

Human Rights and Indigenous Australians

Mark G. Brett

A decade before the advent of the *UN Declaration of Human Rights*, the Yorta Yorta leader William Cooper led a group of Aboriginal people to the German Consulate in Melbourne to convey a protest against the treatment of Jews in Germany. In 1938, Australian Indigenous leaders were well aware of the capacity of democratically elected governments to act oppressively towards their own people. In that same year, a 'Day of Mourning' was proclaimed, and the following statement was put before the public:

WE, representing THE ABORIGINES OF AUSTRALIA, assembled in conference at the Australian Hall, Sydney, on the 26th day of January, 1938, this being the 150th anniversary of the white man's seizure of our country, HEREBY MAKE PROTEST against the callous treatment of our people by the white man during the past 150 years, AND WE APPEAL to the Australian nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people TO FULL CITIZEN STATUS and EQUALITY WITHIN THE COMMUNITY. (Attwood & Markus 2004)

It would be four decades before this message was heard and translated into the Constitutional referendum of 1967. But the legacy of that referendum has been mixed, and it does not represent a great leap forward for human rights (see Behrendt 2007).

It is quite clear, for example, that Australian law has not provided Indigenous people with appropriate compensation for the compulsory acquisition of their land (State based 'land rights' legislation of the 1970s and 1980s simply presumed that native title was legally extinguished). Nor were treaties negotiated with the various groups of traditional owners, as in the other British colonies. The British rejection of John Batman's 'treaty', in 1830s Victoria, was symptomatic of a general failure of legal responsibility that was finally exposed in 1992 with the common law recognition of native title in the *Mabo* judgment of the Australian High Court (see Attwood 2009).

It is therefore nonsense, in one sense, to suggest that the quest for Indigenous land rights is a quest for 'special rights', enjoyed by only one group of Australians. Aboriginal and Torres Strait Islanders have not been afforded the kind of rights that all landowners expect to enjoy under the Australian Constitution. 'Just terms' compensation for compulsory acquisition of land was established by the Constitution (section 51), and therefore Aboriginal people have been denied this right to compensation since 1901. This conclusion was shared by three of the High Court judges in the *Mabo* case, yet it did not prevail in the final judgment (see Strelein 2006:20-23).

In the 16 years of its operation, the *Native Title Act* has failed in its stated intention to deliver compensation for the wrongful extinguishment of Indigenous title. The current state of the law even suggests that this obligation to provide compensation relates only to the period following the establishment of the *Racial Discrimination Act* (1975), not the Australian Constitution of 1901.

Our native title system is unjust in other ways as well. For example, A group who may have 'revitalized' their customs and traditions in recent years cannot be recognized as native title holders *unless* those traditions have been observed, substantially without interruption, since the assertion of British sovereignty. The law does not regard it as relevant to question whether governments might have been responsible for any disruption of a people's 'connection to country'.

The UN *Declaration on the Rights of Indigenous Peoples* (2007), on the other hand, provides the right to revitalize Indigenous cultures (e.g., in Article 13), and the *Native Title Act* needs to be amended accordingly if international benchmarks in human rights are to be met.

The Rudd Government has now endorsed the UN *Declaration on the Rights of Indigenous Peoples*, but there has been no explicit attention to past statements made by UN bodies to the effect that our native title system in Australia does not live up to established international standards.

The Commonwealth Government has not, for example, addressed this statement from the UN's Committee On the Elimination of Racial Discrimination in 1999, suggesting that legal changes made under the Howard Government compromised its obligations to UN agreements:

The Committee, having considered a series of new amendments to the *Native Title Act*, as adopted in 1998, expresses concern over the compatibility of the *Native Title Act*, as currently amended, with the State Party's international obligations under the Convention. (CERD 1999)

Similarly, the High Court ruling on the removal of Aboriginal children in *Kruger v. The Commonwealth* (1997), illustrates the ongoing failure to protect even the most basic civil rights in our legal system. In relation to their rightful claims for equality before the law, freedom of movement, and freedom of religion, the Aboriginal plaintiffs were unsuccessful on each count. No legal case has delivered compensation to the 'Stolen Generations'.

Such examples all lead to a clear conclusion: Indigenous and non-Indigenous Australians are not equal before the law, and the recent suspension of the federal *Racial Discrimination Act* (to make way for the Intervention in the Northern Territory) simply highlights the underlying legal problems.

In seeking to remedy this situation, the UN *Declaration on the Rights of Indigenous Peoples* (Art. 27) is highly relevant: this provides requirements for effective consultation ('free, prior and informed consent') around all policies that affect the lives and resources of Indigenous peoples:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Such rights to participation have yet to be enshrined in Australian law, and the recent report by the Brennan committee suggests only a weak mechanism with a similar intent (Recommendation 15).

Much stronger mechanisms, entrenched in human rights legislation, will be required. History speaks for itself on this point. Aboriginal and Torres Strait Islander peoples have no real reason to trust the shifting tides of Australian parliaments.

Our conclusion, therefore, should be that both the parliaments and the courts require a more substantial and more basic vision of a just society. While the proposed Charter of Rights might be a first step, we will also need to address the complex issues surrounding the spectrum of economic, social and cultural rights, if Indigenous Australians are to see justice done.

The Brennan report does at least include a recommendation that Aboriginal and Torres Strait Islanders be included in the delivery of a human rights educational program. This initiative is to be welcomed, in that it will provide a forum to illuminate the endemic injustices outlined in this paper.

There are various conceptions of justice that might be brought into future debates about the rights of Indigenous Australians. For those of us whose social imaginations are shaped by the Bible, there are many reasons to involve ourselves in those debates (Adam 2009; Brett 2009).

References

- Adam, Peter, 'Australia – whose land?', available at www.nswchurches.com/Resources/Articles/A09105.pdf
- Attwood , Bain and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League*. Canberra: Aboriginal Studies Press, 2004.
- Attwood, Bain, *Possession: Batman's Treaty and the Matter of History*. Melbourne: Miegunyah Press, 2009.
- Behrendt, Larissa, 'The 1967 Referendum: 40 years on', available at [www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153_Larissa Behrendt.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153_Larissa_Behrendt.pdf)
- Behrendt, Larissa, *Achieving Social Justice: Indigenous Rights and Australia's Future*. Sydney: Federation Press, 2003.
- Brett, Mark G., *Decolonizing God: The Bible in the Tides of Empire*.

Adelaide: ATF Press, 2009.

CERD Committee Decision on Australia, 18 March 1999, paragraph 6. Available at <http://www.austlii.edu.au/au/journals/AILR/1999/15.html>

Strelein, Lisa, *Compromised Jurisprudence: Native Title Cases since Mabo*.

Canberra: Aboriginal Studies Press, 2006.