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Law Protecting Rights: Restoring the law of self-determination in the neo-colonial world

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Abstract

In light of the continuing state dominance of international legal relations, it is questionable whether international law adequately protects the right of self-determination. Yet, as it is enshrined in international law, self-determination retains great emancipatory promise. It is therefore essential that the law of self-determination, and its means of implementation, further evolve in order to harness the right's full potential in the wide range of twenty-first century claims to the right. In this paper I consider self-determination in relation to the contemporary rights claims of Irish nationalists and Indigenous peoples in Australia. This comparison allows for an analysis both of the impacts of colonialism in the present and of the various means by which self-determination may be asserted today. I am advancing two central arguments: firstly, that self-determination retains a mission of decolonisation in the twenty-first century; and secondly, that a 'human rights approach' to self-determination presents the best means of advancing the rights of contemporary claimants while protecting the rights of non-claimants.

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Introduction

In light of the continuing state dominance of international legal relations, it is questionable whether international law adequately protects the right of self-determination. Yet, as it is enshrined in international law, self-determination retains great emancipatory promise. It is therefore essential that the law of self-determination, and its means of implementation, further evolve in order to harness the right's full potential in the wide range of twenty-first century claims to the right. In this paper I consider self-determination in relation to the contemporary rights claims of Irish nationalists and Indigenous peoples in Australia. This comparison allows for an analysis both of the impacts of colonialism in the present and of the various means by which self-determination may be asserted today. I am advancing two central arguments: firstly, that self-determination retains a mission of decolonisation in the twenty-first century; and secondly, that a 'human rights approach' to self-determination presents the best means of advancing the rights of contemporary claimants while protecting the rights of non-claimants.

Alongside doctrinal legal analysis, I have conducted 28 in-depth research interviews in Ireland and Australia in order to consider self-determination, its definitions and its scope from a 'bottom-up' perspective, and to develop a critique of the state of the law in the area. The rationale for using a socio-legal method to explore an international law topic is to bring human voices to international legal analysis, and to advocate the opening of international legal discourse to the perspectives of non-state actors. In both research sites, interviews were conducted with lawyers, academics, human rights activists, community workers

and politicians, with the aim of gaining both a breadth of perspectives and a depth of analysis from people intimately engaged with the issues of self-determination. Data from this qualitative research is included in this article, first, to shed light on the meaning of self-determination and, second, to demonstrate some of the arenas in which contemporary claimants to the right identify the stifling influence of colonialism.

This paper explores some of the key practical and theoretical proposals which have emerged through my analysis of interview data and secondary material, particularly in relation to self-determination and colonialism. First I briefly consider the meaning of self-determination itself. Secondly I argue that colonial experience continues to impinge upon peoples' capacity to assert and realise self-determination. Finally I propose some means by which law's protection of self-determination might be extended in order to fulfil the right's emancipatory potential.

Self-determination: Legal status and meaning

The concept of self-determination has its origins in the Enlightenment, but it did not emerge as a principle of international law until the early twentieth century. During the post-World War One peace talks in Versailles, US President Woodrow Wilson began to talk about 'self-determination' as 'an imperative principle of action' guiding the re-drawing of the maps of Europe (1918). In the Wilsonian sense, however, self-determination was purely the right of peoples when organised as 'nations', and its application was in practice limited to those new states which the victorious powers intended to create out of the ruins of war. In recognising self-determination only where this was politically expedient, the dominant forces in the international community at this time established a precedent of the dominance of politics over law which continues to impinge upon the right in the twenty-first century. Just as the intensely hierarchical nature of international relations during the early twentieth century prevented the rights claims of colonised peoples being treated equally to the rights of existing states (Ishay 2004), so do contemporary claimant

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peoples struggle to make their claims heard on the international stage. Nevertheless, the term self-determination gained a foothold in international legal discourse at Versailles.

Self-determination then took on the status of a firm pillar of international law following the Second World War, when it was included as a foundation principle in the United Nations Charter (Brownlie 2003). Building on this precedent, self-determination assumed a central place in the international Bill of Rights. The right was enshrined and defined in Common Article 1 of the *International Covenant on Civil and Political Rights* 1966 and the *International Covenant on Economic, Social and Cultural Rights* 1966:

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.

This statement is echoed in relation to Indigenous peoples by the *Declaration on the Rights of Indigenous Peoples* which was adopted by the UN General Assembly in September 2007.

On this legal basis, over the past four decades self-determination has become the most significant and commonly asserted of the human rights owed to peoples rather than individuals. The right stands in opposition to the absolute dominance of states within the international order. It is crucial in enabling communities to preserve and protect their distinct identities (Daes 1993). Indeed, the UN Rapporteur on self-determination described the right as ‘an essential condition or prerequisite ... for the genuine existence of the other human rights and freedoms’ (Gros Espiell 1980: [59]). While the most significant engagement of self-determination to date has been the project of decolonisation, Common Article 1 of the twin covenants confirms that the right has universal application (Crawford 2001). Forty years on, this provision stands as a positive and binding statement that the domination of one people by another will not be legally tolerated (McCorquodale 1995). As will be discussed below, however, the strength of self-determination in legal terms has been undermined by political realities.

Frederic Kirgis has described self-determination as a right with many ‘faces’. These include, but are not limited to, secession, freedom from colonial domination, integration with an existing state, limited autonomy within a state, and protection of minority groups (Kirgis 1994). Practical examples demonstrate that the right may manifest across a broad spectrum, and while it is this flexibility that makes self-determination uniquely adaptable to the needs of all peoples, the lack of a constant and defined application for the right has prompted James Crawford (2001) to critique the right as *lex obscura* or uncertain law.

