NARRM ORATION 2012

ABORIGINAL WOMEN: THE RIGHT TO SELF-DETERMINATION

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Distinguished guests, ladies and gentlemen.

As a Cobble Cobble Aboriginal woman from southwest Queensland who grew up in southeast Queensland, I acknowledge the traditional owners of this land, the Wurundjeri People of the Kulin Nations. Thank you Aunty Joy for that moving welcome to country and the privilege of wearing the possum skin for the Oration. I would like to thank Professor Ian Anderson for inviting me to deliver the 2012 Naarm Oration, which I consider a great honour and privilege. In addition, special mention and thanks must be made to Ellen Day for organising my time here and the kind and patient manner in which she dealt with my chaotic schedule.

And finally, I would also like to acknowledge Senator Rachel Siewert and Professor Marcia Langton, colleagues from the Expert Panel on the Constitutional Recognition Indigenous Australians. I was privileged to sit on the Expert Panel with Marcia last year and was fortunate to spend a lot of time with her and now consider her a dear friend, Marcia's early scholarship on Aboriginal women and land rights, and Aboriginal women and feminism was an significant influence on me in pursuing the field of research of Aboriginal women and political participation. And I have enjoyed watching a new generation of Aboriginal lawyers read her work in my Indigenous Women and the Law class.

Introduction

When Ian invited me to deliver the oration, I remembered that the last occasion he asked me to speak here at the University of Melbourne was roughly 10 years ago as a very junior academic. And so it is wonderful to return to the University of Melbourne to deliver this Oration 10 years later as a Professor and member of the United Nations Permanent Forum on Indigenous Issues, and now with Ian as the Assistant Vice Chancellor in Indigenous Higher Education Policy and as Director of Murrup Barak. I have reflected on the last time I did speak here because it is relevant to what I want to speak about; 10 years ago, the topic was the Treaty process! Oh, how the times have changed!

Back then, the Aboriginal and Torres Strait Islander Commission ('ATSIC') still existed and treaty and self-determination remained central to Indigenous rights advocacy and part of the national discussion and debate on Indigenous affairs. Today, 'self-determination' has been eviscerated from the lexicon of Australian politicians, policy-makers and Australian journalists and political commentators and inelegantly dismissed as a 'failed experiment' and antithetical to Aboriginal economic development. Still, as I discovered last year as a member of the Prime Minister's Expert Panel, a treaty and the language of self-determination remain at the forefront of Aboriginal and Torres Strait Islander communities' concerns when they reflect upon the issue of 'recognition'.[1]

Yet in spite of the adjournment in its use by the political elite, the right to self-determination and human rights remains fundamental to the aspirations of Aboriginal communities. And given Australia's Aboriginal history – the Protection era, for example, where draconian controls were placed on Aboriginal people's right to speak language, right to marriage, freedom of movement, freedom of speech and association, right to hold property and right to participate in political choices that govern one's life[2] – it would be ahistorical to pillory or admonish the allegiance of the Aboriginal political domain to human rights.

It is the case that in Aboriginal communities, Aboriginal culture has been 'porous' to international human rights.[3] Indigenous communities have been enthusiastic about and open to rights as informing and framing their relationship with the state. However this devotion to the 'rights agenda' has been mostly uncritical and sometimes dogmatic, and its implementation or translation into the domestic domain skewed.

I say this because the fundamental norm that underpins the corpus of Indigenous rights so eagerly embraced by Aboriginal culture – the right to self-determination – has arguably promoted an impoverished form of self-determination for Aboriginal women in Australia. And, in the course of my work as a member of the United Nations Permanent Forum on Indigenous Issues, I can say with clarity that this appears to be the case for most Aboriginal women in the world. Tonight, in the spirit of the Naarm Oration, which is aimed at enriching our ideas about possible futures for Indigenous Australia in a way that remains grounded and respectful but also open to new ways of thinking, I want to explore this further.

