

Cultural Rights - Some Developments

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PROTECTING CULTURAL RIGHTS - SOME DEVELOPMENTS

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THE CONTEXT OF INTERNATIONAL LAW

This year marks the fiftieth anniversary of the signing of the *Universal Declaration of Human Rights*. This workshop, organised by UNESCO's New Zealand Commission and the Centre for New Zealand Jurisprudence ("CNZJ") at the University of Waikata Law School, provides an opportunity for reflection on what cultural rights mean in the context of the South Pacific. Cultural rights represent one of the least developed areas of human rights. This is so, despite the fact that the *Universal Declaration* recognised that human rights went beyond what happened at the ballot box, in the police station or at the courthouse. Human rights extend far beyond the realm of civil and political rights, important though they are. They embrace the "economic, social and cultural rights" indispensable for the dignity of every human person and the "free development" of that person's personality. Specifically, in the context of cultural rights, the *Universal Declaration* included recognition that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share its scientific advancement and its benefits". Moreover, "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author."

For three precious years I was entrusted by the Secretary-General of the United Nations with appointment as his Special Representative for Human Rights in Cambodia. Although Cambodia is far from the South Pacific and although its problems were, and still are, acute (following as they do the devastation of revolution, invasion, war and genocide), the experience in that post taught me how vitally important it is, in the field of human rights, to be conscious of the range of rights that fall to be protected. It is an easy mistake to make - easier for people from developed societies and particularly easy for lawyers - to consider that human rights is really about the criminal law process and the political, religious and other freedoms that go to make up a modern society. Although these are vitally important, no less so in the South Pacific than in Cambodia, they do not represent the entirety of human rights concerns. In Cambodia I was taught very directly by my experience that for the ordinary citizen, economic, social and cultural rights (as well as group rights and peoples' rights) are just as important as civil and political rights.

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Much of my work in Cambodia, reflected in my reports to the General Assembly of the United Nations and to the Commission on Human Rights, concentrated on economic, social and cultural rights. The right to social security and support by the state for the poor and disadvantaged. The right to free choice of employment and the provision of employment without discrimination in such a way as to afford dignity to the worker and sustenance to the worker's family. The right to rest and leisure in which fulfillment as a human being can be derived. The right to a standard of living adequate for health and well being, including food, clothing, housing, medical care and necessary services. The right to education, including the education of young women and the fostering of tolerance and friendship irrespective of racial, religious or other differences. My experience in Cambodia opened my eyes to the importance, from the point of view of human rights, of protecting citizens from the ravages of HIV/AIDS; of ensuring the provision of clean drinking water; of providing emergency hospital facilities to deal with accidents and the medical crises of life; and of the provision of universal educational facilities.

In my reports on Cambodia quite a lot of attention was paid to cultural rights. The magnificent legacy of the Khmer kingdoms is to be seen in all parts of Cambodia but nowhere more so than in the Angkor Wat complex out of Siem Riep. The monuments and the temples there have been the subject to destruction, despoliation and theft by succeeding generations of conquerors, as well as by Cambodians themselves. With the support of UNESCO, heroic efforts have been made in recent times to safeguard the temples, to protect them from looting, to guard their precious treasure and to restore them with professionalism that will prevent collapse and further ruin.

So the starting point of this UNESCO workshop is the obligation of each of us to rid our minds of the notion that human rights is a confined and limited topic, restricted to civil and political rights. It is not. The *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by the General Assembly of the United Nations in 1966 and which came into force in 1976 contains the affirmation of the States Parties that they will recognise the rights of everyone:

"(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its application;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production in which he [or she] is the author".

By that Covenant the States Parties promise to take the steps "necessary for the conservation, the development and the diffusion of science and culture". They undertake to respect the freedom indispensable, relevantly, to creative activity. They commit themselves to encourage and develop international contacts and cooperation, relevantly in the cultural fields. These, then, are the commitments.

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UNESCO has long been a leader, as would be expected from its mission, in the protection of cultural rights. In 1966 the Declaration on the Principles of International Cultural Cooperation was adopted by the UNESCO General Conference. That Declaration recognises that each culture has a dignity and value which must be respected and preserved. That every people has the right and the duty to develop its culture and that all cultures form part of the common heritage belonging to all mankind. Cultural and other international cooperation are promised as a commitment. Such collaboration is taken as a vital contribution to peaceful relations between states and friendship among the peoples of the earth. Ensuring the authenticity of the dissemination of the ideas of each culture is given high priority by UNESCO. So is the education of young people in the culture of all nations.