To give human context to the meaning of self-determination, I have asked interview respondents what the right means to them on a practical level. I argue that the term ‘self-determination’ offers the best clue for how to define the concept; the meaning of the right must be contextualised and defined by peoples themselves in their unique circumstances. For some people, the right begins at an individual level before taking on its role within the collective:

I think self-determination is within yourself, being proud of who you are. Aboriginal people find that really hard because you have all these people knocking you down all the time (Mundine 2006).

Indeed, self-determination may be seen to actuate on several layered levels:

Self-determination means the right of a nation to determine its own political, social, economic and cultural affairs, and its own relations to other peoples and other nations. Within that it also means the rights of specific communities, whether they be geographical communities or communities of interest, for example gendered, racialised or ethnic communities, and it means that they can do exactly the same things in the context of the nation. It is for the individual too (Ó Broin 2006).

As Ó Broin asserts, self-determination is often bound up with political autonomy, yet Paul O’Connor demonstrates that the right is also important for dispossessed peoples in terms of culture and identity:

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I certainly would argue that freedom in the political sphere also means freedom in the social and cultural spheres as well. For instance, I find it frustrating that my children are using textbooks that have got no cultural relevance to them (O'Connor 2006).

Just as, depending on context, self-determination can be understood in political, social, economic, cultural or other terms, so too can discrete exercises of the right be far more localised. As Linda Burney explains, not every exercise of self-determination must result in full independence for a people:

The international definition is a fine set of words, but realistically it would be difficult to find many places in the world where the practice of self-determination includes all of those elements. In the context of an individual community in New South Wales — Bega, La Perouse, Yamba or wherever — it is about Aboriginal people being able to take responsibility for decision-making that will affect them (Burney 2006).

The highly contextualised nature of self-determination represents one aspect of the right which powerful international actors, especially nation states, have typically failed or refused to understand. Certainly some self-determination claims involve challenges to state sovereignty and existing borders, such as those asserted by Irish nationalists, Palestinians and Basques. However, many other claims, notably those typically made by Indigenous peoples in Australia, seek autonomy within existing nation states and promote the notion of co-existing forms of sovereignty within the same territory.

The variety of characterisations of self-determination offered by participants in this research demonstrate that the definition in international law is but a starting point for peoples seeking control over their own destinies. Indeed, attempts to impose restrictive definitions of the right actually serve to deny the right's true nature and potential. Only a self-determining people can determine what the right means for them. This is a difficult fact for law and lawyers to face, however, and examples from both Irish and Indigenous Australian contexts show that the right is currently inadequately protected by international law and institutions. As I discuss in the following section, those engaged

in the evolution of the international law of self-determination must be confronted with the fact that colonial experiences continue to stifle peoples' achievement of self-determination.

Self-determination and the mission of decolonisation

Some key theorists of colonialism have influenced my exploration of the relationship between colonialism and self-determination. I follow Frantz Fanon's view that the history of colonialism is 'the history of pillage', and that colonialism imposes material and moral violence which must be struggled against (1965: 41, Sharawy 2003). This research has included in-depth interviews with people struggling for self-determination in Ireland and Australia, in order to listen to the voices of the colonised and honour their demands for self-determination (Sartre in Fanon 1965: 12). I also concur with Judge Ammoun's famous separate opinions in the *Namibia* (1971) and *Western Sahara* (1975) cases before the International Court of Justice that colonialism is a plague which causes a distortion in history for the colonised. The judge argued that self-determination is the only means by which a claimant people may overcome that historical distortion and reassert their independence. The greatest obstacle to claimant peoples who seek to use the right in this way is that international law has not yet engaged with its Eurocentric bias, with the result that colonialism rarely features prominently in international legal analysis (Anghie 2004: 34). Instead, as Antony Anghie (2004) recognises, having been born from colonialism, international law now reproduces colonialism at every turn.

Some international legal commentators have argued in recent times that the process of decolonisation, which reached its peak in the 1960s and 1970s, has all but reached its conclusion (Pearson 2006a). For example, Christine Bell (2005) finds colonialism to be a fairly unhelpful tool of analysis in relation to sovereignty debates in Ireland and asserts more generally that self-determination solutions which do not alter existing borders are typically more appropriate in the present

day. I argue, however, that evidence from both Ireland and Australia demonstrates the continued influence of colonialism over claims to self-determination. International legal actors and institutions are challenged to confront both the legacy and the contemporary experience of colonialism if international law is to offer adequate protection to the right of self-determination and act more forcefully to compel states to respect the right. This research is one site in which the influence of colonialism over self-determination claims can be made more explicit in international legal discourse.

Case studies from Ireland and Indigenous Australia

In many ways the circumstances of nationalists in the North of Ireland and Indigenous peoples in Australia could not be more different. Indeed, the key distinction between the two case studies is that Irish nationalists claim self-determination in the form of a reunited Ireland, thus challenging the status of existing state borders, whilst almost all self-determination claims advanced by Indigenous peoples in Australia propose some form of autonomous solution within the existing state structure. Yet this essential difference is one of the two most important reasons for comparing the two cases. Consideration of different types of self-determination claims illuminates the adaptable nature of the right and challenges the typical statist view that self-determination necessarily entails a claim to secession and a challenge to a state's territorial integrity.

The other important reason for this comparison of the Irish nationalist and Indigenous Australian claims is that both claims are heavily influenced by a colonial experience which has not been adequately recognised either at the domestic or international level. Irish nationalists and Indigenous peoples in Australia continue to experience 'settler colonialism' (see Clayton 1996). This experience is distinct from the 'salt-water' colonialism suffered by the many recently formed nation states whose right to self-determination was upheld by international law through the project of decolonisation.

