but, even if they do, there is a fairly broad horizon of choice as to the right's content under international law. In relation to the kind of right of self-determination proposed by the ACT and Tasmanian committees and the Tasmanian government — a replication of common art 1 of the *International Covenants*, which is the most politically feasible formulation of the right — the role of the state in interpreting, applying and fleshing out the right would remain central. All of this has particular implications for *constitutive self-determination*, in that it would be the interpretive choices made by government actors that would shape the kind of institutional order established under a statutory right of self-determination. Aside from the possibility of informal negotiations between Indigenous peoples and the state being conducted 'in the shadow of the law', there is no mechanism under statutory bills of rights by which Indigenous peoples can have input into the scope and nature of a right of self-determination.

Another way in which the state would retain control over a statutory right of self-determination is inherent in the 'dialogue model' of statutory bills of rights. As I noted earlier, the rationale underpinning the dialogue model is that the protection of human rights ought to be the result of a 'conversation' between the Parliament, the executive and the judiciary.¹²³ In particular, the model seeks to avoid a situation where judges, rather than Parliament, have the final say about human rights. Placing a premium on parliamentary sovereignty, the dialogue model does not require legislation — either that which is introduced into Parliament or that which is declared rights-inconsistent by the courts — to be made compatible with human rights. In practice, it is rare for courts to declare that legislation is incompatible with human rights,¹²⁴ and, in fear of an electoral backlash, Parliaments may be inclined to amend any legislation declared

Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 909; Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' (2001) 17(2) *Policy* 19; John Hatzistergos, 'A Charter of Rights or a Charter of Wrongs?' (2008) 20(2) *Sydney Papers* 102, 105–7.

¹²³ See above n 10.

¹²⁴ At the time of writing, only one declaration of incompatibility had been made in the ACT (on 19 November 2010) in more than six years of operation of the *HRA* (ACT): see *Re Islam* [2010] ACTSC 147 (19 November 2010). The decision is being appealed by the ACT government: see Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 February 2011, 71 (Simon Corbell, Attorney-General). The first declaration of inconsistent interpretation in Victoria was made only very recently, in *R v Momcilovic* (2010) 25 VR 436, an appeal of which was being heard by the High Court at the time of writing.

incompatible so as to make it rights-consistent.¹²⁵ In the United Kingdom, for instance, almost all declarations of incompatibility have resulted in the United Kingdom Parliament amending or repealing the legislation or policy in question.¹²⁶ Similarly, Parliaments may be unwilling to pass new legislation that is potentially inconsistent with human rights lest it provoke the ire of voters — at the very least, Parliaments are likely to be loath to acknowledge that new legislation is rights-inconsistent in their statements of compatibility.¹²⁷ In these respects, although Parliament may hold ultimate legal power to pass or retain whichever laws it wishes — human rights compatible or not — there may be political limits on the kinds of laws Parliament is willing to pass or let stand.

The extent to which these political limits would impact on legislation abrogating Indigenous peoples' right of self-determination is debatable. This is because in all Australian jurisdictions, Indigenous people constitute a minority of the population — in most instances, a very small minority.¹²⁸ Population numbers are by no means the only determinant of political power: for instance, civil society institutions, including the many institutions that comprise the 'Indigenous sector', can wield significant political power.¹²⁹ It is also true that, even in the context of electoral politics, it is strategic value rather than size that is important.¹³⁰ But more often than not, there is a strong correlation between strategic value and size, and Indigenous peoples' numerical disadvantage in Australia is very real. As even Noel Pearson, one of the most influential Indigenous leaders in the country, acknowledges, it is 'the problem of the 3 per cent Mouse versus the 97 per cent Elephant'.¹³¹ The political clout of Indigenous people is therefore considerably limited in the context of Australia's ballot-box majoritarianism.

Of course, it is possible that legislation that disregarded an Indigenous statutory right of self-determination would be unpopular with the general electorate; however, in most cases it would be unlikely for this to translate into significant

¹²⁵ See Allan, 'The Victorian *Charter of Human Rights and Responsibilities*', above n 122, 912–16. At the time of writing, no legislative amendments had been made or introduced in response to the declaration of incompatibility in the ACT or the declaration of inconsistent interpretation in Victoria: see above n 124.

¹²⁶ Byrnes, Charlesworth and McKinnon, above n 10, 160.

¹²⁷ Such statements of compatibility may be contradicted by the parliamentary committee that scrutinises legislation for compliance with human rights: see Evans and Evans, above n 19, 59–60. See also ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) 29–31.

