A REFLECTION ON THE LIMITATIONS OF THE RIGHT TO SELF-DETERMINATION AND ABORIGINAL WOMEN

by Megan Davis

When the *Indigenous Law Bulletin* ('ILB') was created I was contemplating beginning grade one in primary school in Queensland. Since that time, I have never ceased formal study: primary school, high school, undergraduate, and postgraduate study until 2011. It is an auspicious occasion then that in the 30th year of the ILB I finish my formal education and graduate from my PhD from the Australian National University.

The ILB was an important source of material for my doctoral thesis which focused on Aboriginal women and the right to self-determination. During the past 30 years some 80 articles have explored the issues of Aboriginal and Torres Strait Islander women. Indeed it is striking how the ILB has catalogued the evolution of the United Nations system, especially international human rights law, in addressing the issues of Indigenous peoples. This is no more evident than the many articles that map the development of the United Nations *Declaration on the Rights of Indigenous Peoples* ('UNDRIP') and the right to self-determination. However what is clear from the 30 years of ILB and my doctoral research is that the right to self-determination in practice is an essentially state-centric concept whether recognised in international law, translated by the state or constructed by the Aboriginal political domain. It does not pay adequate attention to the situation of Aboriginal women.

Internationally and domestically self-determination is read as: self = aboriginal collective. This is because Aboriginal people pursue their human rights and freedoms collectively underpinned by a fundamental cultural relationship with the land, a legal understanding that the UNDRIP now animates in international and domestic law. However self-determination has developed into an essentially state-centric concept that is located primarily between Indigenous peoples and the state. Of course this reflects in part the important role that international human rights law has played in the political and legal advocacy of Indigenous peoples globally and the exigencies of adversarial political strategy with the state. However it is an undernourished concept of self-determination that has detrimentally affected the lives of Australian Aboriginal women. The state-centric construction of self-determination is skewed towards the Indigenous man as 'Indigenous peoples' because it makes mistaken assumptions about the shared experiences of Indigenous men and women and has manifested in distorted policy-making and judicial decisions that impact negatively upon Aboriginal women.

The contemporary reductionist configuration of the right to self-determination is illustrated by the 2006 Northern Territory Emergency Response ('NTER'). The NTER represented a critical juncture in the Aboriginal rights movement, by bringing to the surface unspoken tensions in Aboriginal rights advocacy. The NTER was the Federal Government's response to the findings of the *Ampe Akelyernemane Meke Mekarle – 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* 2007.[1] The report found evidence of widespread violence and abuse of Aboriginal children and women in Northern Territory remote Aboriginal communities.[2] The Intervention was poorly conceived and implemented and added many layers of bureaucratic complexity to prescribed communities. The public political debate on the intervention for the past three years has been both polemic and polarised. In particular, one of the most fundamental objections to the NTER remains that Aboriginal people were not consulted on the intervention, given that one of the main recommendations of *Little Children are Sacred* was that self-determination was important in finding solutions to the problems communities face.

It is clear however that the Aboriginal political domain struggled with the public scrutiny of the dialectical tension between rights to land and the rights of women and children.[3] This is because the right to self-determination has primarily been constructed as situated between Aboriginal people and the state and rarely viewed as a principle guiding intra-cultural conversations and behaviour particularly in relation to the treatment of women. For example, intracultural sexual abuse and

violence is frequently resituated between the perpetrator and the state because of the brutality of colonisation which reinforces the state-centric configuration of self-determination as a human right undifferentiated by sex and absolving perpetrators of responsibility for their actions. Given the breadth of literature that challenges the land measures of the NTER, it is evident that the Aboriginal political domain can discharge effectively and convincingly a defence of Aboriginal land rights and an abstract notion of self-determination insofar as it relates to 'consultation' and articulate a sophisticated understanding of the *Racial Discrimination Act* ('RDA') and treaty law.[4] What is of interest to me as an Aboriginal feminist scholar, however, is that the inchoate concept of the right to self-determination has meant that many actors in Aboriginal politics equivocated on issues of violence against women and women's rights and were ill-prepared philosophically and politically to deal with any conflict of rights arguments other than land rights and the RDA, both substantive frameworks that have been granted by the state. The flaws and mistakes of the NTER aside, the NTER has highlighted the limitations of the self-determination framework in its current configuration.