Many of the United Nations conventions which have been adopted in the fifty years since the *Universal Declaration* was agreed to, have relevance to the recognition and protection of cultural rights. Thus, the *Convention on the Prevention and Punishment of the Crime of Genocide* seeks to secure the physical survival of peoples throughout the international community. As peoples carry with them the cultures of their ancestors, and the passion, the appreciation and feeling that is necessary to preserve their legacy, the protection of peoples from the crime of genocide is itself essential to the survival of different cultures. It is difficult, if not impossible, for culture in its full variety to survive if the survival of peoples is not assured. It has been said that indigenous culture "is a testimony of the past without which the present would have no future". Although all people, including settler people and those who have adapted to, absorbed or adopted the culture of the settlers, have precious human rights to culture which are protected by international and domestic law, the context of the present workshop suggests that we should concentrate on those aspects of the recognition and protection of cultural rights as specifically affect minorities and in particular indigenous peoples. It is here that the greatest risks exist that precious attributes of culture may be damaged. They can be damaged just as surely by the obliteration of languages and traditions, of religions and ceremonies as by the smashing of temples or the looting of artifacts.

The first international convention dealing specifically with the cultural and other rights of indigenous peoples was one adopted by the oldest of the United Nations agencies (in fact it was established under the League of Nations). I refer to the *Convention on Tribal and Indigenous Populations* ("ILO 107") adopted by the International Labour Organisation in 1957. This convention has been significantly criticised by indigenous peoples. In the result, it was revised in 1989. The revised convention is titled *Convention on Indigenous and Tribal Peoples in Independent States* ("ILO 169"). Despite some improvement, this ILO Convention is still regarded by serious commentators as falling short of adequate attention to the rights and aspirations of indigenous peoples.

In 1985, the Working Group on Indigenous Populations of the United Nations began to draft a Declaration on the specific rights of indigenous peoples. This was finalised in 1994. The resulting document is the *Draft Declaration on the Rights of Indigenous Peoples*. It was submitted to the United Nations Commission on Human Rights for its consideration. Informed commentators suggest that "it will likely be several years before the Declaration is

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considered for adoption by the General Assembly". The Draft Declaration is broad ranging. But its overall purpose is to recognise the dignity and rights of indigenous peoples as unique peoples. It is to call attention to the protection of their culture, land and resources, knowledge and traditions together with their rights to participate equally and without discrimination in all facets of their lives in the societies in which they live. At the moment, the Draft Declaration has no real status in international law. It is an aspiration. But it is one of which the workshop should be aware. It has been adopted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. This, at least, gives it a foothold at the entrance of the doorways to international and municipal law.

I pass over the complex question of the right to self-determination of peoples which is mentioned in the Charter of the United Nations and which lay behind the United Nations achievement of the great movement of decolonisation that marked the fifty years since its foundation. The right of peoples to self-determination is recognised in the common first articles of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Many of the debates about the right to self-determination of peoples has concerned the definition or description of who are a "people" for the enjoyment of such right. I had the privilege of serving on expert groups of UNESCO which spent much time endeavouring to describe the features of a "people" for the purpose of enjoying the peoples' right to self-determination. In effect the UNESCO advisers agreed that there were four elements:

- (a) Commonalties of race, religion, geography, history, tradition, commerce, etc, which bound the people in question together and gave them a cohesive element of identification as a people;
- (b) Sufficient number to be a "people" for the purposes of international law;
- (c) Common institutions to give expression to the cohesiveness of the people in question; and
- (d) The will to be a "people", distinctive and separate from others.

What has not been fully recognised by many commentators is that the right to self-determination does not mean, at least necessarily, achievement of an entirely separate political relationship. So transfixed have we been with the nation state that many observers mistakenly believe that the right to self-determination is equivalent to a right to separatism and to the establishment of an entirely different and distinct nation or international entity. It is not. At least it is not necessarily so. Various degrees of self-management within the context of a broader nation state may well fulfil the international human rights promise given to distinct peoples that they shall enjoy self-determination as an attribute of human rights and as a feature of the freedom of all peoples.