¹²⁸ In the two Australian jurisdictions with statutory bills of rights, the ACT and Victoria, the Indigenous population is respectively 1.2 per cent and 0.6 per cent. All other jurisdictions have Indigenous populations of less than 4 per cent, except for the Northern Territory where 31.6 per cent of the population is Indigenous. See Australian Bureau of Statistics, above n 110, 5.

¹²⁹ See generally Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (UNSW Press, 2002).

¹³⁰ See Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52 *Australian Journal of Politics and History* 517, 554.

¹³¹ Noel Pearson, 'Reconciliation Must Come with the Republic', *The Australian* (online), 14 January 2010 <<http://www.theaustralian.com.au/news/opinion/reconciliation-must-come-with-the-republic/story-e6frg6zo-1225818986734>>.

political damage.¹³² The danger that Parliament might simply ignore an Indigenous right of self-determination under a statutory bill of rights therefore remains a tangible reality. We can also say that the power of Parliament under the dialogue model to dominate Indigenous peoples by ignoring a statutory right of self-determination falls foul of *self-determination in its ongoing aspect* — it does not allow Indigenous peoples to live and develop freely on a continual basis through proper and good faith negotiation with the state.

The final way in which a statutory right of self-determination would remain under the control of the state concerns the right's very existence. Being only a provision in an Act of Parliament, a statutory right of self-determination could be amended or repealed at any time without consultation or negotiation with Indigenous peoples. This offends the principle of *constitutive self-determination*, because it permits changes to be made to the institutional order in the absence of Indigenous participation and consent. There are, again, political imperatives that would militate against the amendment or repeal of a statutory right of self-determination. James Allan has referred to the 'colonizing power of rights'¹³³ over the minds of the citizenry, a consequence of which is a very low likelihood that any government would ever decide to 'expend the political capital' necessary to abolish an established bill of rights.¹³⁴ Others have suggested that statutory bills of rights attain a 'quasi-constitutional status' and become, for political reasons, almost impossible to amend.¹³⁵ Specifically in the context of Indigenous self-determination, Kingsbury observes that legislative provisions enshrining Indigenous self-determination, 'although formally unilateral, may be understood over time as requiring the consent of all affected groups before amendment.'¹³⁶ These are all valid points. I would add that, given the difficulties associated with constitutional reform and other potential avenues for the legal protection of Indigenous self-determination (such as a treaty or similar agreement), legislation is probably the strongest form of legal protection that is politically feasible, at least in the foreseeable future.

However, without some form of legal entrenchment beyond legislative enactment, recent history reminds us of the ease with which a brazen government can divest Indigenous people of their statutorily protected rights without fear of

¹³² Indigenous issues generally do not rate highly on the general population's list of electoral concerns. For instance, in 2007, less than one per cent of respondents said that 'treatment of Aborigines' was the issue of greatest importance to them and their family during the 2007 election campaign: Ian McAllister and Juliet Clark, *Trends in Australian Political Opinion: Results from the Australian Election Study, 1987–2007* (2008) 53. This was at the time of the Northern Territory Emergency Response (the 'Northern Territory Intervention'), which contained a raft of measures that were widely viewed as discriminatory and which had been announced and rushed through federal Parliament with very limited consultation.

¹³³ Allan, 'A Defence of the Status Quo', above n 122, 184.

¹³⁴ *Ibid* 190.

¹³⁵ See, eg, Carr, above n 122; Sir Harry Gibbs, 'Does Australia Need a Bill of Rights?' in *Proceedings of the Sixth Conference of the Samuel Griffith Society* (1996) 74, 78. *Contra* Byrnes, Charlesworth and McKinnon, above n 10, 69.

¹³⁶ Kingsbury, 'Reconstructing Self-Determination', above n 60, 28.

electoral fallout. The Hindmarsh Island bridge affair,¹³⁷ the 1998 amendments to the *Native Title Act 1993* (Cth),¹³⁸ the abolition of the Aboriginal and Torres Strait Islander Commission,¹³⁹ and the suspension of the *Racial Discrimination Act 1975* (Cth) under the Northern Territory Intervention¹⁴⁰ each involved the abrogation of Aboriginal and Torres Strait Islander peoples' statutory rights simply by way of subsequent amending or repealing legislation. The fate of a statutory right of self-determination would similarly be in the hands of Parliament, and this in a context where the abrogation of Indigenous rights is generally unlikely to affect election results.