Tonight, I want to expound on why I believe the right to self-determination as configured in international law, translated by the state and adopted by Indigenous communities has been skewed in a way that actually impedes the capacity of Aboriginal women and girls to freely determine their political status and their economic, social and cultural destiny. This is an important inquiry because Aboriginal women in Australia are the most vulnerable and marginalised group of any in Australian society. Many Aboriginal women are routinely subjected to violence and high levels of stress, and are regularly positioned by statistical data in the lowest categories of economic and social status. Yet despite the extensive chronicling of these facts over the years, they have not been seriously taken into account in the context of Indigenous peoples' rights and self-determination.

Tonight I want to achieve two things.

First, I want to sketch for you a picture of self-determination and Aboriginal women in Australia, illustrating the invidious vagueness of the concept that, in its discursive narrative, is too often abstracted from and incongruous with the daily lives of Aboriginal women. The Australian experience of self-determination has been state-centric – overly reliant on state acts – and, I argue, calibrated according to the male experience. Consequently, the strong conditioning force of culture – the privileging of 'race' or 'culture' and the concomitant marginalisation of gender – has ultimately been to the detriment of Aboriginal women's wellbeing and bodily integrity.

Second, again, in the spirit of the Naarm Oration, I will suggest an alternative framework for re-imagining self-determination. Here, I will draw upon Martha Nussbaum's capabilities approach as a complementary framework to Indigenous rights. The capabilities approach can do what human rights discourse can't do alone, and that is enliven rights advocacy in a way that gives specificity and shape to the vocabulary of self-determination.

Adopting the capabilities approach is one of the many ways we can re-imagine the right to self-determination. In problematising the right to self-determination in relation to Aboriginal women, I am encouraging others to conceive of ways we can achieve self-determination that is inclusive and responsive to the unique experiences, needs and aspirations of women. In Australia, where Aboriginal groups and Aboriginal women are highly localised in terms of geography and culture, self-determination can only be elucidated in a context-specific way. Self-determination must become more specific and personalised in order to be capable of reflecting what self-determination means for Aboriginal women in their daily lives. And we cannot leave it to the state to do that for us. We must do that as Aboriginal people.

Part I

To begin with I wanted to provide you with a truncated history of the right to self-determination internationally and domestically. The right to self-determination is the right of peoples to freely determine their political status and their economic, social and cultural destiny; it underpins the normative framework of Indigenous peoples' rights in international law and politics. It is a concept with a long pedigree in international law, beginning with the Enlightenment; then becoming synonymous with decolonisation at the end of World War II; and aligning with democratic governance with the end of the Cold War.[4] Thomas Franck labelled it the 'oldest aspect of the democratic entitlement'; 'it is the right of a people in a established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement'.[5]

It has a relatively more recent history in the politics of Indigenous peoples, who adopted it as they turned to the United Nations in '60s and '70s in the absence of domestic remedy for dispossession and racial discrimination. And when the General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples*[6] in 2007, the right to self-determination as recognised in the individualistic corpus of international law, was extended beyond 'individuals' in democratic states to include 'Indigenous peoples' collectively.

The right to self-determination is taken seriously in most states of the world that have Indigenous communities because self-determination in its true form is intended to enhance democracy and enhance political participation. For this reason it has animated voluminous academic commentary and scrutiny, particularly in the context of the multifarious aspects of political participation in liberal democracies (for example, designated parliamentary seats, Indigenous parliaments, agreements and constitutional recognition).[7] And many countries have done this well.

If we look to Australia, we can trace the development of self-determination from the adoption of the *International Convention on the Elimination of All Forms of Racial Discrimination*[8] in 1965 to the Commonwealth government who introduced a self-determination policy in 1972. This heralded a period of bipartisan support for over 30 years, until the demise of ATSIC in 2005, and saw the introduction of legislation giving effect to self-determination such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*'), the *Aboriginal Councils and Associations Act 1976* (Cth) and the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). This legislative and institutional form of self-determination reflects an Indigenous jurisdiction entirely informed by state acts.