Within the United Nations system, difficulties are presented by the issue of self-determination. This is because the Organisation is, as its name suggests, an Organisation of nations. Nations tend to be very suspicious of self-determination. They are concerned,

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understandably, with the potential disruptiveness of separatism. Correctly, national leaders point out that the right to self-determination, promised in the International Covenants must find its content and substance in the context of the wider objectives of international law. These include, crucially, the provision of international peace and security and an international environment in which political and economic progress can be made and standards of living of economically disadvantaged peoples and States can be improved, to the enhancement of human happiness.

It is to the great credit of UNESCO that it was willing to examine the content of the peoples' rights to self-determination. If we look around the world today, including in the South Pacific, there can be few topics which are more deeply felt by the peoples concerned, more sensitive, more difficult and more likely to lead to unrest, social disruption and even bloodshed.

In 1986, a tribe of indigenous peoples in Canada (the Mikmaq) complained to the United Nations Human Rights Committee alleging that Canada was in breach of its obligations to accord them the right to self-determination. In its report on the complaint, the Committee acknowledged that the right to self-determination could apply to indigenous peoples. However, it refused to admit the complaint. It held that the right was a collective right and that the Committee was only permitted to receive complaints brought by individuals. As informed commentators have suggested, this seems to rule out the possibility of further complaints based on self-determination pursuant to the First Optional Protocol to the *International Covenant on Civil and Political Rights*.

AUSTRALIAN MACHINERY FOR PROTECTION

The last twenty years or more has seen the passage of federal and State laws in Australia designed to protect the cultural rights of Australia's indigenous peoples, being the Aboriginal people of Australia and the Torres Strait Islanders who mainly live in Queensland and Northern Australia. The laws enacted appear in the statute books of the Commonwealth, the States and the Territories. For example, the federal Parliament has enacted the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("Heritage Protection Act"). The purposes of that Act are defined to be "the preservation and protection from injury or desecration of areas ... that are of particular significance to Aboriginals in accordance with Aboriginal tradition". Part II of the Act prescribes the general mechanism for fulfilling these purposes. The key provision is s 10 which empowers the Minister to make a declaration to preserve and protect significant Aboriginal areas. The Minister may do this where he or she receives an application on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration. The meaning of "injury or desecration" is defined. In the case of an area it involves the use or treatment of the area in a manner inconsistent with Aboriginal tradition or adversely affecting such tradition, or the passage through or over it of any person in a manner inconsistent with such tradition. In the case of an object, it involves the use or treatment of that object in a manner inconsistent with Aboriginal traditions.

Where the Minister receives a complaint of this kind he or she may institute an inquiry by an

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independent person who must report on the particular significance of the area to Aboriginals; the nature and extent of the threat; the extent of the area that should be protected; the prohibitions and restrictions to be made with respect to the area; the effects the making of a declaration under the Act might have on the proprietary or pecuniary interests of persons other than Aboriginals; the duration of any declaration to be made; and the extent to which the area is or may be protected under a law of a State or Territory.

This beneficial legislation, of considerable potential importance for Australia's indigenous people, gave rise to a protracted series of challenges when a property owner and developer proposed to build tourist facilities on Hindmarsh Island in South Australia and to construct a bridge from the mainland to afford access to that development. The result was an application to the Minister on behalf of a group of Aboriginal people for a declaration under the *Heritage Protection Act*. The application claimed that the area affected by the proposed bridge and development constituted a significant Aboriginal area under threat of injury or desecration. A declaration was sought under the *Heritage Protection Act*, in effect to restrain the building of the bridge for a period of twenty-five years.

Following receipt of the application, the Minister instituted an independent inquiry. After receipt of the report on that inquiry a declaration under the Act was made. The aftermath of that action was protracted litigation, further inquiries and a State Royal Commission. The entitlement of the second reporter under the Act a federal judge, to conduct the inquiry was challenged on the basis that she was a judge incapable of accepting such an appointment. This challenge was upheld by the High Court of Australia.

Faced with the prospect of a third inquiry, the Australian government proposed, and the Parliament of Australia enacted, a special law viz the *Hindmarsh Island Bridge Act 1997* (Cth). That law was designed to bring the objections by the Aboriginal group concerned to a conclusion and to permit the development with the connecting bridge, to go ahead. The *Hindmarsh Island Bridge Act* was itself challenged before the High Court of Australia on the basis that the Australian Parliament lacked constitutional power to enact such a law. The only basis upon which the *Bridge Act* was said to be sustained was a little used provision of the Australian Constitution which authorises the Federal Parliament to make laws with respect to "the people of any race ... for whom it is deemed necessary to make special laws".