Contemporary legal commentators have recognised that the salt-water test of colonialism, which aimed to impose predictability by ruling out claims from peoples not separated by an ocean from their colonisers, was manifestly unjust (Hurrell 2003) and indefensible (Wippman 1998). The maintenance of the salt-water test throughout the project of decolonisation has marginalised peoples who have experienced other forms of colonialism.

In this section I explore the responses of interview participants in both Ireland and Australia. In each interview, respondents were asked whether they identified a continuing colonial influence over their community's claim to self-determination. There was almost universal agreement across the 28 interviews conducted that colonialism does continue to impinge upon contemporary self-determination claims in Ireland and by Indigenous peoples in Australia. However, as this is a qualitative study, the depth of the data gathered is more interesting than the degree of correlation between responses. Not only did almost all participants agree that colonialism was a continuing force in their lives, but they gave rich and diverse explanations of the real effects of colonialism. This type of analysis has rarely been included in international legal discourse.

Ireland

In Ireland, the partitioned north-eastern six counties represent a last vestige of British colonialism. The border of 1920 remains in place, despite its international illegitimacy and status as a 'religion-linked, political gerrymander' (Swan 1986: 139). The legacy of the colonial mindset, promoted by the British state in Ireland through a range of means as recently as the twentieth century, may still be seen in the social imperialism expressed by some British unionist politicians who resent power-sharing and negotiation with Irish nationalists. Further, sectarianism is reinforced by the British state as is clear in the case of John Taylor, a former unionist politician who in 1991 advised a group of young people that one in three Catholics was either a murderer or

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a supporter of murder (McKay 2000: 363–4). Taylor now holds a life peerage in the House of Lords.

In all but one of my interviews in Ireland respondents recognised a continued colonial British influence in the North of Ireland. Contemporary colonialism in Ireland, however, is less explicit than in past centuries. In arguing that colonialism relates not to distance but to type of administration, Robert McCorquodale (2006) asks: ‘Is the type of administration a foreign administration over those who are different and who don’t share the same approach?’ The use of the term ‘foreign’ is complicated in the Northern Irish context because around half of the constituents of that jurisdiction identify themselves as British, ‘Northern Irish’ or ‘Ulstermen’ and remain accepting of British governance. For Irish nationalists across the island, however, British rule is both foreign and different in approach from how they imagine governance in a unified Ireland. Like McCorquodale, Bernadette McAliskey (2006) rejects the salt-water approach to colonial categorisation, finding that the British presence in Ireland has never been appropriately named as colonial due to the erroneous perception that colonies must be distant from the imperial power. Further, several respondents to this study identified the unaccountability of the British ruling class as a signifier of continued colonialism. Anthony Coughlan (2006) admits finding colonial terms somewhat simplistic, but nevertheless states: ‘The classic characterisation of colonialism was a subordinate people who had their laws made by others, by foreigners, and Britain does still do that in Northern Ireland’. Terry Enright (2006) is far more explicit in his condemnation of the unaccountable British politicians and bureaucrats who continue to share power with the Northern Ireland Assembly: ‘These people are like a secret society, behind closed doors, who still think of us as the natives and still think that the natives have to be told how to live and what to do’.

A further active legacy of colonialism in Ireland is the failure of the British state to confront its own role in the conflict. In August 2007 Britain withdrew the last representatives of its wartime garrison in Ireland, leaving what it terms a ‘peacetime’ garrison of no more

than 5000 soldiers. However, Britain continues to promote what is known as the ‘community relations’ conception of the conflict in Ireland, which depicts the British state as the neutral arbiter of a community-based conflict. Paul O’Connor, director of the Pat Finucane Centre — an NGO focused on gaining justice for families of those killed by the state during the conflict — rejects the community relations analysis. He argues that the state’s role in collusion with police and loyalists in the murder of civilians, the shoot-to-kill policy, Bloody Sunday, torture and detention without trial (see Larkin 2004) evidence the state’s role as a combatant rather than a mediator in the conflict (O’Connor 2006). Indeed, during the period known as the Troubles British soldiers were directly responsible for the killings of 301 people, including 138 Catholic civilians and 20 Protestant civilians. On 25 June 2007, despite comprehensive findings of state collusion in the murders of several civilians during the conflict, the Public Prosecutions Service announced that it would not prosecute any member of the British security forces or police (*Press Notice: Public Prosecution Service — Conclusion on Stevens III* 25 June 2007). Immediately following Canadian judge Cory’s recommendation that an independent inquiry be held into the killing of Catholic solicitor Pat Finucane, the Westminster parliament passed a new *Inquiries Act* 2005, which enables the state to withdraw incriminating information from the defence, prosecution and the judge. Belfast lawyer Niall Murphy (2006) questions how truth and justice can be served under this new statute, which is clearly designed to protect the interests of the state over the citizens.

A further aspect of continued colonial influence identified by Irish respondents to this study was the dominance of British culture over Irish culture within many areas of social life. An obviously contentious display of British culture occurs each July during the Orange marching season. In 2006, having established a Parades Commission as a means of developing rights-based and negotiated solutions to contentious marches, the Northern Ireland Office appointed an Orangeman previously found liable for unfair employment practices against nationalists to head the commission. In contrast, those with Irish

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identities face greater obstacles in freely expressing those identities. Paul O'Connor (2006) complains that his children's education is not culturally relevant, because British points of reference — such as visiting Big Ben — are used in children's textbooks. Of particular current concern is the inability of either the British government or the Northern Ireland Assembly to give appropriate legislative support to the Irish language (Enright 2006). Many people promote the use of the Irish language as a means of claiming their cultural identity (Murphy 2006). Under the European Convention on Regional and Minority Languages and the Good Friday Agreement, Britain was obliged to establish legislation protecting the rights of the rapidly growing number of Irish speakers in the north of Ireland. Further, Britain made a commitment to introduce this legislation in the St Andrews agreement which preceded the recent re-establishment of the devolved Northern Ireland Assembly. A public consultation round was held and the overwhelming majority of responses were in favour of rights-based legislative protection for the language. However, Britain failed to introduce the legislation before power over cultural rights was devolved to the unionist-dominated Assembly. The Assembly, dominated by the Ian Paisley-founded Democratic Unionist Party, appears to have abandoned any commitment to enacting the legislation, with DUP member Nelson McCausland linking the Irish language to the IRA armed campaign and describing efforts to promote it as a form of 'cultural rearmament' (2007).

