Enforcing the globalist agenda of indigenous self-determination:

Legal and social implications for Australia

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1. First Considerations

One hundred and forty-four countries signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly on 13 September 2007, but four countries voted against the Declaration, including Australia.

It contains 46 Articles, which outline Indigenous people's rights in international Law. Specifically, the Declaration advocates the right of Indigenous peoples to self-determination within the Commonwealth through an independent, self-governing Aboriginal political entity, the establishment of which requires the agreement of the Australian government.

2. Australia's embrace of the United Nations Declaration on the Rights of Indigenous Peoples

Although Australia was not one of the original signatories of the Declaration, the Australian Government officially adopted it at a ceremony in Parliament House in April 2009.[1] This basically committed Australia to support the notion that Aborigines are a politically separate and sovereign people, who are entitled to a state of their own.[2] Article 3 of the UN Declaration makes this very clear:

> **Article 3.** Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The UNDRIP thus supports self-determination in a new Aboriginal state endowed with political autonomy to determine matters relating to economic, social, and cultural development. This is further elaborated in Article 4, which states that self-determination involves 'autonomy or self-government in matters relating to internal and local affairs':

> **Article 4.** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The goal of the above provisions is the establishment of an independent Aboriginal state. Article 18 of the UNDRIP goes on to support the establishment of a separate indigenous 'Parliament'.

> **Article 18.** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representation chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 of the UNDRIP then states:

> **Article 19.** States shall consult and cooperate in a good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

These goals should be achieved through the entrenchment of treaties and agreements between the federal government and leaders of the Indigenous communities, which would have the power of law to override any incompatible existing domestic law.

Indigenous people not only would be eligible to receive the host nation's welfare and citizenship benefits but, according to Article 34, would also be entitled to their own legal-institutional structures which must be separate from the rest of the nation's legal-institutional structures.

> **Article 34.** Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards.

According to Article 37.1, all these structures should be enshrined in treaties and agreements between the government and leaders of the Indigenous peoples who define themselves this way.

> **Article 37.1.** Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

This overview of the UNDRIP certainly reveals that it supports the principle of self-determination for Indigenous people, and the establishment of separate legislative and administrative institutions to achieve that goal. In this context, it is instructive to document how Australia has sought to implement the UNDRIP since 2009. But to fully appreciate the measures taken by the government to comply with its UNDRIP commitment, it is useful to first sketch the historical development of race relations in Australia, followed by a consideration of how international treaties are implemented in Australia's legal framework.

3. The Historical Development of Race Relations in Australia

The leaders for constitutional recognition of Aboriginal rights hold the view that the sovereignty of the Australian Government over its territory is intrinsically questionable. Reasons given are that European sovereignty was established as the result of an invasion, and that the incoming conquerors and the Aboriginals did not enter a treaty. These reasons have significance because they are 'the source for claims to entitlements, compensation, and land-rights potentially over the whole of Australia.'[3] However, as Australian rabbi and academic Shimon Cowen correctly points out,

> **It is a nearly, if not wholly, universal phenomenon that states all over the world have generally displaced earlier nations or groupings and occupied their territories. After the event of conquest and the establishment of a new State on the conquered territory, with the practical submission and acceptance of its subjects, the state becomes its owner. To challenge such a state's sovereignty is like challenging the sovereignty of any other existing state. As sovereign proprietor, the laws it makes relating to property within its jurisdiction – so long as these are not capricious, arbitrary and inconsistent – are law.[4]**

In the second half of the 19th century, Social Darwinism deeply influenced European nations, such as Great Britain. As a result, many started to believe that European colonisation of places such as Australia was 'proof of the racial inferiority of the indigenous peoples, who simply did not have the inherent abilities — especially mental talent — of the European colonizers'.[5] This form of Darwinism served to sanction the extinction of so-called 'low and mentally underdeveloped populations with which Europeans came into contact'.[6]

Fortunately, the colonisation of Australia was not primarily a Darwinian experiment. It was rough at times and some evil was perpetrated on its frontiers. However, when some colonialists accused the Aborigines of being less than entirely human, treating them as disposable beings and subject to violence, most European settlers in