A question arose in the challenge as to whether a particular statute, whose purposes included the *diminution* of what would otherwise be the rights of a group of Australian Aboriginals was within the constitutional power. Was such a law one with respect to the people of any race "for" whom it was deemed necessary to make special laws? Did that provision, in the context of its history (including the amendment of the Australian Constitution in 1967) give power only to make laws for the benefit of people on the ground of their race? Or did it permit the making of laws for the *benefit* or for the *disadvantage* of people based, or by reference to, their race? Most members of the High Court of Australia found it unnecessary to determine that basic question finally. However, I suggested that the constitutional power was limited to making laws which did not discriminate adversely against any people on the basis of their race. One other Justice of the Court, whilst not having

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to decide the matter finally, suggested that she would favour a view of the scope of the power not dissimilar to my own. Two other Justices suggested that they were of the contrary view. The other members of the Court declined to express an opinion, considering that it was unnecessary to the resolution of the case.

The Aboriginal group in question in the Hindmarsh Bridge litigation were the Ngarrindjeri of South Australia and specifically a group of Ngarrindjeri women. The matter was complicated by the fact that another group of Ngarrindjeri women disputed the contention which the plaintiffs made that the tourist development and building of the bridge would offend the culture, religious rights and cultural sites of the Ngarrindjeri. The matter was further complicated by the fact that the Ngarrindjeri plaintiffs asserted, in part at least, that it would breach their sacred and spiritual beliefs to reveal the secrets on the footing of which they objected to the alleged intrusion into their cultural rights. Obviously this stand represented something of a clash between cultures. The simple fact remains, however, that if parties come to a court of law and invoke its jurisprudence and procedures, they must be prepared to conform to its requirements. They have to provide the evidentiary foundation upon which the court (or tribunal, commission or investigator) can act in accordance with the law administered by them. Having said this, the court may be able to vary or adapt its procedures, within limits, to respect minority cultures and their beliefs. Seeking to do justice courts will often endeavour to do so.

In addition to the federal legislation in Australia which I have mentioned, laws have been enacted by the States and Territories to afford protection to cultural rights. For example, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) was enacted together with that Territory's land rights legislation to protect sites of spiritual and cultural significance to indigenous Australian peoples in the Northern Territory of Australia. The Act provides a means of acquiring the property interests in those sites. It is designed to ensure access by traditional owners and custodians to the sites in accordance with the customs of the indigenous people. The sites which can be claimed for protection are not limited to areas of unalienated Crown land or Aboriginal reserves. Generally speaking, these are the areas, which, together with lands included in pastoral leases since the *Wik* case, cover a large part of the Australian continent. These are the lands upon which native title to land may be claimed in Australia and may secure recognition under the principles established by the High Court of Australia in *Mabo v Queensland [No 2]* and now by the machinery afforded by the *Native Title Act 1993* (Cth).

Apart from the specific and particular legislation addressed to the protection of cultural sites, relevant State and Territory laws in Australia, although of general application, can sometimes afford potential use to protect cultural rights and the freedom of religion and belief of indigenous peoples. Thus the *Anti-Discrimination Act 1977* (NSW) provides that discrimination on the ground of race may occur if the discriminatory act is based upon "a characteristic that appertains generally to persons of that race". This phrase has not been interpreted as confined to characteristics of a purely physical kind. Accordingly, knowledgeable authors suggests that it may be possible to argue that the phrase extends to protecting from discriminatory conduct the cultural traits or behaviours which are included

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within the meaning of characteristics appertaining to people of a particular race.

One area requiring particular attention concerns the protection by intellectual property law of the cultural and like interests of indigenous peoples. Such rights, and the need to protect them, are reflected in the Draft Declaration to which I have referred. The cultural and intellectual property of indigenous Australians can occur in many forms. These may extend to sacred knowledge and information; artifacts including skeletal remains; sacred objects, designs, dances, paintings, carvings, songs and stories. Such interests would certainly fall within various international instruments. However, within Australia no provisions have been specifically enacted as part of Australia's intellectual property law to deal specifically with the indigenous cultural and intellectual property. Nevertheless, commentators suggest that the potential exists to use present, generally applicable, intellectual property and other laws to protect such interests. They point to legislation dealing with cultural heritage, museums, racial vilification, the tort of passing off, breach of confidence, breach of contract, defamation and even possibly blasphemy as legal weapons that could be used, depending on the case. I consider the last-mentioned to be doubtful given that, if that law is still part of the common law, it has in the past been confined to the protection of the religious susceptibilities of Christians and specifically particular groups of Christians rather than religious beliefs more generally. This notwithstanding, some writers have argued that the recognition of native title may be used, by analogy, to support recognition of indigenous cultural and intellectual property laws. Obviously, I must make no comment on that possibility lest one day it come before me in court.

