

## REVIEW ARTICLE\*

*Aboriginal Human Rights, The Criminal Justice System and the Search for Solutions: A Case for Self-determination (Discussion Paper)* by LUKE McNAMARA (Australia: North Australia Research Unit, Australian National University, 1993), pp vi + 49. Softcover recommended retail price \$5.00 (ISBN 0 7315 158670).

International law grants to all “peoples” the right to self-determination. The question is, who are the “peoples” to whom this right is accorded? There is no doubt that self-determination, the right of a people to take control of its own destiny, has been recognised in the decolonisation context. The *modus operandi* of self-determination, in that context, has been one of either secession from the colonial power to form an independent state, free association with another state, or integration with another independent state. Controversy has arisen, however, as to the right to self-determination of peoples who are inhabitants of territories already considered to be independent. The argument is made that where a government fails to represent the majority of the population, as, for example, was the situation in South Africa until recently, or where a government fails to adequately represent a racial, linguistic or ethnic group, then the unrepresented group has a right to self-determination. The appropriate methodology for the exercise of the right - assuming it is recognised - is, however, still controversial.

In this discussion paper Luke McNamara examines the treatment of Aboriginal peoples within the Australian criminal justice system. Drawing, inter alia, on the findings of the *Royal Commission into Aboriginal Deaths in Custody* the author concludes that the discriminatory impact of the criminal justice system on Aborigines is a sufficient basis upon which to found a claim to self-determination. As the author says, the discrimination inherent in the system “is essentially the product of non-Aboriginal society’s continuation of a historical process based on

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\* Rosemary Rayfuse, LLB Queen’s Ontario, LLM Cantab, Lecturer, Faculty of Law, UNSW.

the imposition of alien values, concepts and structures that are fundamentally irrelevant - in cultural and legal terms - to Aboriginal people”<sup>1</sup>

In furtherance of the argument that the case for self-determination exists, the author examines the conventional responses which have been implemented to deal with “the problem of Aboriginal contact with the justice system”. “Special treatment” for Aborigines within the system is derided as reflecting outdated and inappropriate paternalistic notions. Decriminalisation of public drunkenness, although well intentioned, is shown to have been inadequate in view of the paucity of resources and alternative treatment mechanisms available. The key to change, it is concluded, is for non-Aboriginal Australia to “recognise as a general policy, the importance of recognising the right of Aboriginal people to control their own lives”<sup>2</sup>. The author goes on to examine some of the more “constructive” and “imaginative” initiatives which have been proposed, such as the recognition of Aboriginal customary law and the introduction of community justice mechanisms. McNamara concludes that these developments - limited in their success to date - are valuable and necessary in their recognition of the needs for political autonomy of Aboriginal people.

And where does a right to political autonomy come from? It comes from developments in international law concerning the right to self-determination, which developments are exemplified in the work of the United Nations Working Group on Indigenous Populations. By recognising the development of the concept of self-determination in international law and its applicability to the Aboriginal peoples of Australia, McNamara believes “a decisive step towards more enduring and constructive solutions”<sup>3</sup> will be made. This discussion paper is a useful starting point in the quest for those solutions.

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1 L. McNamara, *Aboriginal Human Rights, The Criminal Justice System and the Search for Solutions: A Case for Self Determination (Discussion Paper)*, North Australia Research Unit, Australian National University (1993), p 40.

2 *Ibid*, p 11.

3 *Ibid*, p 42.