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Northern Territory Statehood and Constitutional protections: issues and implications for future Aboriginal governance

One of the dearest-held goals of Aboriginal people in the NT has been the protection of our rights in a constitution.

Since the days of the Bark Petition, Aboriginal people have been aware that the protection offered by legislation – ranging from the Aboriginal protection ordinances to the Land Rights Act – is only as secure as the government of the day.

We have long believed that the protection of our rights deserves a higher level of recognition and protection.

One of the watersheds in recent Aboriginal thinking about constitutional development and statehood was the 1998 statehood plebiscite.

Prior to the vote, the Kalkaringi Statement was developed by Central Australian Aboriginal representatives. After the plebiscite failed, Aboriginal representatives from the whole NT came together and endorsed the Kalkaringi Statement, and developed an action plan for constitutional recognition.

The bottom line is the discussion has always been the protection of our traditional rights. Aboriginal people have been clear that we are not opposed to statehood as such, but that we would oppose any move to statehood which did not take account of our unique position as the traditional owners of much of the NT, and recognise our continuing systems of law and governance.

In many ways, the 1998 plebiscite was an example of what not to do. It is hoped that the new Chief Minister's statehood agenda learns from those mistakes, and develops a participatory and consultative process which honours our core principles:

- Protection of traditional rights, particularly our land rights, and the fundamental tenet of informed consent to use of our land;
- Recognition and protection of our continuing law and systems of governance;
- Good government: equality of access, transparency, fair representation and opportunities for participation;
- Protection of our human and cultural rights: to education, health, safety, use of our languages, and religious practices.¹

These same principles can apply at a local and regional level to create genuine bicultural systems of governance which combine the best of both worlds.

¹ Kalkaringi Statement principles; Batchelor Indigenous Constitutional Convention outcomes, 1998

However the capacity to implement local and regional change without the structural or constitutional support is limited. Without genuine constitutional reform, we could end up with overburdened regional/local governments with no real power to deliver on the expectations and aspirations of our people.

Talk of Aboriginal governance then must involve both the big picture and the small. It must build on the strengths of our existing rights and systems, while incorporating the strengths of western models. This may sound hard to achieve, but if it can be achieved anywhere in Australia it is here, in the NT. It is our challenge – to ourselves as Aboriginal people and to our government – to make that happen.

Some years ago, my chairman, Galarrwuy Yunupingu, said: **“A Constitution should be about the rights of the people, not the powers of Government”**.

That is my message to you again today.

Let’s look at how that could be done in the NT.

Protection of traditional rights and recognition of Aboriginal law

The highest priority for a new constitution must be the protection of Aboriginal law, and the rights which flow from our law, including our land and sea rights.

The Bark Petition, forty years old this year, said in part:

... [T]he land in question has been hunting and food-gathering for the Yirrkala tribes from time immemorial; we were all born here. [P]laces sacred to the Yirrkala people as well as vital to their livelihood are in the excised land, especially Melville Bay. [T]he people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakia tribe will overtake them...²

The petition was followed several years later by the Blackburn case in the NT Supreme Court, where Yolngu people tried to convince the judge that they had a system of law and Government. Indeed Justice Blackburn found that they did have such a system. It’s just that he also said Yolngu weren’t entitled to use their own system. They had to live by another system. Justice Blackburn said:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim and influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in evidence before me³.

² Yirrkala Bark Petition, in Yunupinugu, G., (ed) *Our Land is Our Life*, University of Queensland Press, 1996, appendix 1, p. 211.

³ *Milirrpum v Nabalco* 1972-73 ALR 65; 1971 17 FLR 141

Although the Yolngu lost this case, its high profile led to the Whitlam Government appointing Justice Woodward in 1973 to inquire into how to recognise land rights. Woodward sat down and talked to Aboriginal people. He travelled around the country trying to learn about Aboriginal law and to understand our people and our culture.

