Judicial Anxiety: Customary International Law at the Protection of Human Rights in the Domestic Arena
“Lifestyle choice”: 
The racially discriminatory treatment of remote Indigenous Communities
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The racially discriminatory treatment of remote Indigenous Communities

Julie Cassidy
School of Law
Auckland University of Technology
Introduction:

• The Australian Prime Minister Tony Abbott recently described living in remote Indigenous communities as a "lifestyle choice" (10 March 2015)
• Commonwealth funding has been withdrawn
• Proposed closure of "unsustainable" remote Aboriginal communities (18 March 2015 WA Premier Colin Barnett)
• Hardly a life style choice: grinding poverty, little employment opportunity, chronic substance abuse
• The final nail in the coffin that started with the Howard government
• This era was exemplified by racially discriminatory legislation (ALR (NT)Act, NTAct and NTNERAAct)
• The rejection of self determination and reinstatement of policies based on paternalism and cultural superiority (ie shared responsibility agreements)
• Another attempt at stealing traditional lands
Background: The Self-Determination Era

• The failure of earlier Aboriginal policy to accommodate Indigenous needs led to increased Indigenous activism in the 1960's and 1970's
• Greater concern in the international arena for the plight of Indigenous peoples

• Spurred the adoption of policies of 'self-management' and 'self-determination'
• Finally accepted assimilation policies were based on a denial of human rights and tainted by notions of cultural superiority
• Aboriginal policies began to reflect support for Indigenous claims to social and political rights such as self determination
The Self-Determination Era

• The election of the federal Whitlam Labor government in 1972 marked the beginning of a new era respecting the inherent right of Indigenous people to practice their own culture and manage their affairs
• First Commonwealth Department of Aboriginal Affairs
• National Aboriginal Consultative Committee created to advise the Department and Minister
• NACC replaced by the Fraser government by the National Aboriginal Conference
• The Aboriginal Development Commission established to administer monies allocated to Aboriginal affairs
• Heralded as a new era of self-determination
The Self-Determination Era:

- Both Whitlam and Fraser federal governments sought to return some autonomy to Indigenous people through land rights legislation
- For example, Aboriginal Land Rights (Northern Territory) Act 1976
- Not just a mechanism for the return of land
- Self-management fostered through the creation of local and regional Aboriginal Land Councils
- Creation of a further representative body, the Aboriginal and Torres Strait Islander Commission
- Creation of Council for Aboriginal Reconciliation

- The "rise of the Indigenous sector": Rowse (2002)
The Self-Determination Era

• Mabo No 2 (1992)
• Prime Minister Paul Keating's response:
  • Native Title Act 1993 (Cth)
• The establishment of the Indigenous Land Fund
• The Social Justice Package

• HREOC Report, Bringing them home (1997)
• Howard government elected soon after

• Self-Determination era was not perfect
• Criticised by the Royal Commission into Aboriginal Deaths in Custody (1991)
• But it was based on the recognition of Indigenous rights and the importance of Indigenous autonomy
The Retrograde Era: The Howard Era

- The Howard era marked an extraordinary retrograde period of Australian Indigenous Policy
- Self-Determination discarded in favour of policies based on so-called "mutuality" and "equal rights"
- A denial of Indigenous autonomy
- The imposition of racially discriminatory policies
- Abandoned the formal process of "reconciliation" and adopted "practical reconciliation": McRae et al
- Rejection of CAR recommendations and its abolition
- Indigenous policy based on paternalism and the consequent implication of cultural superiority
- A theme throughout this period was refusal on the part of the Howard government to acknowledge past injustices to Indigenous Australians
- Fuelled by the 'new right' Howard maintained an idealised past of the Australian nation: Brett (2001)
The Retrograde Era: The Howard Era

• Shift to "self-management" / "self-empowerment" (quasi-assimilationist) and rejection of self-determination: Minister of Indigenous Affairs John Herron (1996)
  • An "active partnership and consultation with government": Commonwealth Govt Response to CAR Final Report (2002)
  • As NT Intervention laws and Shared Responsibility Agreements evidence, far from self-management

• CERD Report (2000) concern re Howard Government's disregard of the right to self determination (Art 1 ICCPR 1966)
  • Voted again UNDRIP 2007, Art 1 right to self determination
  • Abolition of ATSIC and ATSIS (2005) and funding shifted to mainstream non-Indigenous government departments
• CERD Report (2005) expressed concern re the reduced participation of Indigenous peoples as required by ICCPR
The Retrograde Era: The Howard Era

Shared Responsibility Agreements:

• Under this new policy Indigenous communities were not autonomous
• Rather working in "partnership and consultation with government" and had "shared responsibilities"
• SRAs are agreements between Indigenous communities and government whereby funding is conditional on satisfaction of a prerequisite(s), often behavioural
• Under these agreements basic facilities are at times only conditionally extended to Indigenous communities
The Retrograde Era: the Howard Era

• A number of concerning aspects of the SRA policy
• First, racially discriminatory
• Not applied to non-Indigenous communities
• Indigenous communities must bargain for basic rights and services they are entitled to as citizens
• A breach of s 9 RDA and the Convention

• Second, based on retrograde notions of paternalism
• For example, Mulan Indigenous community
• SRAs are akin to the assimilation policy; to coerce Indigenous Australians to adopt western ways in the same way as rationing: Lawrence and Gibson (2007)
The Retrograde Era: The Howard Era

• Third, SRAs are imposed in an environment founded on an imbalance of power
• Powerless remote Indigenous communities pitted against the federal government and mainstream government Departments
• The abolition of ATSIC was part of introducing SRAs (Minister for Indigenous Affairs, Amanda Vandastone (2004))
• For example, the Northern Territory Mutitjulu Aboriginal Community