Australia 'affirmed both the sinfulness of such behaviour and the essential dignity of their Aboriginal brethren.'[7] Bella d'Abrera commented that in 1788,

> **the British colonists brought with them centuries of accumulated knowledge and the basis of our cultural heritage. They brought with them the values of liberty, inquiry, toleration, religious plurality and economic freedom. They brought with them Christianity, which had positioned the individual as the locus of meaning, sovereignty and significance. Equality of man, individual dignity and the abolition of slavery were all bequeathed to the world by Christianity and Christian thinkers.[8]**

The British settlement of Australia initially aspired to make a penal colony more humane and charitable. Over that period the Evangelical movement was very influential and a supporter of 'settlerism' — the processes of moving to a new land with the intention of personal and social improvement and accompanied by the belief that one should reproduce the best in the culture and values of the old in the new colonial world.[9] As Keith Windschuttle points out:

> **Evangelical Christianity was the dominant Protestant movement of nineteenth-century Australia and a contemporary driving force for social reform. Britain's great Evangelical revival in the eighteenth century required its adherents to apply the principles of the Gospel to social life and to engage not only in religious rituals but in benevolent social works ... including prison reform, orphan schools, education for the poor, and especially ... the abolition of British engagement in the slave trade in 1807 through the efforts of William Wilberforce.[10]**

Australian government and laws were originally developed out of English institutions that were heavily imbued with a significant Christian heritage.[11] Hence, writes law professor Michael Quinlan, 'the new arrivals brought with them a legal system deeply rooted in Christianity.'[12] At the time of settlement, Christianity formed an integral part of the English system of law and government.

According to Roy Williams,

> All Western legal systems were grounded on two core assumptions, both of them Biblically based: man has free will, and morality is God-given. But the English went further. For centuries Christianity was recognised as an integral part of the law of the land. Chief Justice Sir Matthew Hale's statement to that effect in 1676 — 'The Christian religion is a part of the law itself' — was still received wisdom when the First Fleet arrived at Port Jackson. Such procedures continued to be followed long into the nineteenth century. It is therefore unsurprising that the notion that Christianity was central to English society and English law was widely held in the Australian colonies.[13]

When the colony of New South Wales was established, in 1788, the laws of England were transplanted into the new land according to the doctrine of reception. The *Australian Courts Act 1828* (Imp) recognised the reception of these laws through its section 24, which stated that all the laws and statutes in force in England were to be respected and applied by the courts of New South Wales and Van Diemen's Land, so far as these were applicable.[14] The courts of these colonies were expected to decide what laws were 'received' under the colonial circumstances.[15] This doctrine of reception was explained by Sir William Blackstone in Commentaries on the Laws of England as follows:

> If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the conditions of an infant colony.[16]

The principles summarised in the statement above provided the foundation for the reception of the common law in the colonies.[17] Of course, Aboriginal communities had their own laws which were inseparable from their animistic religion. However, as Paul Kelly explains, 'they were a collection of hundreds of tribes speaking different

languages, devoid of collective political purpose or leadership, often at war at each other and without the structures to allow sovereign negotiations or dealings'.[18]

Hence, Australia was properly declared a terra nullius so that the reception of the common law could be reaffirmed by Lord Watson in *Cooper v Stuart* (1889), as follows:

> **The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a very great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract or territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class ... In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail.** [19]

The Aborigines who occupied the Australian soil did not form a nation state and any attempt to identify aspects of Aboriginal law resulted in the understanding that Aboriginal law conflicted with the principles of natural law, meaning it was perceived as being unable to secure the full protection of individual rights.[20]

This is evident in the decision of the Supreme Court of New South Wales in *R v Jack Congo Murrell* (1836) where Justice Burton manifested the view that the Aborigines had no proper law 'but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness'.[21]

Such a characterisation of Aboriginal customary law as 'irrational superstitions' further nurtured the recognition of common-law principles extending to the law of the land. Despite the lack of recognition of Aboriginal customary laws, the instructions from the King to Governor Phillip provided for the legal protection of the Aborigines.[22]