If we come to understand and accept that the right to self-determination needs to evolve beyond state-centric boundaries then we need to pave the way for a new conversation about what that framework looks like. The UNDRIP as adopted by the General Assembly in 2007 is certainly one important tool in achieving that.[5] The UNDRIP provides an elaborate sense of what self-determination looks like in practice. Although it does augment the position of Indigenous women as one of vulnerability within Indigenous communities and that requires protection by the state from violence.

In my own research I have developed another approach that can complement the abstract human rights approach drawing upon Martha Nussbaum's Capabilities approach as an alternative approach to understanding the right to self-determination.[6] The capabilities approach is a valuable way to (re)learn the language of self-determination. It would enable a tailored approach to the specific geographical needs of communities across Australia reflecting in a more nuanced and tactile way what it means to live as an Aboriginal person in an Aboriginal community whilst giving texture to the discourse of international human rights law. Indeed while here I have adopted the term 'Aboriginal political domain' to describe the various actors in Indigenous affairs in a national public sense, there is a very real tension between those who drive the rights agenda at a national level and those in communities who believe the discourse of the political domain is detached from the daily realities of life across Australia. Indeed as long as routine violence continues as a daily experience of the life of an Aboriginal woman, she can never reach the threshold of what is required to live a dignified human life.

The right to self-determination is skewed by the influence of the Australian utilitarian ethic upon Aboriginal culture and when the undifferentiated nature of collective politics collides with the majoritarian nature of liberal democracy, *the greatest good for the greatest number* sides with the Aboriginal male. The privileging of Aboriginal men by Australia's public institutions has given many men an elevated status. In the past it has provided Aboriginal men with opportunities for leadership and experience in decision-making and negotiating that Aboriginal women do not have because Aboriginal men are constructed as the purveyors of culture. One of the most interesting developments in relation to this is the National Congress of Australia's First Peoples that has enshrined in its constitution gender equity and the principle that there must be a female and male co-chair.[7] This development, originating from the ideas and suggestions of Aboriginal people themselves, can only lead to a more enriched and inclusive notion of self-determination.

In order for self-determination to enrich Aboriginal women's lives, Aboriginal women must first reach a threshold-level of capabilities in which they are able to live a dignified human life. The challenge for us as Aboriginal people is to question whether the right to self-determination in its current conformation is able to facilitate Aboriginal women's capability to freely determine their political status and freely pursue their economic, social and cultural development. This is an uncommon question, rarely posed. But the question is critical to the economic, social and cultural development of Aboriginal women. And given that Indigenous peoples' right to self-determination is anchored to the fiercely guarded belief that Aboriginal communities alone have the solutions to the problems that afflict their own communities, it is a question Aboriginal communities must ask of themselves.

Megan Davis is Associate Professor and Director of the Indigenous Law Centre, University of New South Wales. Megan is an expert member of the United Nations Permanent Forum on Indigenous Issues. Her doctorate from ANU is on the limitations of the right to self-determination and Aboriginal women in Australia.

1 See generally, Mal Brough, Minister for Families, Community Services and Indigenous Affairs, 'National Emergency Response to Protect Children in the NT' (Press Release, 21 June 2007) <http://www.fahcsia.gov.au/internet/minister3.nsf/content//emergency_21june07.htm>.

2 Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle – 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

3 See generally, Editorial, 'Answers are Neither Black nor White', The Weekend Australian (online), 18 October 2008 <http://www.theaustralian.news.com.au/story/0,,24512710-16741,00.html>; Hon Jenny Macklin and Hon Tanya Plibersek, Transcript Doorstop Parliament House, Canberra 30 January 2009; Francesca Merlan, 'More than rights' *Inside Story* 11 March 2009 at< http://inside.org.au/more-than-rights/>.

4 See generally, Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007).

5 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007) ('*UNDRIP*').

6 Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2000); Megan Davis, Unpublished thesis Aboriginal women and the right to self-determination (2010).

7 See National Congress of Australia's First Peoples <http://www.nationalcongress.com.au/index.html>.

Saint Mc
Teena McCarthy

Oil and charcoal on canvas board
400mm x 500mm