When Woodward wrote his first report, he didn't make many recommendations, except that he wanted to set up the Northern and Central Land Councils to help him in his work. He said that he couldn't fulfil his task without the wisdom and advice of senior Aboriginal people. He needed us to tell him what Aboriginal law said. This is how the Land Councils were born, and this is how they still operate. In that first report, Woodward made some statements about what he had learnt from us:

The spiritual connection between a clan and its land involves both rights and duties. The rights are to the unrestricted use of its natural products; the duties are of a ceremonial kind – to tend the land by the performance of ritual dances, songs and ceremonies at proper times and places.⁴

It is these ongoing "rights and duties" to the land and sea, and to our own system of law, that a new NT constitution must recognise and protect. And it is the dynamic ongoing reality of that system of law which should be celebrated as the most unique aspect of the Territory.

Good Government and political participation

If the Northern Territory becomes a State, it will have a lot more powers than it currently has. States can generally make laws on anything unless their constitution specifically excludes it. This is why controls and limits on powers of the Government in the NT Constitution are important.

The Kalakaringi and Batchelor statements set out a number of key "governance" requirements which Aboriginal people endorsed as being critical to a proper constitution for the Northern Territory.

These include: Freedom of Information legislation, an independent electoral commission, a more representative electoral system, and a clear separation of powers between different arms of government.

The Martin Government has brought in Freedom of Information, and has commenced an inquiry into an independent electoral commission for the NT. These are important first steps.

However, the fact that there are still only four Aboriginal members of the NT Parliament is a sure sign that our system is not yet providing adequate representation.

⁴ Woodward, A.E. Aboriginal Land Rights Commission, First Report, AGPS, July 1973

But changing the electoral system is only part of the answer. This is because the problem with majority rules is that the majority often looks after its own interests and not those of smaller groups – this is why it is important that Indigenous rights are protected by writing them into the constitution, as well as changing the electoral system.

Human and Cultural Rights

One of the ideas behind constitutions is that every person has rights and freedoms. In Australia, the rights of citizens are not spelled out in the Commonwealth or state constitutions.

There is a growing view that we need our rights ought to be identified and protected, at least in part, in the constitution.

Other countries protect the rights of individuals in a bill or charter of rights. In the United States, minority interests are protected by protecting the rights of the individual, but not the group.

In Canada, the protection of group rights, including Indigenous rights, has been an important part of the constitutional process.

International law recognises a range of rights which are written down in declarations, conventions and treaties. They do not have the force of law unless the Australian government passes a law based on the treaty or convention such as the *Racial Discrimination Act 1975*.

There are certain rights which should be included in any bill of rights:

- Equality before the law
- Rights to property
- Freedom of thought, religion, speech and expression
- rights to adequate education and health
- the right to participate in the life of a society

There are two important rights which are included in the words that set up the United Nations. These are right to **self-determination** and the **right to equality and non-discrimination** which was put into law by the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1992* (NT).

A Northern Territory constitution must recognise, protect and enhance these rights.

However, the listing of rights is meaningless if they can not be enforced. Some ways to enforce these rights include:

- Power for courts to make decisions
- Through a Human Rights Commission
- Constitutional requirement that laws must be passed for the enforcement of human rights

Conclusion

As might be clear from this speech, and other statements the NLC has made in the past, I consider that the constitution is the most appropriate vehicle for protecting rights, particularly Aboriginal rights.

The nearest equivalent to our Aboriginal systems of law is the concept of a constitution. It is vital that our rights and interests are reflected and protected through an instrument of similar or equivalent force.

The lesson of many years of fighting to hang on to our statutory rights under the Land Rights and Native Title Acts has only strengthened our views on this critical matter.

In relation to Aboriginal governance in the NT, there is no way that the “operational” aspects can be expected to work well if the fundamental structures are not right.

Currently, our governance systems – black and white – barely recognise each other. Our law is ignored by the mainstream system most of the time.

How can a new generation of leaders grow up and become strong if the foundation of their authority is not recognised?

Perhaps the next great chapter in the history of our people will be the development of a unique and powerful NT Constitution.

The power will come from its recognition of both laws, and its success will come from the leaders that promote a new relationship between our peoples.