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IS INDIGENOUS SELF-DETERMINATION TRULY IRRECONCILABLE WITH LIBERAL DEMOCRACY?

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Democracy is widely accepted as the indispensable ingredient in the legitimisation of a political system.¹ A seamless liberal democracy espouses an egalitarian polity with protections on individual rights and liberties from the hostile exercise of governmental power. It is a form of representative democracy.² It is frequently contended that Indigenous self-determination cannot subsist in the Australian democratic framework. However, an examination of the consequential relationship between the granting of equal rights and Indigenous self-determination demonstrates that Indigenous self-determination is compatible with the Australian system.

Commentators assert that Indigenous self-determination threatens the political unity of Australia and is thus incompatible with its liberal democracy. Such an assertion is intuitively political but legally a half-truth. Self-determination entails various different methods of exercise. Self-determination within the framework of the existing settler state, that is, internal self-determination, is viable in a democratic Australia.³ In fact, the doctrine of equality and individual rights advocated by liberal democracy renders Indigenous self-determination not only compatible with, but imperative to democratic legitimacy. The illusory mismatch between Indigenous self-determination and liberal democracy is not attributable to any doctrinal incongruity. Rather, the discrepancy between theory and praxis is attributable to the peripheral responses accorded to the Indigenous ‘problem’, such as the Northern Territory Intervention. Lacklustre policies have been systematically used as pawns

in a political power grab by governments.⁴ Furthermore, the central democratic tenet of individual rights renders external self-determination also permissible as a last resort mechanism to claim rights. Indigenous self-determination, in its internal and external manifestations, can be accommodated within the discourse of rights.⁵ As such, the very denial of Indigenous self-determination militates against the legitimacy of Australian democracy.

States have been vigilant regarding the grant of Indigenous self-determination due to the fear that self-determination leads to secession and therefore, challenges the territorial integrity and political unity of the State.⁶ State commentators assert that this secessionist manifestation of self-determination is contrary to the principles of Australian democracy.⁷ This is because secession renders impotent the essential majoritarian component of any democracy.⁸ Furthermore, it is argued that sovereignty and the territorial integrity of a State are fundamental principles of international law and the UN Charter. The preamble of the 1970 *Declaration on Principles of International Law Concerning Friendly Relations* holds that “any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter”.⁹ This territorial and political unity is seen as fundamental to the safeguarding of democracy. This is due to the fact that secession threatens to destabilise States and thereby imperil the indispensable mechanism for the promotion of democracy.¹⁰ David Held argued that sovereignty mediated the rise of the modern state and framed the

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development and consolidation of democracy. Consequently, secessionist self-determination seemingly conflicts with the sovereignty-centric international legal order and very preservation of liberal democracies. States have utilised these justifications perhaps in a bid to camouflage agendas concerning the balance of power that aim to maintain and enhance the security of the State through sovereignty and bigness bias.

As such, States have been keen to ensure that Indigenous self-determination is exercised in a manner consistent with the existing political, social, and legal frameworks of the State.¹¹ Internal self-determination is broadly acknowledged as compatible with the Australian democratic system.¹² Habermas maintains that democracy requires a “symmetrical relationship of reciprocal recognition between bearers of individual rights”.¹³ This inter-subjective


discourse of rights between Indigenous and non-Indigenous Australians operates as a microcosm for a credible representative democracy.¹⁴ The UN system is consistent with this approach. The Indigenous population of Australia aspires to internal self-determination, by way of equal access and citizenship, the right not to be discriminated against, and involvement in policymaking, rather than secessionist self-determination.¹⁵

Professor Karen Knop adopted a rights based model for internal self-determination characterised by the following attributes: (1) that Indigenous peoples retain a distinct standing when compared to the colonial peoples who have previously benefited from secessionist self-determination; (2) that self-determination guarantees fundamental human rights for Indigenous peoples; and (3) that self-determination assures Indigenous peoples the scope for genuine involvement in the political processes of the State.¹⁶ Through the establishment of a deliberative democracy the adoption of Knop's model would institutionalise the political autonomy of the Indigenous population while maintaining the territorial unity of the Australian State.¹⁷

Substantive internal self-determination for Indigenous Australians has an empty history. In 2007, the former Howard Government launched its Northern Territory Intervention Plan. The passing of the legislation authorising the Intervention necessitated the suspension of the Racial Discrimination Act 1975.¹⁸ This far-reaching intervention was rationalised on the grounds that traditional self-determination approaches to combating child abuse and

welfare dependency in Aboriginal communities have been futile.¹⁹ However, self-determination comparable to the model proposed by Knop has never been attempted in Australia.²⁰ No Australian government has been prepared to unsettle the status quo to afford the Indigenous population real autonomy.²¹ Although Australia had an official self-determination policy between 1972 and 2005, the success of this policy was premised on the assumption that after two centuries of subservience and dependency, the Indigenous community would immediately be equipped to assume greater autonomy over their lives.²²

Additionally, Australian governments have continually persisted with a top-down attitude to Indigenous self-determination rather than a bottom up or government to government approach – a clear contradiction in terms.²³ This top-down approach is further illustrated in the arena of native title. Here, the parliamentary statutes and juridical edicts of the existing Australian state explicitly delineate what constitutes a sufficient acknowledgment of Indigenous customs in order to obtain native title recognition. Government policies of self-determination have been more concerned with community management than with placing meaningful political and economic power in Aboriginal hands.²⁴ Meaningful internal self-determination would be more effective in addressing Indigenous disadvantage than the current paternalistic approach. The Intervention operates as a watershed, institutionalising racism that prevents Indigenous Australians from achieving equitable citizenship.²⁵ The imposition of the austere measures of the Intervention and condescending welfare