It is clear from all of this that a right of self-determination under a statutory bill of rights would be at odds with relational Indigenous self-determination. In seeking to preserve parliamentary sovereignty, the dialogue model pays special attention to one particular power dynamic — namely, that between Parliament and the judiciary — but completely ignores another — that between the state and Indigenous peoples. Under statutory bills of rights, there are no legal arrangements that establish relations of 'dialogue' or negotiation between Indigenous peoples and the state — in respect of the right of self-determination or anything else. The relations are, rather, built around the monologue that has been the *leitmotif* of Indigenous–state relations in Australia for more than two centuries, a monologue in which the state tells Aboriginal and Torres Strait Islander peoples how things are going to be.¹⁴¹ Though a statutory right of self-determination is likely to result in some sort of recalibration of the Indigenous-state relationship in favour of increased Indigenous autonomy, statutory bills of rights as they currently exist do not provide any machinery by which Indigenous peoples can have a role in defining the terms of this recalibration. Instead, statutory bills of rights give power to the state to define the content of Indigenous self-determination, to decide whether or not to abide by the precepts established in relation to Indigenous self-determination, and ultimately to determine whether the right will continue to exist in statutory form. This continues the state domination of Indigenous peoples rather than putting in place a framework so that Indigenous self-determination can be realised through Indigenous–state negotia-

¹³⁷ See *Hindmarsh Island Bridge Act 1997* (Cth). The High Court has held this Act effected a partial repeal of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth): see *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

¹³⁸ See *Native Title Amendment Act 1998* (Cth).

¹³⁹ See *Aboriginal and Torres Strait Islander Amendment Act 2005* (Cth).

¹⁴⁰ These provisions were originally contained in *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(3), 6(3). They have since been repealed: see *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) sch 1. It is an open question, however, whether aspects of the Northern Territory Intervention legislation nonetheless remain inconsistent with, and thereby effect an implied partial repeal of, the *Racial Discrimination Act 1975* (Cth).

¹⁴¹ Cf F L Morton, who has suggested that, under the *Canadian Charter of Rights and Freedoms* at least, the supposed dialogue is actually a monologue delivered by the judiciary and obeyed by the Canadian Parliament: see F L Morton, 'Dialogue or Monologue?' (1999) 20(2) *Policy Options* 23.

tion processes conducted on mutually acceptable terms. A statutory right of self-determination would, for Indigenous peoples, be ‘a juridical smokescreen for a totally different reality’.¹⁴²

V THE HUMAN RIGHTS PROJECT AND THE JURIDIFICATION OF INDIGENOUS SELF-DETERMINATION

The challenge for advocates of Indigenous self-determination is to find an appropriate means of guaranteeing what is in essence a political claim by Indigenous peoples for increased intra-state autonomy. Under international law, the answer is to secure self-determination by way of a legal right, which, as we have seen, is developing to accommodate the situation of Indigenous peoples. Similarly, in the domestic legal context, Indigenous self-determination might be guaranteed as a legal right (echoing international law) enshrined in a statutory bill of rights. As I have suggested, this is not a particularly meaningful guarantee of Indigenous self-determination at all. Here I want to offer a more general analysis of the quest to ‘juridify’ the Indigenous claim for self-determination in the form of a legal right.

In a seminal discussion of the problem of juridification (albeit in a different context), Gunther Teubner posed the issue thus:

law ... has at its disposal modes of functioning, criteria of rationality and forms of organization which are not appropriate to the ‘life-world’ structures of the regulated social areas and which therefore either fail to achieve the desired results or do so at the cost of destroying these structures.¹⁴³

Jürgen Habermas has referred to this as the colonization of the life-world¹⁴⁴ — an apt description, perhaps, in the context of Indigenous self-determination. We might simply say, however, that juridification represents the tendency to subject social and political claims to the logic of the law. This frequently results in acts of translation (that is, from political claims to legal claims) which have the effect of distorting or even negating those claims. Juridification also has the effect of depoliticising conflicts and expropriating them into the legal arena.¹⁴⁵ Of course, this is not to valorise politics as the best means of working out problems — as I have argued, Indigenous peoples are at a distinct disadvantage when pitted against the state and the general population in political conflicts. It is to suggest,

¹⁴² Tomuschat, ‘Self-Determination in a Post-Colonial World’, above n 57, 13–14.