Australia

All Indigenous respondents to this research identified a continuing colonial relationship between Indigenous peoples and the Australian state. In this regard they echoed the famous comment on contemporary colonialism made by Yawuru elder and Aboriginal spokesman, Patrick Dodson, in his influential Fourth Annual Vincent Lingiari Memorial Lecture of 1999. Dodson titled his lecture 'Until the Chains are Broken: Aboriginal Unfinished Business'. The title was a reference to an excerpt from Frank Hardy's book *The Unlucky Australians*:

Will I, having written it, be free to turn to other books and obsessions, will you, having read it, be free to turn to the pursuit of happiness, will the lucky country remain free while the unlucky Australians are in chains? (Hardy 2006)

The colonial ‘chains’ which continue to bind Indigenous peoples in Australia, in Dodson’s conception, are diverse and diffuse; in all, he identified 17 elements of ‘Aboriginal unfinished business’ which must be settled before the colonial legacy may be overcome. As was reflected by the variety of responses from Indigenous participants in this research, contemporary colonialism in Australia goes far beyond the historical and continuing dispossession of land and resources to encompass myriad forms of domination and disempowerment.

Even in the post-*Mabo* period, as Irene Watson states (2006), Australian legal and public institutions have failed to recognise or respect continuing Aboriginal sovereignty. The High Court has stated categorically that it has no jurisdiction to inquire into the acquisition of sovereignty by Britain in Australia (*Mabo v Queensland (No 2)*, hereinafter *Mabo*), and consequently a native title regime has been developed which requires Indigenous claimants to establish an unbroken link between their ‘traditional laws and customs’ as practised at the time of European colonisation and those laws and customs which they continue to practise today in connection with their traditional lands (*Members of the Yorta Yorta Aboriginal Community v Victoria, Native Title Act 1993 (Cth) section 223*). Nor has the Australian Constitution evolved to the point where it would drive, or at least facilitate, a fundamental alteration in the relationship between Indigenous peoples and the Australian state (Behrendt 2006). The absence of recognition of Indigenous sovereignty by the Australian legal and constitutional framework is hardly surprising, however, in light of Linda Burney’s comment that the prior occupation of Australia by Indigenous people was not legally recognised until the *Mabo* decision of 1992 (Burney 2006). The framework of ‘settlement’ and ‘terra nullius’ which justified the colonisation of Australia in the eyes of Anglo-Australian law meant that the colonial relationship did not develop to the point

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reached in other comparable colonial countries, such as New Zealand/Aotearoa, the United States and Canada, where prior ownership was acknowledged through treaties (Calma 2006).

One of the key practical legacies of this failure to recognise Indigenous sovereignty has been the development of administrative frameworks which isolate and patronise Indigenous people in the present day. This is evident in the lack of proportional representation of Indigenous people in important social institutions such as parliaments, the judiciary and the education system, a circumstance which Irabinna Rigney (2006) believes demonstrates the ongoing disproportion of power between Indigenous and non-Indigenous in Australia. Aden Ridgeway, at the time of interview the only Indigenous senator in the Commonwealth Parliament, asserts that a consequence of this lack of representation is a governmental attitude that Indigenous people remain, in a sense, 'wards of the state'. Ridgeway (2006) argues that this attitude results in a colonial governmental approach which emphasises Indigenous disadvantage, and suggests that governments are best placed to decide *for* Indigenous peoples how their circumstances might be improved. A parallel concern expressed by Professor Mick Dodson (2006) is that the disempowerment of Indigenous people means that governments typically make decisions affecting the lives of individuals and communities without seeking or gaining Indigenous consent. Dodson gives the example of the 2006–2007 abolition of the permit system in the Northern Territory, whereby it was no longer necessary for outsiders to gain permits to enter private and freehold Aboriginal property. As is the case for Irish nationalists in Northern Ireland, Indigenous people in Australia continue to identify a colonial legacy in the marginalisation of their voices and ignorance of their concerns.

An abiding and unfortunate consequence of the marginalisation of Indigenous people from positions of influence in Australian society is the continued prevalence of racist and discriminatory attitudes towards Indigenous people. Larissa Behrendt (2006) asserts that Australia has not changed psychologically as a country, and that while the dominant

community appears to resent public debates about racism or Indigenous rights, a key concern for many Indigenous people is bringing an end to the discrimination they routinely suffer. Arguably one of the key indicators of this abiding discrimination towards Indigenous people is the replacement and erasure of Indigenous cultures that continues in the present day (Rigney 2006). The problem of cultural erasure is emphasised as a key colonial barrier to Indigenous self-determination by Noel Pearson, who comments:

There's never been agreement by the country to say that Indigenous peoples are entitled to maintain their distinct identities, to maintain their languages, to maintain the integrity of their relationship with their traditional lands — we've not reached the point where those things have been proclaimed as foundations for moving forward (Pearson 2006b).

Encapsulated in Pearson's comment is an idea which is also inherent in a wide range of comments made by participants in this research — namely, that colonialism abides wherever there is a failure to recognise and respect every people's equal right to self-determination.