They were recognised as 'subjects of the Crown,' thus entitling them to the full protection of the law. Consequently, judge John Plunkett who presided over the re-trial of those responsible for the Myall Creek massacre of twenty-eight Aborigines in New South Wales, in 1838, sentenced seven white settlers to death.[23] Governor Phillip's

'Instructions', dated 25 April 1787, contained the following provision applicable to the treatment of the Indigenous peoples:

> **You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoying all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.**[24]

Following Federation in 1901, one had to wait until 1967 to witness the creation of a colour-blind society where the distribution of societal burdens and benefits would not depend on a person's race – an involuntary characteristic over which people have no control. In 1967, following a successful referendum, the *Australian Constitution* empowered the Federal Parliament to make laws for "The people of any race for whom it is deemed necessary to make special laws". The amended Constitution enabled the Parliament to adopt legislation which removes impediments to ensure that members of any race become full members of the polity. These new powers of the Parliament facilitated the entrenchment of the principles of 'political equality' and 'equal citizenship' in the political DNA of Australia.

Since 1967, successive federal, state and territory governments steadily enhanced the status and situation of Indigenous people in Australia. Concurrently, the role played by the High Court, relying on the external affairs power – section 51(xxix) of the Constitution – has been crucial in the implementation of international treaties and conventions.

4. The implementation of international treaties in Australia

International treaties and conventions form part of International Law: the law that governs the conduct of nations, international organisations, and multinational enterprises. While the people make domestic law through their own elected representatives, unelected bureaucrats decide the content of international law 'through a dialogue they conduct only among themselves'[25], and not by parliaments elected on the principle of one citizen one vote. As a result, 'the citizens of nation states increasingly find themselves governed by regulatory institutions unaccountable to them and which, in many cases, they did not even know existed.'[26]

Australia is a participant and signatory party to thousands of international treaties and conventions that cover social, economic, and cultural rights. International treaties and conventions may then be incorporated into statutes through federal legislation, the adoption of uniform state legislation, or be applied in common law. In *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995), Chief Justice Mason and Justice Deane stated:

> **Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.**[27]

However, Australia's dualist model dictates that no international treaty or convention has the force of law unless the federal Parliament converts their provisions into domestic law. Therefore, treaties or conventions, like the UNDRIP, must **not** apply within Australia, or be enforced by the Australian courts unless the Commonwealth Parliament has converted such international documents into domestic legislation via section 51(xxix),

the external affairs power, of the Australian Constitution.

In other words, no international treaty or convention, even if signed and ratified, forms part of the Australian law unless the federal Parliament converts it into domestic legislation, which bears a sufficient relationship to the relevant treaty or convention. In *Commonwealth v Tasmania ('Tasmanian Dam Case')* (1983), the High Court determined that there must be a proportionality between the means (embodied in the legislation) and the end (implementation of the treaty), so that the federal law must be appropriate and adapted to implementation of the treaty.[28]

As can be seen, to implement any international treaty or convention that Australia has signed, and even ratified, an Act of Parliament is still required. Furthermore, the prevailing position by the courts is that the Australian Constitution is **not** to be read subject to, or to conform to, International Law. In *Al-Kateb v Godwin* (2004), Justice McHugh indicated that the Constitution is the primary source of, and not an exercise of, legislative power. If the Australian Constitution was read in a way to imply conformity with International Law, then the fluid nature of International Law would amount to *de facto* amendment of the Constitution, contrary to the sole process for amendment expressly set out in section 128 of the Constitution (popular referendum).[29]

Of course, the signing of international agreements activates the 'external affairs power' found in section 51(xxix). As the range of topics regulated under the external affairs power has been endlessly expanded since the 1980s, the scope of this head of power encompasses any relationship with, or between, foreign States, and foreign or international organisations or other entities, regardless of whether they are the subject matter of international treaties or less formal dealings or agreements. In *Pape v Federal Commissioner of Taxation* (2009), Justice Heydon observed that 'the treaty or ***commitment*** need not have the precision necessary to establish a legally enforceable agreement at common law, but it must avoid excessive generality' [emphasis ours].[30]