There have been cases before Australian courts in which indigenous Australians have invoked intellectual property law to uphold their alleged cultural rights. Thus in *Yumbulul v Reserve Bank of Australia*, a case concerning the design on the Australian ten dollar note which displayed an Aboriginal motif, the Federal Court of Australia found that communal rights were not protected by Australian copyrights laws. On the other hand in *Milpururru v Indofurn*, the same Court recognised certain communal rights and awarded damages to the claimants collectively. It left it to them to distribute the damages according to their own indigenous traditions. Difficulties with extending Australia's intellectual property law to the styles and nuances of the artistic creations of Aboriginal and other indigenous people of Australia suggest that there may be a need to look specifically at the express adaptation of that law to the needs of indigenous peoples so that the law can respond to the problem and not simply impose its view of what the problem is upon all people uniformly.

It would be beyond the scope of this paper to describe the developments in land law in Australia as these affect the rights and culture of indigenous people. Obviously, the provision of protection for native title in Australia may help to sustain the culture of those affected as well as the economic well-being of indigenous peoples. The High Court of Australia has recently delivered judgment in an important case which concerns the question left open by *Mabo* and *Wik*, whether a grant of fee simple (the highest form of property in land known to the common law) whenever made and of whatever duration of itself, without more, permanently extinguishes the survival of native title in that land. The court held that it did. Native title in Australia cannot co-exist with fee simple interests in land. Several other

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questions concerning native title remain to be resolved in Australia. These relate to the hunting, fishing and gathering rights of the indigenous peoples. Reconciling the customs and culture of the Aboriginal and Torres Strait Islander peoples with the general law applicable to all other Australians is by no means a simple task. In the field of criminal law, for example, it has presented acute problems because of the enactment of general criminal legislation which is often different from, and inconsistent with, indigenous tradition. A decade ago the Australian Law Reform Commission performed a major task of examining the customary laws of Australia's Aboriginal peoples suggesting ways in which the Australian legal system could be adapted to the recognition or respect of such laws in a way that was still compatible with the general uniformity of the legal system. So far, legislation to enact the proposals of the Law Reform Commission has not been placed before the Australian federal Parliament.

CONCLUSIONS: PROTECTING DIVERSITY

This review indicates the large measure of progress that has been made since the United Nations adopted the *Universal Declaration of Human Rights* in 1948 and included in the catalogue of rights the right to culture. There has been much international law. I have mentioned only some of it. There have also been domestic laws in Australia and I have mentioned some of these. As well, the common law, made by the judges, has adapted to afford greater respect to the rights of indigenous peoples. In this, Australia, like other settler societies, has belatedly begun the task of adapting its legal system to afford greater dignity and respect to the protection of the cultural and other rights of the nation's indigenous peoples.

The needs of each society will be different, including the varied societies in the South Pacific. Those needs will depend upon the composition of each society and the role in it of the law (usually inherited in its broad outline from colonial times). Typically that law needs adaptation today because of the growing appreciation of the importance of protecting cultural and other minority rights. Although much progress has been made, much remains to be made. The purpose of this workshop should be to identify the areas in which (despite the differences) we can learn from each other. It will be of help to our societies, their governments and peoples, if we can identify some guideposts for the years ahead. In a society such as Australia, it is not surprising that we are living through a period of some discomfort because of the long period of neglect of the cultural and other rights of indigenous peoples. But since the referendum in 1967, the Australian people and successive governments of every political persuasion, have set themselves upon a course of correcting the neglect, indifference and ignorance of the past. I am sure that, in our path to enlightenment, we can learn from the experience of neighbouring countries. All of us can draw upon the international initiatives of the world community and especially those pioneered by UNESCO. There will be no turning back on this journey of enlightenment. This workshop represents an opportunity to extend the enlightenment and chart new directions that can be taken. The defence of cultural rights has been too long neglected. It is a vital attribute of human dignity, diversity, personality and freedom. Once that is recognised and the importance of cultural rights as part of human rights is appreciated, the provision of

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legal, administrative and other defences must follow as of course.