Like me, Australian historian and anthropologist Tim Rowse has questioned the deployment of land rights or the Indigenous jurisdiction as the only anchor for Aboriginal aspirations to self-determination.[9] Why do we say this? The adoption of a policy of self-determination for Indigenous peoples by the Commonwealth government meant that the developing norm of self-determination became state-centric – focused on the state – and less attention was paid to how the right to self-determination should be managed internally within Indigenous groups themselves, especially in regard to Aboriginal women, gender equality and violence.

The state-centric focus of the right and the patriarchal nature of Western public institutions inculcated Aboriginal political culture and institutions to the detriment of Aboriginal women's rights and status in Aboriginal communities. There are many examples of the marginalisation and exclusion of Aboriginal women.

There is plenty of evidence one can draw upon to support the argument that not only were Aboriginal women marginalised from the development of land rights legislation and land councils, but that anthropologists – the very important profession that drove policy debate on Aboriginal people in the early days – privileged the stories and status of Aboriginal men over Aboriginal women.[10] In addition, there is voluminous analysis of the way in which customary Aboriginal law has been used to mitigate crimes of violence against Aboriginal women in sentencing; another example of how Aboriginal women have been marginalised in the legal system and 'culture' privileged over the fundamental human rights of Aboriginal women and children.[11]

ATSIC – the state-centric institutional form of self-determination conceived of and legislated by the state – in an evaluation of its own programs and services found that it had limited effectiveness in meeting the needs of Indigenous women. The report concluded that women had little involvement in formal ATSIC decision-making processes and few women were familiar with or had access to ATSIC's programs and services. The report's final conclusion was a clear indicator of ATSIC's failure to deliver self-determination to women: '[a]ll in all, what lay at the heart of their concerns was that decisions that affected them, their communities and families were invariably made with limited input from the women these decisions would most affect'.[12] This report is a powerful reminder from the self-determination era of how Aboriginal women were excluded from bodies designed to achieve self-determination. It reveals the limitations of an institutional approach for Aboriginal women if effective measures are not taken to ensure women are included.

Another example is the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), established in 1987 following national outrage over the number of Aboriginal deaths in custody.[13] It investigated 99 deaths that had occurred between 1 January 1980 and 31 May 1989, in prisons, police stations and juvenile detention institutions. Of the 99 deaths investigated, only 11 were women.

Many concerns were raised by Aboriginal and non-Aboriginal women about the failure of the RCIADIC to adequately consider Aboriginal women's issues.[14] Important statistics emerged at the time that the number of deaths of Indigenous women by alcohol-related homicide was more than the deaths in custody for the period of RCIADIC.[15] Despite these alarming statistics about the deaths of Aboriginal women at the time – due mainly to interpersonal violence between Aboriginal men and Aboriginal women – the problems concerning Indigenous women were 'overshadowed by the problems facing Indigenous "people", which in reality equated to problems facing Indigenous men'.[16]

Audrey Bolger made the same point in her seminal 1991 report *Aboriginal Women and Violence*.[17] Bolger noted that during 1987 and 1988, three Aboriginal men died in custody in the Northern Territory, yet in 1987 and 1988, of the 39 homicides recorded in the Northern Territory, 17 of them were Aboriginal women, most at the hands of Aboriginal men:

> When the number of Aboriginal people dying in custody was brought to public attention it caused such consternation that the Royal Commission was set up. Yet the fact that Aboriginal women particularly suffer far greater violence in their own communities and are much more likely to be killed and injured in and around their own homes caused no similar public outrage.[18]

And finally, in more recent times, it seemed to me that the Aboriginal political domain struggled with the public scrutiny of the dialectical tension between rights to land and the rights of women and children. For the first time there has been a very public and sustained division between Aboriginal leaders on this point. Given the volume of literature and commentary that challenges the legitimacy and motives of the Northern Territory Emergency Response ('NTER') land reform measures, it is evident that the Aboriginal domain can effectively, convincingly and passionately discharge a defence of Aboriginal land rights.[19] What is of interest to this enquiry is that, as a consequence of the poorly developed concept of the right to self-determination, the Aboriginal political domain equivocated on issues of women's rights and the right of children to be safe.