¹⁴³ Gunther Teubner, ‘Juridification — Concepts, Aspects, Limits, Solutions’ in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter, 1987) 3, 3–4. My thinking on juridification owes a debt to Kathy Bowrey: see Kathy Bowrey, ‘Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices’ (2006) 6 *Macquarie Law Journal* 65.

¹⁴⁴ See generally Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans, Beacon Press, 1984–1987) vol 2 [trans of: *Theorie des kommunikativen Handelns* (first published 1981)]. Teubner’s translation of Habermas’s phrase is the slightly different ‘colonization’ of the life-world: see Teubner, above n 143, 4.

¹⁴⁵ See Teubner, above n 143, 7–10.

however, that the tendency to convert political claims into legal ones can give rise to a new set of problems.

We can see a level of juridification at work in the international law on self-determination, with the effect that claims for self-determination may be fundamentally, even contradictorily, altered. As Kingsbury has observed, ‘the logic of self-determination is that “the people” themselves should make these evaluations [as to their own governance], not state governments; but this is not the logic of the human rights programme.’¹⁴⁶ The point is that international human rights law, including the right of self-determination, is still largely the preserve of states.¹⁴⁷ And it is states that have been the most instrumental ‘in trying to articulate the idea [of self-determination] in a palatable way, in transforming it — in an acceptable manner — into a set of legally binding standards’.¹⁴⁸ Taiaiake Alfred has gone so far as to suggest that Indigenous rights should be viewed not as a remedy for colonialism but as an *extension* of it, because “rights” are invariably created, controlled and limited by states themselves’.¹⁴⁹ While this may be an extreme and oversimplified view, it nevertheless highlights several important concerns in respect of an Indigenous right to self-determination, viz, the extent to which the juridification of Indigenous self-determination develops in response to state concerns while disregarding Indigenous ones, keeps power in the hands of states, and allows for the ongoing domination of Indigenous peoples.¹⁵⁰

I do not intend to suggest that the international law surrounding Indigenous self-determination is without value. On the contrary, international law can provide a powerful and universal language through which Indigenous peoples can articulate their claims. International law establishes minimum standards that may be appealed to in states where those standards are not being met. Furthermore, international law may establish a range of options as to how a right might be secured in the domestic context, and these options may prove useful in the advocacy of Indigenous peoples. However, this range of options is necessarily also limited in that it prescribes only certain legal effects or consequences and excludes others. This is particularly problematic in the context of Indigenous self-determination, for it can effectively work to dictate and delimit the terms of Indigenous self-determination, which is at odds with the idea that the content of Indigenous self-determination needs to be worked out with and approved by Indigenous peoples, in negotiation with the state.

¹⁴⁶ Kingsbury, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples’, above n 58, 99.

¹⁴⁷ Tomuschat, ‘Self-Determination in a Post-Colonial World’, above n 57, 10.

¹⁴⁸ Cassese, above n 29, 5.

¹⁴⁹ Taiaiake Alfred, cited in Colin Samson and Damien Short, ‘The Sociology of Indigenous Peoples’ Rights’ in Lydia Morris (ed), *Rights: Sociological Perspectives* (Routledge, 2006) 168, 181.

¹⁵⁰ As Ivison states: ‘what postcolonial theorists have pointed out are the particular ways in which regulative conceptions of freedom, sovereignty, self-determination and reason, for example, have been deployed in colonial contexts — as forms of control and domination as much as anything else’: above n 95, 43–4.

Where the juridification of self-determination becomes an especial dilemma, however, is in the domestic setting. In the case of a statutory right of self-determination, what is essentially a political claim by Indigenous peoples for increased control over their own affairs is translated into a legally enforceable statutory right. As I have sought to show in the previous section, this act of translation has the perverse effect of excluding Indigenous peoples from deliberations over the form their self-determination will take, whether the state will comply with the statutory requirements of the right of self-determination, and whether the right will in fact continue to exist. In short, a statutory right of self-determination would not guarantee self-determination for Indigenous peoples, at least not as I have defined it.

This is not to suggest that the other rights protected under a statutory bill of rights necessarily encounter the same problems or encounter them to the same extent. Putting it in Teubner's terms, the 'life-world' structures that would be regulated by a statutory right of self-determination are relatively distinct, in that they concern the fundamental relationship between the state and Indigenous peoples. The claim for Indigenous self-determination is not simply about preventing the state from acting in a certain way (as with, for example, the right to life) or requiring the state to act in a particular way (as with, for instance, the right to education). Indigenous self-determination involves a significant reorientation of state power in respect of Indigenous peoples. It is a challenge to the way institutional power is held within the state and to the standard modes of state interaction with Indigenous peoples. In this respect, the right of self-determination is unique.