In this sense, any international "commitment" is enough to provide the basis on which the Australian government may enact federal legislation bringing such "commitment" into effect. This reliance on a "commitment" only needs to be evident from the Preamble to the legislation giving effect to the international agreement. Hence, the statement in the UNDRIP's Preamble 'that indigenous peoples have suffered from historic injustices as a result of .... their colonization and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs

and interests' is sufficient to activate the external affairs power. Moreover, Justice Brennan made the role of international law and UN covenants in promoting legal change clear in his comment in *Mabo v Queenslan*d (n.2) (1992) that Australia's common law should conform to international covenants. According to him, 'the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law.'[31]

Regardless, it is important to understand that one of the great virtues of the Australian Constitution is its equal treatment of all citizens. It is a federal document for all Australians regardless of race, culture, or origin. It is improper to use such a document to promote one group over the rest of the population. And yet, a constitutional amendment aimed at recognising the kind of 'self-determination' of the 'First Peoples' found in the UNDRIP, including the right to 'Aboriginal governance under the full body of Aboriginal customary laws,' would undermine the egalitarian nature of the Australian Constitution.

5. Reinforcing a Divisive Racialist Agenda

There are many laws already in place to reinforce Indigenous rights, including the *Native Title Act 1993* (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). In addition to these major Acts are State Constitutions as well as Territory self-government Acts and anti-discrimination laws promoting Indigenous culture and tradition.[32]

However, it could be argued that these laws – now nudged on by the UNDRIP – seek to institutionalise racial preference, even self-determination, thus prolonging the history of racial difference.[33] As Senator Jacinta Nampijinpa Price explains, this is about further dividing Australia along racial lines by entrenching indigenous separatism and constitutionally enshrining 'the idea that Aboriginal people are perpetual victims forever in need of special measures'.[34]

Yet, over the years, there have been countless, and sometimes corrupt, Aboriginal quangos, like the Australian and Torres Straits Islander Commission (ATSIC), that have wasted millions of dollars. By any standard, the Indigenous industry has spawned

the creation of huge, bloated bureaucracies, the maintenance of which is expensive. Often, these administrative behemoths have designed and administered doomed policies, including housing, and social welfare programmes.

A recent example of this trend – undoubtedly inspired by a desire to implement the UNDRIP – was the attempt to enshrine the 'Voice to Parliament,' an 'advisory body,' to have its own chapter (Chapter IX) in the Constitution, alongside the Legislature, the Executive Government, and the Judicature. It would be impossible to remove a body that is entrenched in the Constitution since it could only be terminated in accordance with section 128 of the Constitution, which requires a referendum and a double majority – a majority of electors, and a majority of States. However, the establishment of such an advisory body would be in accordance with Article 18 of the UNDRIP, which requires that Indigenous peoples have their own parliamentary structures.

The Voice proposal envisaged that the advisory body would consist of twenty-four members, entitled to make 'representations to the parliament and the executive on laws and policies affecting Indigenous people in Australia. Although the word 'representation' did not require the legislature and the executive to consult, and seek the advice of, the 'Voice', it was always expected that the Voice would have needed to be consulted when the governing party, which would have a majority in the House of Representatives, proposed to adopt laws.

The requirement of 'consultation' raised the question of whether it would have been sufficient to ask the Voice for advice, or whether it must give advice. Article 18 of the UNDRIP certainly suggests that it would be the latter. If the latter, and the adoption of legislation is delayed until the Voice provided its advice, it could effectively stymie the governance of the country by adopting the convenient device of not giving an opinion at all, thereby arrogating to itself a veto power, and paralysing the machinery of government. In such a case, the Voice would have effectively functioned as a third chamber in addition to the House of Representatives and the Senate. But this outcome would have been entirely in line with the UN Declaration.