• Fourth, SRAs are ad hoc
• Not integrated into broader regional or national programs
• They are not needs based
The Retrograde Era: The Howard Era

• SRAs are not the only example
• 2006 Aboriginal Land Rights (Northern Territory) Amendment Act
• To "improve access to Aboriginal land for development, especially mining"
• To encourage 99 year leases of Aboriginal land to the government which would be subleased for establishing businesses and private home ownership
• As with SRAs funding and services were tied to granting the 99 year leases
• These forced leases have continued under subsequent Labor and Liberal governments
• Prime Minister Tony Abbott has just announced proposals to amend NTA 1993 to facilitate development on Aboriginal land
The Retrograde Era: The Howard Era

• Further examples include the overt racial discrimination through deliberate breaches of the RDA
• Native Title Amendment Act, note esp ss 7(2) and (3)
• CERD Reports re breaches of The Convention

• NT Intervention legislation 2007
• Spearheaded by an unprecedented peace-time military presence in remote Northern Territory Aboriginal communities
• Includes compulsory acquisition of Aboriginal lands by forced leases: Part 4 NTNERA
• Overriding just compensation: ss 60 and 134 NTNERA
• Again, express sections overriding RDA ie s 132 NTNERA
• Claims that they are special measures and thus do not breach RDA ie s 132 NTNERA
• Does not meet the definition: sole purpose of advancement of racial group and requires consent of affected community (Art 1(4) Convention and Gerhardy v Brown)
Indigenous policy today:
One step forward two steps back

• Five months after the announcement of the NT Intervention the Labor party was elected to government
• While there were a number of positive gestures, very much one step forward two steps back
• Labor completed CERD Reports, including for periods under Howard era (Combined 15th, 16th and 17th Reports)
• Labor adopted a very different attitude to UN monitoring
• However, did not address CERD concerns regarding, inter alia, RDA breaches in NTA and NT Intervention legislation (discussed further)
Indigenous policy today:  
One step forward two steps back

• Labor signed UNDRIP
• Art 1 recognises the right to self-determination

• Prime Minister Kevin Rudd apologised to the stolen generation and recognised the damage caused by past government policies (13 February 2008)
• However, steadfastly refused to provide any compensation

• Policy of privatising Aboriginal land for private home ownership continued
• Policy of forced long term leases for services and infrastructure continued
• The forced five year leases under Part 4 NTNERA continue
Indigenous policy today:
One step forward, two steps back

• Promised reinstatement of RDA into NTA did not happen
• CERD Reports did not address the suspension of RDA

• Promise of RDA reinstated in NTNERA legislation
• While ss 1-3 repealed by Reinstatement of RDA Act 2010, detailed provisions overriding RDA remain in NTNERA

• CERD Report (2010) noted the absence of any entrenched prohibition against racial discrimination in the Constitution
• Final Report of the Expert Panel (2012) had recommended insertion of new s 116A into the Constitution
• Prohibiting the Commonwealth, a State or Territory discriminating on the basis of "race, colour or ethnic or national origin"
Indigenous policy today:
One step forward, two steps back

• In the lead up to the election, the then Labor government announced in September 2012 it was postponing the referendum for two years
• On 12 March 2013 ATSI People's Recognition Act 2013 passed recognising the first occupants
• Did not include a statutory endorsement of s 116A
• Prime Minister Tony Abbott's opening of parliament referred to the proposed constitutional recognition of Aboriginal and Torres Starit Islanders
• No reference to proposed prohibition against racial discrimination
• Abbott has subsequently rejected such a clause
Indigenous policy today:  
One step forward, two steps back

- *Tony Abbott*: cannot "endlessly subsidise lifestyle choices", referring to remote Aboriginal communities (10 March 2014)  
- *Hardly a "lifestyle choice"*  
- "Remote Hope" Four Corners 11 May 2015  
- These are their traditional lands  
- Offered WA government a final lump sum of $90m  
- WA Premier Colin Barnett announced in parliament that there would be mass closures of up to 150 communities  
- He referred to the current 273 remote Aboriginal communities as not been "sustainable into the future"  
- WA Aboriginal Affairs Minister, Peter Collier: there is no list on remote community closures, but says there are "too many"  
- Communities will have to show "sustainability"  
- Must prove a "safe, nurturing environment for the children; it can provide job opportunities and training ... Outcomes for the entire community"
Indigenous policy today: One step forward, two steps back

- What will happen to the closed communities
- History repeats itself: the modern fringe dweller

- Most recently White paper on developing northern Australia (18 June 2015)
- A more efficient native title process to create more certainty for investors
- Amend A&TSI Heritage Protection Act 1984 (Cth)
- Increase individual property rights in townships
- Transfer of communal land to home ownership
- Conversion of Indigenous communal land to ordinary freehold with no restrictions on commercial leasing
- More 99 year township leases in NT
- Head lease to Executive Director of Township leasing, subleases to third parties, these sublease assignable without consultation or consent of traditional owners
- Uses the term "willing" but coincides with no funding

Acts committed with intention of destroying plaintiffs’ racial group may give rise to actionable claim for damages. But cautious about the minority asserting justice.
Concluding thoughts

• The racially discriminatory legislation enacted by Howard continues under both Labor and Liberal governments
• Racially discriminatory policy of SRAs continues
• Proposed constitutional prohibition against racial discrimination has been rejected
• The forced dispossession via 99 year leases is now a key plank in Abbott's plans for Northern Australia
• The closure of remote Aboriginal communities living on their traditional lands
• Assimilatist policy of converting communal land to individual property interests, focus on "home ownership"
• Allotment policies have lead to dispossession

• Stolen Generation finally received an Apology on 13 February 2008
• But governments refuse to compensate
• Hardly a lifestyle choice