The impoverished concept of the right to self-determination meant that the Aboriginal polity was ill-prepared philosophically and politically to deal with any rights arguments other than land rights and the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), both substantive frameworks that have been granted by the state. The debate about the NTER has brought to the surface the (once unspoken) tension between Indigenous self-determination and Aboriginal women's rights. While the response of the Aboriginal polity to the NTER indicates that the undifferentiated, standardised mode of Aboriginal politics is strongly entrenched, the Intervention represents a critical juncture in Aboriginal self-determination as it applies to women. And I think the evidence of this is the number of women who feel comfortable about speaking up about the issue of violence.[20]

So these brief examples are just the tip of the iceberg. Add to this what I label the strong conditioning force of culture. Women – including women like me – do not like to say these things because of the nature of intimidation and bullying that goes on when the light is shone on intra-cultural tensions. This is probably why there is very little written in Australia about Aboriginal women and self-determination. And the limited literature that does exist about Aboriginal women and self-determination is essentialised, predicated on an assumption that Aboriginal women are aligned with Aboriginal men and the Aboriginal rights movement. So you will find in Aboriginal political statements on self-determination there is no mention of women or differentiation between Aboriginal men's and Aboriginal women's aspirations or goals. 'Indigenous peoples' is taken as a universal and singular standpoint for the purposes of political strategy. This assumption means that there has been no need to interrogate self-determination in terms of what it means to women and what impact it has upon their lives. Strategically, it is more effective to engage with the state if Aboriginal men and women are united.

However, to dismiss the construction of Indigenous peoples as a 'collective' only for political strategy fails to appreciate the subtle and insidious way in which sex discrimination – direct and indirect – operates to marginalise and exclude women. While the primacy of race loyalty and communal responsibility is justifiable and understandable, less scrutinised is the way in which women often sacrifice their own wellbeing and safety for the greater good, particularly because of the power of the harrowing narratives about the emasculation of Aboriginal men and their displacement as a result of colonisation.

To summarise my critique of the right to self-determination: it has never been prescriptive enough. It lacks specificity

because it is both an abstract human right and also primarily employed as a political tool. In Australia, the focus has been on land rights and the creation of institutions to deliver self-determination. And the literature abounds with evidence to support that view that Indigenous rights are based on a narrative calibrated according to the dominant idea of what it means to be Indigenous, and this invariably is male: the male prisoner, the male spiritual custodian of culture, the male victim of colonisation, the male perpetrator as victim.

This, and the state-centric nature of the right, has meant that less time has been given to determining what the content of self-determination may mean to Aboriginal people living in both Indigenous and non-Indigenous communities. Moreover, because self-determination is state-centric, attempts to define the content pay too much attention to the relationship with the state and too little is given to Aboriginal peoples' relationships with each other. We know this because for over three decades, Aboriginal organisations, corporations, representative bodies and land councils – the groups that make up the collective 'self' have to a large extent ignored the marginalisation and violence experienced by Aboriginal women.

And I think it is appropriate here to quote a true champion of Indigenous rights in the United Nations system, Professor Erica-Irene Daes, former Special Rapporteur of the United Nations Working Group on Indigenous Populations, who posited:

> It is important that we must try to guard against a kind of false consciousness with respect to achieving the true spirit of Indigenous self-determination ... [T]he true test of self-determination is not whether Indigenous peoples have their own institutions, legislative authorities, laws, police and judges. The true test of self-determination … is whether Indigenous peoples themselves actually feel that they have choices about their way of life.[21]

Daes agrees that the emphasis on regulatory instruments, such as land laws and corporate laws, masks the ways in which these instruments may in fact operate against the achievement of true self-determination.