Fortunately, in rejecting the Voice proposal, Australians averted, at least temporarily a slide into racism. Indeed, there is utter confusion as to who is to be regarded as 'Indigenous,' how the twenty-four members of the Voice would have been chosen. In Australia, 'Aboriginality' seems to have developed into an amorphous, undefinable concept that has steadily been expanded to cover cultural traits that are different from the mainstream population. If membership of the Voice had been determined, not on the basis of

strict guidelines that define 'Aboriginality', the proposed advisory body could have been used to drive a wedge between people, not bringing them together, as the *Uluru Statement from the Heart* – a Statement prepared near Uluru in 2017 – wanted us to believe. Hence, the entrenchment of the Voice in the Constitution would have resulted in the allocation of group (separate) rights for a racial group. This may well have constituted a violation of the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*. The Convention stipulates in Article 1(4) that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups ... shall not be deemed racial discrimination, **provided, however, that that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups** and that they shall not be continued after the objectives for which they were taken have been achieved. [our emphasis]

The enshrinement of the Voice in the Constitution would have clearly offended this Convention. This is because such enshrinement would have institutionalised discrimination in Australia and led to "the maintenance of separate rights for different racial groups". Of course, Article 1(4) is clearly incompatible with the UNDRIP which advocates self-determination and racial separateness; this incompatibility further erodes the credibility of the United Nations as an objective arbiter of the rights of Indigenous Peoples and offends the principle of 'political equality'.

A manifestation of the principle of 'political equality' is that all electors have one equal vote and do not benefit from favoured or preferential treatment. In contrast, the Voice was all about exploiting differences between racial groups, only giving a voice to people deemed to be part of the favoured group. Indeed, the gains of 1967 would be undone if the Voice referendum had been successful because it would have enshrined discrimination forever into the Constitution, and Australia would have become a racist country where burdens and benefits are distributed based on characteristics that have nothing to do with merit, but everything to do with political expediency.

But in Australia, the promise of 'political equality' has been progressively emasculated since the adoption of the *Racial Discrimination Act* 1975 (Cth), which facilitated the implementation of various forms of affirmative action, coupled with growing advocacy by Australia's Indigenous activists.

These developments confirmed that a colour-blind society is merely a lofty aspiration, easily punctured or extinguished by governments that advocate for a more radical form of equality of results or outcome. In this context, Eric Abetz's admonition that 'What is being promoted as healing and reconciling is in practice dividing and alienating' is apposite.[35]

Proponents of these developments often condoned a violation of the principle of equality before the law to atone for violations of equality in the past. And yet, they fail to explain how it is possible to correct past discrimination by condoning the entrenchment of a discriminatory and divisive system that violates the equal treatment of all citizens in the future.

The Constitution is based on the principle of equality of all citizens before the law. Indeed, one of the greatest virtues of our Constitution is precisely its equal treatment of all citizens. This is the nation's fundamental law for **all** Australians regardless of origin, culture, or ethnicity. It is, therefore, improper to use this basic law to promote one group over the rest of the population, even if the UNDRIP demands a different approach, involving the implementation of the principle of self-determination.

6. The Principle of Self-Determination

The principle of self-determination, found in Article 4 of the UNDRIP is a principle of international law. Many international instruments proclaim the principle of self-determination. For instance, the *United Nations International Covenant on Civil and Political Rights* (1966), ratified by Australia, declares in Article 1: '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.'

On a first glimpse, the principle of self-determination is founded upon democratic premises. The principle bestows a right upon a local community to 'determine itself', meaning to determine for itself that it has the capacity and status of a self-governing community.[36] It has even been suggested that self-determination can encourage the development of human rights, including those of voting, assembly, speaking out and holding office.[37]

However, the question of whether Australian Aboriginals have a right of self-determination is

more complex. The matter is disputed because the prospect poses a 'threat to the legitimacy of the established order'.[38] Perhaps for this reason, it has been argued that 'any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations'.[39]

The idea of Aboriginal self-determination in the Australian context appears to be more about 'sovereignty,' carving out a separate state which requires the Australian government to enter treaties with 'First Nations' peoples under applicable rules of international law to be primarily found in the UNDRIP. If Australians want to ascertain how this would work, they should consider the experiences of other countries where similar developments have taken place. For example, New Zealand has an advisory Maori body and there are five dedicated seats in parliament for the Maoris.