The challenge for international law

Such examples demonstrate the gaps between the international legal standards set for self-determination and the political will of nation states to protect peoples' right to self-determination. Britain, particularly during the sovereignty dispute over the Falklands/Malvinas Islands, has been one of the most prominent champions of the right to self-determination in the international forum, notably commenting that the right is owed to all peoples, even those inside British borders (UK representative to the UN 1982: 432). Yet, so often in the case of the Irish people in Northern Ireland, Britain has disregarded its obligations and commitments under international law by failing to make space for the expression of their right to self-determination. Similarly, the conclusion of the Committee on the Elimination of Racial Discrimination (1999) that amendments to Australia's native title laws led by the Howard government were in breach of racial discrimination standards did not persuade Australia to alter its course. Indigenous

respondents to my study have said that the Declaration on the Rights of Indigenous Peoples which was recently adopted by the UN was of such significance because it is the only legal instrument they have with which to confront state intransigence on self-determination (Davis 2006, Dodson 2006). Clearly, then, the evolution of international law must be accompanied by renewed political will on the part of states to respect and enable self-determination for all peoples.

Restoring the law of self-determination through international law

For claimants of self-determination who continue to struggle against the suppression of their rights through colonialism, the most pressing concern remains survival and the maintenance of distinct identities. Another key question, however, is whether international law can evolve in the twenty-first century to ensure that self-determination does not lose its emancipatory potential. I turn now to some suggestions of means by which the utility of self-determination may be enhanced.

Decolonising the law of self-determination

In order to achieve its contemporary mission of decolonisation, the law of self-determination must itself be decolonised. A key means of achieving this is by enabling the variety of legitimate manifestations of the right. It has always suited states to depict self-determination as inherently threatening to state sovereignty, but in law the right is capable of being realised as anything from independence from colonial rule to the exercise of autonomy within state borders or the enjoyment of democratic governance in an existing state arrangement (Kirgis 1994: 307). Robert McCorquodale (2006) regards this statist tendency to emphasise the risk of secession as a 'deliberate misunderstanding' designed to maintain state control over sovereignty at all costs. Undoubtedly the Irish nationalist claim to self-determination does challenge existing state borders, but Indigenous peoples in Australia very rarely assert self-determination claims which challenge the sovereignty of the Australian state. A decolonised law of

self-determination must countenance the variety of assertions of the right, and in doing so should motivate the international community to engage with each claim on its own merits.

An allied means of decolonising the law of self-determination is through breaking down the artificial dichotomy which has been proposed between ‘internal’ and ‘external’ self-determination. In this characterisation, external self-determination, or independent statehood, is regarded as highly threatening and only permitted in cases of severe oppression by a dominant state. Internal self-determination, such as limited autonomy within existing borders, is typically preferred. I oppose the use of this division in international legal discourse as unhelpful and designed to always preference the political interests of states. The statist world has been definitively eroded (Falk 2000: 112) in law — if not in practice — and the artificial opposition between external and internal self-determination is inapplicable given ‘the reality of multiple human associational patterns in today’s world’ (Anaya 1996: 81). The law of self-determination can be decolonised by abandoning these arbitrary categories and empowering claimant peoples to frame self-determination in their own terms.

Group identity and the state

The evolution of self-determination in the twenty-first century is also required to develop state acceptance of the right’s continued place in the international legal order. This is an area for the intervention of international law and legal analysis since, as Antonio Cassese recognises, the law on self-determination presently fails to countenance the claims of, or provide legal remedies to, ethnic, national, religious, cultural or linguistic minorities:

In short ... international law takes a ‘statist view of self-determination’. Of course, political stability and the territorial integrity of States are important values that need not be disregarded. ... On the other hand, one cannot fail to note that international law could provide a host of contingency solutions which while not undermining the international legal order, would be likely to pay regard to the aspirations of those groups and minorities that suffer from discrimination and oppression (1995: 328).

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If international law is currently complicit in supporting an overly statist interpretation of self-determination then it has a role to play in making that right a less threatening proposition for states. Arguably the human rights approach to self-determination (discussed below) has the potential to promote this development in that it makes secession and conflict less likely outcomes of self-determination claims based in a particular group identity and builds in rights protections for those with competing worldviews. To enhance this outcome states ought to question their traditional opposition to assertions of group identity. State engagement with people's claims to self-determination would be in keeping with international law's acknowledgement that political boundaries are legitimate because they protect groups as well as individuals (Binder 1992–1993: 225).

Nationalist and claimant movements, for their part, could respond to an increased state engagement with self-determination claims by rejecting exclusivist modes of definition and embracing pluralism. In Ireland Sinn Féin is attempting such a transition by moving away from the narrow cultural focus of Irish nationalism towards civic republicanism and inclusivity (Ó Broin 2006). It is to be hoped that future conceptions of self-determination in the Irish context can reconceive of group identity as a unifying notion and move beyond the stultifying question of which group deserves what towards arrangements which advance the interests of all people on the island.

Empowering peoples through an inclusive international legal system

Almost thirty years ago Lee Buchheit challenged international law to affirm self-determination's continued currency and avoid 'an uncritical affirmation of the supremacy of the "sovereign" state' (Buchheit 1978: 7). The capacity of self-determination to force international actors to question the assumptions inherent in international law could be enhanced through a restructuring of international legal institutions (Lâm 1992). Should the international legal system be opened to the participation of peoples, this may also assist in overcoming a key paradox — that the international community 'upholds the right to

self-determination but can do so little to provide for its consistent or effective implementation' (Hurrell 2003: 297). In proposing the development of an 'inclusive international legal system' McCorquodale (2004) notes the precedents already set by the evolution of self-determination, which was driven largely by peoples, often with the opposition of states. Such a development is appropriate in light of self-determination's status as a right of peoples against states (Crawford 1988), and by the right's significance as an essential condition for the realisation of all other human rights (Gros Espiell 1980, Kolodner 1994–1995).