Part II

Having identified some of the limitations of the right to self-determination, I want to take up the challenge of the Naarm Oration and sketch an alternative approach or vision to self-determination building on the capabilities approach to human functioning. The capabilities approach is a normative framework based on the empirical work of economist Amartya Sen[22] and philosopher Martha Nussbaum.[23] The capabilities approach has been very influential internationally, informing the production of the United Nations Development Programme's ('UNDP') Human Development Reports[24] since 1990, as well as international development pertaining to the rights of Indigenous peoples. (And I am not so concerned with claims, relativist or otherwise, that the capabilities framework is inappropriate to the Indigenous rights framework, culture or worldview because I think that – admirably – Aboriginal communities have been porous to external influences of international human rights law and development theory.)

To provide a truncated version of the capabilities theory, Sen identified shortcomings in the way that quality of life was traditionally measured by economists. Sen noted that the quality of life of citizens within nations was ranked according to crude and inexact measurements of income and consumption.[25] So, while wealthy developed nations can marshal and distribute significant resources to their citizens, there is no measurement of the equality of that distribution.[26] Thus, it is not possible to extrapolate from such a homogenous approach to quality of life how education, health, race or gender inform the use of these resources. Thus, Sen, in a development context, looked to measuring what people are actually able to do and be, the capabilities approach pays attention to a citizen's ability to achieve. In this way, the capabilities approach is an evaluative tool or framework in which the traditional indicator of welfare economics, utility, is replaced by the freedom to be and do.[27]

To explain further, utilitarian economics does not take into account the cultural pressures that affect individuals' preferences and desires in life because it assumes that people are rational agents seeking to maximise utility regardless of the pressures or norms of tradition. Thus if we do not have information about how people actually choose to live their lives then we cannot improve people's lives.[28] An example of this utilitarian ethic in the context of Australian Aboriginal affairs can be seen in the record levels of expenditure boasted by the Commonwealth government in Indigenous affairs in 2007. While promoting the spending as a solution to Indigenous disadvantage, the Commonwealth government failed to measure the actual outcomes of such expenditure. In

2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma asked, 'since when did the size of input become more important than the intended outcomes?', and questioned why the record expenditure was emphasised by the government when there was no measurement of the effects of this funding.[29] In fact, a proportion of the record funding included Commonwealth monies expended on legal fees for farmers and pastoralists challenging Aboriginal native title claims in the court system.

This demonstrates what Sen has described as the 'informational poverty' of the utilitarian calculus in the task of understanding how people live their daily lives.[30] An impersonal figure or amount does not tell us how the money is spent and who is actually benefiting. As an evaluative framework, capabilities theory is based on the premise that in order to live a valuable human life a person must have the freedom to make choices about how they live their life.[31] To enjoy that freedom, one must have the capabilities in order to do and be: to work, to be healthy, to read, to care, to love, to be well fed or to have shelter.

I was attracted to Martha Nussbaum's version of the capabilities approach because Nussbaum's work has built on and refined Sen's approach, focusing on the correlation between women, poverty and sex inequality based mostly on her field work in India.[32] Nussbaum observed that women in many cultures are not treated as individuals with their own needs and aspirations. In the case of women, Nussbaum has found that poverty affects what women hope for, what they love, what they fear and what they are able to do.[33] Fundamental to Nussbaum's approach is her concern that women limit their expectations: women adjust to the expectations their culture and community have of them. This is known as 'adaptive preferences', which means that culture and cultural practices limit or neglect women's autonomy.[34] Therefore, utilitarianism, especially in measuring inequality, does not address the fact that women and the poor are generally satisfied with having less and expecting less. For instance, it may be that because land rights are the normative benchmark for Aboriginal self-determination, Aboriginal women aspire to land rights even if they are not included in decision-making about the land or if such land title never actually improves their lives. Another example is the strong cultural pressure not to report the violence or discuss or complain about violence. This pressure influences the behaviour of Aboriginal women, as evidenced by statistics of under-reporting of violence against women.[35] Nussbaum argues that when it comes to women living in poverty, preferences are malleable, and are often shaped by tradition and intimidation.[36]

So, why capabilities and how does this fit with the Indigenous rights project?