So, it is legitimate to ask whether this view of self-determination would contribute to the betterment of Australia's society. Advocates for self-determination fail to demonstrate how this goal can be achieved without Aboriginal people taking full responsibility for themselves, their family, and their community at large. Self-determination would require the Aboriginal communities to make their own decisions and support themselves without any form of governmental assistance and bureaucratic oversight. According to Nyunggai Warren Mundine AO, an Aboriginal businessman who was the national president of the Australian Labor Party,

> **There can be no self-determination or autonomy for any community if there is total dependence on governments and bureaucracies, or if there is no real economy. No country or community can survive without an economy to support it. The greatest threat to Indigenous Australians living on country remote and regional Australia is chronic dependence on government without needing meaningfully to contribute in return.**[40]

7. Aggravating Aboriginal Dependence on Government

Aborigines presently do not lack any possible legal right. Their primary struggle is not with acquiring more legal rights but with the ingrained habits incentivised by welfare policies that prevent many of these fellow Australians from getting a foothold in the Australian economy.

Supporters of Indigenous self-determination often claim that this would somehow improve practical outcomes in Indigenous communities. This is an assertion, nothing more. What is not just an assertion, but objectively true, is that laws and policies, although well-intentioned, often have the opposite effect as that allegedly contemplated. Decades of federal, state and territory policies have miserably failed to improve the lives of Australia's most disadvantaged peoples. Currently, more than half (53%) of all the Indigenous Australians aged sixteen and over are receiving some form of Centrelink income support payment, compared with 26% of non-Indigenous Australians of this age.[41]

Aboriginal culture can also be used to excuse bad behaviour.[42] Any behaviour that a government rewards tends to increase. The prevalence of passive welfare dependence in the Indigenous communities could be solely responsible for the scourge of drugs, pornography, child abuse, and the effects of 'humbugging.'[43] The point is that welfare programs to help their recipients may exacerbate these problems. By handing out welfare checks impersonally to all who potentially qualify, without addressing the underlying behavioural preconditions, welfare policies essentially 'reward' dysfunctionalities that affect the recipients and their communities at large.

Perhaps nobody better expressed the results of a too excessive solicitude on the part of government than the German philosopher, Wilhelm von Humboldt (1767-1835). Described by Friedrich Hayek as 'Germany's greatest philosopher of freedom,' in his book *The Limits of State Action* Humboldt teaches us this important lesson that should be taken into consideration by every Australian:

> **The evil results of a too extensive solicitude on the part of the State, are still more strikingly shown in the suppression of all active energy, and the necessary deterioration of the moral character. ... The idea of**

the first no longer inspire him; and the painful consciousness of the last assails him less frequently and forcibly, since he can more easily ascribe his shortcomings to this particular position, and leave them to the responsibility of those who have made it what it is.

If we add to this, that he may not, possibly, regard the designs of the State as perfectly pure in their objects or execution – that he may suspect that his own advantage only, but along with it some other additional purpose is intended, then, not only the force and energy, but also the purity of his moral nature suffers. He now conceives himself not only completely free from any duty which the State has not expressly imposed upon him, but exonerated at the same time from every personal effort to improve his own condition; and, even fears such an effort, as if it were likely to open out new opportunities, of which the State might take advantage...

Further, the pernicious influence of such a positive policy is no less evident in the behaviour of the citizens to each other. As each individual abandons himself to the solicitous aid of the State, so, and still more, he abandons to it the fate of his fellow-citizens. This weakens sympathy and renders mutual assistance inactive: ... and experience teaches us that oppressed classes of the community which are, as it were, overlooked by the government, are always bound together by the closest ties. But whether the citizen becomes indifferent to his fellows, so will the husband be to his wife, and the father of a family towards the members of this household.[44]

Nevertheless, the fact is that governments around Australia have maintained and nurtured a burgeoning and expensive bureaucracy focused on the welfare of the Aboriginal community. However, it is reasonable to assume that modern Australia's worst Indigenous suffering and deprivation in the dysfunctional remote 'homeland' communities have been caused by the continuing

implementation of welfare policies which began in the 1970s. Decades of federal, state and territory policies have miserably failed to improve the lives of Australia's most disadvantaged peoples. In this context, it is important to consider whether it would not be more appropriate to make direct aid available to encourage Indigenous Australians to look after themselves by reducing, or even eliminating, their dependence on government.