An inclusive international legal system has the potential to enhance popular agency and participation and to provide more accountable and independent systems of oversight for self-determination processes taking place within nations. The United Nations Charter famously begins 'We the Peoples'. If the international legal system is to honour this phrasing, particularly in relation to the right of self-determination which serves *peoples* rather than *states*, it must combine strategies of empowerment with strategies of accessibility (Murphy 2006), something which may in part be achieved through the development of an inclusive international legal system.

'Peoples' v 'territories' v 'human rights': Do we have to define the self?

In traditional approaches to self-determination it has typically been argued that it is necessary to define the 'self' claiming self-determination. A 1990 UNESCO report brought together the most commonly proposed definitions of a 'people', notably emphasising the need for the group to share some objective characteristics such as common ethnicity, language or culture, and the importance of a common subjective desire to be identified as a people (International Meeting of Experts on the Further Study of the Concept of the Right of People 1990). However this 'peoples' approach is problematic in that it fails to recognise how peoples may change over time, it potentially enables peoples to be engineered in order to attain political ends, few individuals can happily state that they are members of one single

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people, and no single definition of people-hood exists (McCorquodale 1994).

In contrast, some commentators favour a 'territories' approach to self-determination, although this has not gained the same level of adherence. The territories approach focused historically on colonial boundaries, conceiving of self-determination as a peaceful vehicle for enabling the transfer of colonial territories from an imperial power to a colonial people. The key problem of the territories approach is that it ignores the range of means by which self-determination may be exercised, and in this way 'is a reminder of the reckless indifference to peoples shown by those who decided on territorial boundaries after the First World War' (McCorquodale 1994: 869).

A 'human rights' approach has been promoted by Robert McCorquodale (1994) as a means of providing clearer rules of adjudication for self-determination claims. The human rights approach evaluates self-determination claims within the context of the whole human rights framework, and especially those rights which may conflict with a people's assertion of self-determination. In focusing not on 'who is the self?' but on how self-determination will be exercised, this approach aims to enable the concurrent protection of the whole range of human rights to their fullest extent (McCorquodale 2006):

While the human rights approach does not make it possible to say in the abstract which peoples have the right of self-determination and the extent of any exercise of this right, it does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed ... (McCorquodale 1994: 885).

In order to explore how the human rights approach to self-determination would work in practice, McCorquodale (1994) considers the notion that most human rights are not absolute values, but rather that limitations may sometimes be imposed to enable rights to interact in the real conditions of social life, as is the case with self-determination. He states the general legal rules that any limitations which are imposed on the exercise of human rights are only imposed to

protect other rights and the interests of society, and that any limitations imposed are to be interpreted narrowly. So while self-determination applies wherever a people is subject to oppression it is subject to the presumption that exercises of self-determination cannot be permitted to destroy or impair the other human rights also enshrined in the international legal framework.

McCorquodale's proposal finds support in some international legal commentary. James Anaya conceives of self-determination as 'a configurative principle' of human rights law which is intertwined with individual human rights standards (1996: 77). When the right is considered in this light the human rights approach appears both logical and well-adapted to twenty-first century conceptions of the true significance of human rights in international relations. Indeed, Gerry Simpson argues that the only means of saving self-determination from a 'descent into incoherence' is an expansive interpretation of the right which recognises its links with autonomy, democracy, cultural self-expression and human rights (1996: 259). A renewal of such links through the human rights approach may also allay the fears of some who regard self-determination as divisive or dangerous. For example, Louis Beres (1994) has called for the balancing of self-determination with the needs of the entire global community in order to protect against the more extreme and violent out-workings of separatism, ethnic conflict and militaristic nationalism. The human rights approach is the only strategy yet proposed which attends to these concerns with both realism regarding the interests of the international community and a respect for the fundamental entitlements of individuals and peoples.

The human rights approach has obvious potential to overcome some of the weaknesses of the human rights framework which currently limit the capacity of claimant peoples to fully realise self-determination. McCorquodale's strategy responds to the lack of enforcement power in international law by proposing a more conciliatory framework of negotiating self-determination. In this context it is foreseeable that states could be persuaded to sit with claimant peoples 'at the same table' on the proviso that a relationship of mutual goodwill could

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be established. This element of the strategy also responds to the marginalisation of claimant peoples from international legal dialogue in that the voices of claimants may seem less threatening to states if they are expressed in a framework of negotiation. Further, the difficulty created by the dominance of political considerations in state responses to self-determination claims is addressed by the human rights approach. Arguably the evaluation of self-determination according to the 'coherent legal framework' of the international law on human rights may make politics a less decisive factor and instead promote negotiated agreements. The Canadian Supreme Court appeared to favour this outcome in giving its opinion on the potential secession of Québec from the Canadian federation. In that case it was held that a Québécois vote in favour of secession would have to be followed by 'principled negotiations' with the other stakeholders in the federation to ensure that all rights were protected to the fullest degree (*Reference re Secession of Québec*).