Senator Neville Bonner AO (Circa 1972). *First Indigenous Australian to be elected to parliament.*

politics, rather than negotiation with the Indigenous community, arguably perpetuates the social dependency of the Indigenous population that contributed to the creation of the problems in the first instance.²⁶

Liberal democracy is not only compatible with Indigenous self-determination, but necessitates it. The recognition of Indigenous difference and the consequential conferral of Indigenous autonomy internally are essential to the legitimacy of Australian democratic institutions.²⁷ Indigenous self-determination can be converted from an ostensible threat to liberal democracy to a foundation for a more fair and inclusive democracy.²⁸ In the Australian democratic system, the peripheral solutions employed to tackle perennial Indigenous issues, such as the hollow self-determination policy introduced by the Whitlam Government, are to blame for the erroneous conception that Indigenous self-determination is incompatible with democratic ideals. Adopting the reasoning of John Stuart Mill, the denial of Indigenous self-determination fatally undermines the Australian liberal democracy.²⁹

Denying the right of self-determination constitutes an expression of cultural chauvinism.³⁰ Any robust liberal democracy must acknowledge the unavoidable social fact that the citizenry of a modern polity is heterogeneous.³¹ Individuals must be given the ability to choose, unimpeded by external coercion, their own method of governance.³² Culturally imposed systems of non-Indigenous governance may be inappropriate for Indigenous communities and may compromise their cultural viability.³³

The current paternalistic approach to addressing Indigenous disadvantage and self-determination claims has been self-defeating. There is a need to reframe Australian discourse towards greater and active Indigenous political participation. The process of genuine inclusion and Indigenous self-determination promotes and fosters, rather than inhibits, a unified Australian nationhood, through the establishment of both shared and distinct political communities.³⁴

Consequently, there is no doctrinal reason for the incompatibility of liberal democracy and Indigenous self-determination. Rather, the failure to adequately grant internal self-determination to Indigenous Australians is attributable to governmental practices that are unfaithful to the doctrine of individual rights. The mainstream political response to the complexities of Indigenous dependency has been simplistic and cursory.³⁵ The Northern Territory Intervention is a form of institutionalised xenophobia, designed to erode Indigenous autonomy.³⁶ A cumulative analysis of a number of Australian government policies regarding Indigenous matters exposes an innate unwillingness to grant equitable citizenship and political participation to the Indigenous community. *The Native Title Amendment Act 1998*, the 2007 Northern Territory Intervention, coupled with the suspension of the *Racial Discrimination Act 1975* on two occasions demonstrate how the Indigenous community is deliberately segregated in terms of legal rights and treated adversely in relation to the wider Australian community.³⁷ Mainstream Australians are unwilling to allow Indigenous minorities to assert their will as political

relations are viewed as a zero-sum game, whereby the increase in the rights and facilities of the Indigenous minority necessarily result in a reduction of the rights and facilities of the majority. Conceding political autonomy to the Indigenous community depicts an existential threat to the non-Indigenous majority.³⁸

An analysis of the circular nature of citizenship furthers the proposition that Indigenous self-determination is compatible with and warranted by any liberal democracy. Rights and responsibilities define citizenship in a particular group.³⁹ If the Indigenous population is accorded rights and recognition, they are expected to show their allegiance to Australia. However, if Indigenous equality and liberties are systematically suppressed, allegiance ceases to be obligatory upon the Indigenous population. Thus, any aspirations for external self-determination would be a consequential outcome of the denial of human rights and freedoms internally. Secessionist self-determination is a natural aspiration if the Indigenous population have no effective redress within the Australian democratic system. Indigenous groups are forced to position themselves vis-à-vis the international system to claim their rights.⁴⁰ For this reason, international law does not prohibit secessionist self-determination. Paragraph 7 of Principle V of the *Declaration Concerning Friendly Relations* provides protection for the territorial integrity of the State in the event of a self-determination claim. However, this protection is not unconditional. Only States who are conducting themselves in compliance with the principles of equal rights and self-determination of peoples are able

to claim protection under international law from secessionist self-determination.⁴¹ The successful secession of East Pakistan from The Federation of West Pakistan indicates that the international community is prepared to recognise a right to secessionist self-determination as the ultimate mechanism to claim fundamental rights and a remedy against the abuse of territorial integrity.⁴²

Although some state commentators assert that Indigenous self-determination is diametrically opposed to the principles of the Australian liberal democracy, a systematic analysis of the relationship between democracy and Indigenous self-determination reveals that the inconsistency is fictitious. Meaningful self-determination has never been facilitated in Australia. Rather, piecemeal policies have been implemented in relation to the Indigenous population. Self-determination is imperative to the legitimacy of a representative democratic system. Due to this, international law permits the exercise of secessionist self-determination as a last resort for Indigenous communities to claim their fundamental rights. The suppression of the aspirations of the Indigenous population is detrimental to the existence of a truly representative democratic system in Australia. In order for the Australian democracy to flourish, the system must facilitate for the distinctive status of the Indigenous population. Otherwise, the democratic principles underpinning the Australian system will become whitewashed and hollow.



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