If self-determination and the establishment of their own legislative and administrative institutions were achieved, in accordance with the UNDRIP dictates, Indigenous people would have to forfeit the extensive and generous benefits, offered to them by a magnanimous State. Surely, self-determination implies political autonomy, which automatically must result in financial independence and no more welfare assistance. Indeed, assuming the benefits of statehood, and receiving the largesse and benefits offered by the host country, constitutes an egregious violation of the rights of Australians to equality. Hence, the self-determination propounded by the UNDRIP implies the relinquishing of welfare dependency on the federal government.

8. Concluding Remarks

One of the great virtues of the Australian Constitution is its equal treatment of all citizens. Far from being "racist," our fundamental law treats everyone equally, no matter when they or their ancestors arrived here. It is entirely inappropriate to use this foundational legal document to promote one group over the rest of the population.

Based on the dictates of an international agreement, the UNDRIP, legally establishing Aboriginal self-determination would consolidate racial divisions that completely undermine the egalitarian nature of the nation's legal-institutional framework.

Of course, Indigenous agreements and laws already exist, further testing the appropriateness for any legal-institutional change based on a lie that Indigenous rights are not sufficiently acknowledged by the Australian legal system.

However, Indigenous self-determination, as presently advocated by the government and promoted by the UNDRIP, would institutionalise an apartheid state with "rent" paid to the Indigenous landowners, ostensibly. This will be another means

to legalise racism and a rort to extort the hard-working Australians who have nothing to do with alleged 'invasion,' or any possible mistakes that may have been committed in a remote past.

The greatest danger lies in the granting of special privileges to one group merely on the ground of the race of its members. The distribution of societal benefits and burdens on the ground of a person's race, which is an involuntary characteristic over which people have no control – an incident of birth – makes a mockery of governments' stated reassurances to create a society where a person's race is irrelevant, and the administration of justice is colour-blind.

Indeed, unless the government wants to create an institutionalised form of apartheid in an effort to implement the UNDRIP, it is not appropriate to exempt any racial group from the application of Australia's general laws.

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16 Sir William Blackstone, *Commentaries on the Laws of England* [1765] ch 1, sec 7.

17 Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) *Adelaide Law Review* 1, 5.

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19 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

20 During the 1960s, Christian leaders became more consistently supportive of Aboriginal land rights and anti-discrimination laws generally. In 1963, a pamphlet by the National Missionary Council stated unequivocally: 'It must never be forgotten that, for the most part, Australia was taken from the Aborigines by force without payment or compensation or recognition of their inherent title to the land'. Two years later the Australian Council of Churches would publish a seminal booklet by the Rev Dr Frank Engel entitled *The Land Rights of Australian Aborigines*, and 'within a few years almost all the mainline Churches had declared their broad support for the cause.' – Williams, note 13, 166.

21 *R v Jack Congo Murrell* (1836) Legge 72; [1836] NSWSupC 35; see also: Parkinson, note 14, 107.

22 Prue Vines, *Law & Justice in Australia* (Oxford University Press, 2005) 9.

23 His religious convictions were apparent in Plunkett's judgement: 'The crime had been witnessed in heaven and could not be concealed. You had not the fear of God before your eyes, but were moved and seduced by the instigations of the devil.' – Meredith Lake, *The Bible in Australia: A Cultural History* (NewSouth Publishing, 2018). 95. As noted by law professor Michael Quinlan, 'References by a judge to heaven, God, and the devil were unremarked upon in the nineteenth century. They were unremarkable at the time. Blackstone's seminal C*ommentaries on the Laws of England* is full of appeals to the Christian scriptures. There was as shared knowledge of the Christian Scriptures, and actions considered sinful or immoral could be judged by that.' – Michael Quinlan, 'A Great Nation? The Changing Place of Religion in Law and Society in Colonial and Contemporary Australia' (2020) (2) *St Mark's Review* 69, 73.

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