Ultimately, there is a paradox operating in relation to the juridification of self-determination, as Duncan Ivison points out: 'to reduce the presence of the state in one sphere of social or political life requires that it be increased in others, acting at a distance.'¹⁵¹ Ivison correctly observes that this paradox cannot be entirely avoided. It is clear that, if we do not want to leave Indigenous self-determination wholly to the vicissitudes of politics (with the attendant imbalances in bargaining power) and want instead to place legally enforceable limits on the power of the state to intrude into the lives of Indigenous peoples, some element of juridification is necessary. Teubner offers a similar conclusion: the solution to the problem posed by juridification does not lie in the abandonment of legal regulation.¹⁵²

How then, in the context of Indigenous self-determination, can we avoid the shortcomings of juridification while also putting in place legal guarantees to secure Indigenous self-determination? For Teubner, the answer is to change the nature of legal regulation: rather than being used as a means of direct regulatory control, law may be better put to use indirectly in structuring negotiation systems and balancing negotiating power between parties.¹⁵³ The point is that '[t]he juridification process is not stopped by ... the reduction of direct state influence

¹⁵¹ Ibid 43.

¹⁵² Teubner, above n 143, 29–33.

¹⁵³ Ibid 35.

but merely steered into new channels.¹⁵⁴ All of this casts doubt on the efficacy of simply enshrining in law a bare right of self-determination without elaborating the terms of the Indigenous–state relationship or establishing procedures for negotiation between Indigenous peoples and the state. It also brings us full circle back to the normative vision of Indigenous self-determination that I outlined earlier.

We can see that the better form of legal regulation of Indigenous self-determination is not through the direct legal guarantee of a right of self-determination but through the legal structuring of the Indigenous–state relationship, the balancing of bargaining power, and the laying down of terms for negotiation. This indirect form of legal regulation effectively preserves the open-natured political negotiations that must take place between the state and Indigenous peoples over Indigenous self-determination, while at the same time providing legally enforceable boundaries on the way those negotiations can be conducted. It also limits the extent to which the state holds discretionary control over Indigenous peoples' self-determination, and ensures that the claim of self-determination is not subject to the distorting effects of juridification.

VI CONCLUSION

The issue of self-determination for Indigenous peoples in Australia and around the world is unlikely to go away any time soon. In fact, the issue is likely to become increasingly prominent in the coming decades. Despite being somewhat marginalised in contemporary Australian policy and government rhetoric, the concept of self-determination retains much power as a touchstone in the advocacy of Aboriginal and Torres Strait Islander people and as a worthwhile goal in the decolonisation of settler-colonial states like Australia. The right of self-determination for Indigenous peoples is also firmly on the agenda in international law, even though the law on the right as it applies in the Indigenous context remains ambiguous. We can also expect the right of self-determination to feature in developments relating to statutory bills of rights in Australian jurisdictions, particularly with the increasing acceptance of the statutory 'dialogue model' as a useful form of rights protection.

My point in this paper has been to question the efficacy of including the right of self-determination in a statutory bill of rights as a means of guaranteeing Indigenous self-determination. The normative model of Indigenous self-determination that I have elaborated has both constitutive and ongoing aspects, it emphasises the importance of the Indigenous–state relationship, and it values negotiation between Indigenous peoples and the state as the best means of structuring that relationship. When measured against this, the inclusion of a right of self-determination in a statutory bill of rights falls short in several respects. First, there are real questions about the capacity of the human rights consultation process to satisfy the constitutive aspect of Indigenous self-determination. Secondly, even if the constitutive threshold can be satisfied, the terms and

¹⁵⁴ *Ibid* 37.

dynamics of the Indigenous–state relationship established under a statutory right of self-determination leave considerable control in the hands of the state, making the relationship relatively one-sided. There are no mechanisms under statutory bills of rights by which Aboriginal and Torres Strait Islander peoples could negotiate with the state over the terms of their relationship or over conflicts that arise in the course of the relationship. Lastly, I have related these problems to the issue of juridification, which besets both international and domestic law in relation to Indigenous self-determination. Rather than directly guaranteeing a right of self-determination for Indigenous peoples — which is inevitably distorted by the legal process — the self-determination project ought to be pursued through the legal structuring of negotiations and balancing of bargaining power between Indigenous peoples and the state.