Some respondents to this study gave specific examples of how the human rights approach could apply positively in practice. According to Kieran McEvoy (2006), 'absolutist' assertions of self-determination in Northern Ireland have been disaggregated over the past several years of the Irish peace process. Today, issues of entitlement, such as claims of British unionists to the 'right to march' or parade, are discussed more frequently in terms of competing rights frameworks, thus developing more practical solutions than were possible in the past. In Australia, too, the human rights approach lessens the risk of rights claims being rejected solely on the basis that they threaten the already protected rights of others. Professor Mick Dodson (2006) agrees that the cause of reconciliation between Indigenous and non-Indigenous people in Australia can only be achieved through a balancing of all rights and interests, as is advocated by the human rights approach. It would be mutually beneficial for states, claimant peoples and all others whose rights are engaged by a self-determination claim if states were to recognise the capacity of the human rights approach to transform their relationship to the concept of self-determination. Practical examples such as those given here show that, with the development of human

rights cultures in domestic settings, international legal standards on self-determination and human rights bear greatly enhanced positive potential.

Self-determination: Process or event?

Both because the right of self-determination does not elapse with the achievement of independence and because many self-determination solutions can be developed within existing state arrangements, the right ought to be conceived of as a process rather than a one-off event. Self-determination as process represents a key means of implementing the human rights approach to the right. A significant advantage of conceiving of self-determination as a process is that this conception is more open to the various means by which the right may be achieved. It promotes a less absolutist approach to sovereignty, which is helpful for Indigenous peoples in Australia, who typically assert self-determination within Australia's borders. It also addresses the concerns of those who fear that the right can exacerbate rather than resolve conflict (Bell 2005). For example, should the two Irish jurisdictions be united, a less absolutist approach to sovereignty might enable arrangements which retain some aspects of the northern jurisdiction (Comerford 2003) as a guarantee that all people on the island will be entitled to express their identity as they wish. In the Australian context, recognition of the right as process could involve the wider community with the notion of Indigenous self-determination and create parallel opportunities for reconciliation and the still absent recognition of Indigenous status.

The human rights approach to the process of self-determination also emphasises what is perhaps the right's central value: the balance it strikes between universal relevance and contextually specific and culturally appropriate application. As previously discussed, self-determination may manifest in a wide variety of forms. As McCorquodale (2006) recognised in our interview, the concept informing all human rights is universal, but the exercise must always be culturally dependent. This value of the human rights approach is particularly important for claimants such as Indigenous peoples in Australia, whose cultural values

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are so distinct from non-Indigenous communities that their claims for self-determination have been misunderstood by non-Indigenous society. There is no doubt that respect for the universal application of self-determination is essential, but the right must be capable of adaptation to the particular circumstances of each claimant people.

Conclusion

Self-determination's development from principle to right was 'one of the most dramatic normative developments of the twentieth century' (Falk 2000: 124). Scores of peoples around the globe have employed the language and spirit of the right to advance their claims for independence, thus forever associating self-determination with the movement towards decolonisation. In the twenty-first century, however, the status of self-determination is threatened by claims that the right has exhausted its decolonising mission. Yet examples from the Irish and Indigenous Australian contexts demonstrate the continuing stifling influence of colonialism upon peoples who seek to determine their own destinies as they see fit. This circumstance warrants the restoration of self-determination in the present day in order that the right may retain its emancipatory role whilst also furthering and informing the broader framework of human rights to which every person is entitled. A human rights approach to self-determination can help to open international legal discourse to the voices of claimant peoples so that their experiences are no longer marginalised and their equal right to self-determination gains recognition and protection into the twenty-first century.

References

- Alston P ed 2001 *Peoples' Rights* Oxford University Press Oxford
- Anaya S J 1996 *Indigenous Peoples in International Law* Oxford University Press Oxford
- Anghie A 2004 *Imperialism, Sovereignty and the Making of International Law* Cambridge University Press Cambridge
- Bell C 2000 *Peace Agreements and Human Rights* Oxford University Press Oxford
- Beres L 1994 'Self-Determination, International Law and Survival on Planet Earth' *Arizona Journal of International and Comparative Law* 11/1: 1–26
- Binder G 1992–1993 'The Case for Self-Determination' *Stanford Journal of International Law* 29: 223–270
- Brownlie I 2003 *Principles of Public International Law* Oxford University Press Oxford (6th edn)
- Buchanan A E and Moore M eds 2003 *States, Nations and Borders: The Ethics of Making Boundaries* Cambridge University Press Cambridge
- Buchheit L C 1978 *Secession: The Legitimacy of Self-Determination* Yale University Press New Haven Connecticut
- Cassese A 1995 *Self-Determination of Peoples: A Legal Reappraisal* Cambridge University Press Cambridge
- Clayton P 1996 *Enemies and Passing Friends: Settler Ideologies in Twentieth Century Ulster* Pluto Press London
- Comerford R V 2003 *Inventing the Nation: Ireland* Arnold London
- Committee on the Elimination of Racial Discrimination *Decision 2 (54) on Australia A/54/18* para.21(2) 18 March 1999
- Crawford J 2001 'The Right of Self-Determination in International Law: Its Development and Future' in Alston 2001: 7–67
- Daes E A 1993 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' *Transnational Law and Contemporary Problems* 3: 1–11
- Declaration on the Rights of Indigenous Peoples* General Assembly Resolution 7 September 2007
- Dixon M and McCorquodale R eds 2003 *Cases and Materials on International Law* Oxford University Press Oxford (4th edn)