In selecting an appropriate model to refashion self-determination, I was motivated by the need to render self-determination more inclusive of Aboriginal people in a way that Aboriginal people are more likely to achieve self-determination than maintaining the current impersonal, standardised normative framework. Essentially Nussbaum argues the capabilities approach is a 'species' of the human rights approach because its goal is to ensure that people function in areas of central importance to a society.[37]

The difference between Sen's approach and Nussbaum's is that she devised a list of areas that most communities would consider to be of central importance to their wellbeing. It asks communities themselves to decide what areas are of central importance because this gives 'important precision and supplementation to the language of rights'.[38] It makes rights more accurate. And given the critics of the discursive and inexact Aboriginal 'rights agenda' (typical of Australian human rights discourse), it requires communities to actually pin down what self-determination looks like on a community-by-community basis. It transforms human rights from a narrow focus on legal guarantees and entitlements to an approach that changes the way in which public policy and law view human rights. It shifts the focus of rights discussions away from legal instruments to the effectiveness of laws and how they actually improve individual's capabilities.

Therefore I found it very useful that Nussbaum had devised a list, and in my work with Aboriginal women this list has proved a very rich exercise in determining what the threshold may be for a fully human, fully dignified life:

- Life. Being able to live to the end of a human life of normal length; not dying prematurely or before one's life is so reduced as to be not worth living.
- Bodily health and integrity. Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter.
- Bodily integrity. Being able to move freely from place to place; being able to be secure against violent assault,

including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

- Senses, imagination, and thought. Being able to use the senses; being able to imagine, to think, and to reason — and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training; being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice (religious, literary, musical, etc); being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom or religious exercise; being able to have pleasurable experiences and to avoid nonbeneficial pain.
- Emotions. Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us; being able to grieve at their absence; in general, being able to love, to grieve, to experience longing, gratitude, and justified anger; not having one's emotional developing blighted by fear or anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development).
- Practical reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. (This entails protection for the liberty of conscience).
- Affiliation. (a) Being able to live for and in relation to others, to recognise and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship. (Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech.) (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. (This entails provisions of non-discrimination).
- Other species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
- Play. Being able to laugh. To play, to enjoy recreational activities.
- Control over one's environment. (a) Political: being able to participate effectively in political choices that govern one's life; having the rights of political participation, free speech, and freedom of association. (b) Material: being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.[39]

Nussbaum confirms that the list and the task are 'frankly' universalist and essentialist but importantly, it is asking us to focus on what is common to all human life rather than on the differences.[40]

It also gives us an opportunity in communities to put meat on the bones of self-determination. What does self-determination look and sound like to those people living in Aboriginal communities? And in reflecting on that, I am reminded of the ATSIC evaluation report when it audited its own programs and policies in 1995 to examine how it responded to the needs of Aboriginal women. The report revealed the unique and specialised way in which Aboriginal women express their rights. After eliciting from the Aboriginal and Torres Strait Islander women interviewed that they felt marginalised from ATSIC decision-making and policy design,[41] from decision-making on land rights excluded from the Native Title negotiations,[42] unsupported to pursue political and leadership aspirations,[43] the report asked women what ATSIC needed to do to support women:

- coin-operated washing machines in women's centres;
- recreation activities for the elderly in city gymnasiums;
- traditional birthing centres;
- sober centres;
- banning of drunkenness from all living areas in communities to make them safe places for women and children;
- vacation programs for communities so children could experience a holiday atmosphere; women assisting in the design of community houses;
- an increase of women's health programs such as pap smears, breast cancer awareness and pre- and post-natal education;
- parenting classes;
- advice on how to do job interviews and CVs and how to enter the workforce;

- market gardening; and
- adult education including numeracy and literacy.

And this is the kind of rich, detailed and textured response you get from women when you present them with a list of capabilities – of what they want to be and do as autonomous and dignified human beings. It provides a practical language that can be used by Aboriginal women to transpose what 'rights' mean in practice. If you give the list to Aboriginal men and Aboriginal women they will often come up with different answers. This reflects the uniqueness of the sexes; the biological difference between men and women. We need to embrace this because then it provides a more fully fleshed idea of what self-determination means. In the end, the framework may not be capabilities, but the idea is to see that a one-dimensional, state-centric idea of self-determination is unable to facilitate self-determination for Aboriginal men or women.

Conclusion

To conclude, the right to self-determination is an explicit goal of Aboriginal people – men and women – within Western liberal democracies. What I wanted to do tonight is start a conversation about how we can re-imagine the right to self-determination in a way that is less state-centric, less institutional and more inclusive of women. And that is the challenge that I lay down to our young Aboriginal and Torres Strait Islander students and academics: what is your solution? The framework that I have laid out is a framework that is consistent with Indigenous rights advocacy because the list embodies much of what self-determination is about: for example, control over one's environment, affiliation and especially being able to form a conception of the good and engage in critical reflection about the planning of one's life.

The benefit of Nussbaum's capabilities approach is that it has the practical value of translating capabilities into the vernacular of 'ordinary daily life', which Aboriginal women can use to capture and name what is happening to them on a daily basis. This approach can provide a benchmark from which to measure how the state and Aboriginal communities have provided the political and material support for Aboriginal women's capabilities. This process is crucial if human rights are to have any meaning and if people are going to benefit from their recognition. Otherwise – and this is the fundamental message of this Oration – how do we know if self-determination has been achieved? On this approach, the goal of self-determination is no longer what is best for the community, but rather it becomes more individualised based on capability and functioning: what is she actually able to do and to be? This is a more inclusive way of viewing self-determination and a more accurate way of addressing disadvantage.

But I conclude with a caution: so long as routine interpersonal violence continues in the daily life experience of Aboriginal women, they can never reach the threshold of what is required to live a dignified human life. Self-determination can never be achieved if half the population is left behind.

Thank you.

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1 This is reflected in the fact that the Expert Panel, while deciding not to make recommendations on sovereignty or treaty, devoted two chapters of its report to capture the opinions and thoughts and submissions of Aboriginal and Torres Strait Islander People on treaty, sovereignty and self-determination: see Expert Panel on the Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) <http://www.youmeunity.org.au>. For an excellent submission on treaty or agreement making please see the submission of Arthur Allens Robinson to the Expert Panel: Allens Arthur Robinson, Submission No 3447 to the Expert Panel on the Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 30 September 2011.

2 See, eg, *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Protections Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth); *Welfare Ordinance 1953* (Cth); *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qld); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aboriginal Affairs Act 1962* (SA); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *Native Welfare Act 1963* (WA); *Natives Administration Act 1905–1936*; *Aborigines Act 1890* (Vic); *Cape Barren Island Reserve Act 1912* (Tas).

3 Tim Rowse, 'The National Emergency and Indigenous

Jurisdictions' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007) 47. Rowse notes that when Aboriginal people are arguing for international human rights law they are in fact postulating 'a jurisdiction that is porous to the norms and laws of the wider world and riven with tension between sexes and generations that an appeal to a common identity can no longer and should no longer contain': at 52.

4 Gregory H Fox and Brad R Roth, 'Introduction: The Spread of Liberal Democracy and its Implications for International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000) 1. See also Susan Marks, 'International Law, Democracy, and the End of History' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000) 532.

5 Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

6 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

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