Maguire

- Dodson P 2000 'Until the Chains are Broken: Aboriginal Unfinished Business' *Arena* 45: 29–31
- Falk R 2000 *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* Routledge London
- Fanon F 1965 *The Wretched of the Earth* MacGibbon & Kee London
- Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO* 12 February 1990 SNS-89/CONF. 602/7
- Gros Espiell H 1980 *The Right to Self-Determination: Implementation of United Nations Resolutions* United Nations New York
- Hardy F 2006 *The Unlucky Australians* One Day Hill Melbourne (first published 1972)
- Hurrell A 2003 'International Law and the Making and Unmaking of Boundaries' in Buchanan and Moore 2003: 275–297
- International Covenant on Civil and Political Rights* General Assembly Resolution 2200A (XXI) 1966
- International Covenant on Economic, Social and Cultural Rights* General Assembly Resolution 2200 A (XXI) 1966
- Ishay M R 2004 *The History of Human Rights: From Ancient Times to the Globalization Era* University of California Press Berkeley
- Kirgis F L Jr 1994 'The Degrees of Self-determination in the United Nations Era' *American Journal of International Law* 88: 304–310
- Kolodner E 1994–1995 'The Future of the Right of Self-determination' *Connecticut Journal of International Law* 10: 153–167
- Lâm M C 1992 'Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-determination' *Cornell International Law Journal* 25: 603–622
- Larkin P 2004 *A very British jihad: Collusion, conspiracy and cover-up in Northern Ireland* Beyond the Pale Belfast
- Letter from United Kingdom's representative to the United Nations to the President of the Security Council* 28 April 1982 Security Council Official Record 37 Session Supp for April, May, June 47–49
- McCausland N 2007 'Letter: Threat of the Irish Language' *Belfast Telegraph* 25 July <<http://www.belfasttelegraph.co.uk/news/letters/article2800210.ece>>

- McCorquodale R 1994 'Self-determination: A Human Rights Approach' *International and Comparative Law Quarterly* 43: 857–885
- 2004 'An Inclusive International Legal System' *Leiden Journal of International Law* 17: 477–504
- McKay S 2000 *Northern Protestants: An Unsettled People* The Blackstaff Press Belfast
- Pearson N 2006a 'Uses of layered identities' *Weekend Australian* 18–19 November: 28
- Public Prosecution Service of Northern Ireland *Press Notice: Public Prosecution Service — Conclusion on Stevens III* Belfast 25 June 2007 <http://www.serve.com/pfc/collusion/pps_st3.pdf>
- Sharawy H 2003 'Frantz Fanon and the African revolution, revisited at a time of globalization' *CODESRIA 30th Anniversary Conference* Dakar
- Simpson G J 1996 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' *Stanford Journal of International Law* 32: 255
- Swan G S 1986 'Irish Unification as Northern Ireland Self-determination: A Speculative Reappraisal of the Evidence' *Florida International Law Journal* 2: 129–157
- Wilson W 1918 'War Aims of Germany and Austria' in Dixon and McCorquodale 2003: 215
- Wippman D ed 1998 *International Law and Ethnic Conflict* Cornell University Press Ithaca
- 1998 'Introduction: Ethnic Claims and International Law' in Wippman 1998: 1–21

Interviews

- Behrendt L 2006 Interview conducted by Amy Maguire with Professor Larissa Behrendt, University of Technology, Sydney, 8 September
- Bell C 2005 Interview conducted by Amy Maguire with Professor Christine Bell, Transitional Justice Institute, University of Ulster, Derry, 27 October
- Burney L 2006 Interview conducted by Amy Maguire with Linda Burney, Member of the Legislative Assembly, NSW Parliament, Sydney, 15 November

Maguire

- Calma T 2006 Interview conducted by Amy Maguire with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Sydney, 11 December
- Coughlan A 2006 Interview conducted by Amy Maguire with Anthony Coughlan, Trinity College, Dublin, 3 March
- Davis M 2006 Interview conducted by Amy Maguire with Megan Davis, Director, Indigenous Law Centre, University of New South Wales, Sydney, 5 December
- Dodson M 2006 Interview conducted by Amy Maguire with Professor Mick Dodson, Australian National University, Canberra, 22 September
- Enright T 2006 Interview conducted by Amy Maguire with Terry Enright, Human Rights Consortium, Belfast, 2 February
- McAliskey B 2006 Interview conducted by Amy Maguire with Bernadette McAliskey, South Tyrone Empowerment Program, Dungannon, 7 June
- McCorquodale R 2006 Interview conducted by Amy Maguire with Professor Robert McCorquodale, University of Nottingham, Nottingham, 27 March
- McEvoy K 2006 Interview conducted by Amy Maguire with Professor Kieran McEvoy, Queen's University, Belfast, 22 June
- Mundine M and Valilis P 2006 Interview conducted by Amy Maguire with Mick Mundine and Peter Valilis, Aboriginal Housing Company, Redfern, Sydney, 8 August
- Murphy N 2006 Interview conducted by Amy Maguire with Niall Murphy, Kevin R Winters and Co Solicitors, Belfast, 15 March
- Ó Broin E 2006 Interview conducted by Amy Maguire with Eoin Ó Broin, Sinn Féin, Belfast, 24 January
- O'Connor P 2006 Interview conducted by Amy Maguire with Paul O'Connor, Pat Finucane Centre, Derry, 2 March
- Pearson N 2006b Interview conducted by Amy Maguire with Noel Pearson, Cape York Institute for Policy and Leadership, Cairns, 6 December
- Ridgeway A 2006 Interview conducted by Amy Maguire with Aden Ridgeway, Tourism Australia, Sydney, 28 November
- Rigney I 2006 Interview conducted by Amy Maguire with Associate Professor Irabinna Rigney, Flinders University, Adelaide, 29 August

Watson I 2006 Interview conducted by Amy Maguire with Irene Watson,
Adelaide, 30 August

Cases

Mabo v State of Queensland (No 2) (1992) 175 CLR 1

Members of the Yorta Yorta Aboriginal Community v State of Victoria [2001] FCA
45 (8 February 2001)

Namibia Opinion ICJ Rep 1971 16 International Court of Justice

Reference re Secession of Quebec [1998] 2 S.C.R. 217 Supreme Court of Canada
20 August 1998

Western Sahara Opinion ICJ Rep 1975 12 International Court of Justice

