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原住民族的自決權*

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摘 要

民族自決的規範由原則到發展到成為權利，是否可以延伸適用到原住民族？我們先將回顧自決權的歷史發展，盤點國際規約中的民族自決條款，接著探索一些理論上的爭議，再來回顧『聯合國原住民族權利宣言』的發展，最後，在檢視原住「民族」的定義、以及原住民族自決權的內容之後，我們將以內部自決的侷限、及可能的新解作為結論。

關鍵詞：民族自決權、原住民族自決權、『聯合國原住民族權利宣言』

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> The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.
> ……
>
> Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the Charter. It requires as well a deeper understanding and respect for the rights of minorities and respect for the needs of the more vulnerable groups of society, . . .
>
> Boutros Boutros-Ghali（1992: paras. 17, 81）
>
> True partners however----whether in political, business, or personal relationships----must be free to enter, maintain, revise, or end their partnerships. Indigenous peoples seek nothing more, but also nothing less.
>
> Maivân Clech Lâm（2002: 21）
>
> 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.
>
> *United Nations Declaration on the Rights of Indigenous Peoples*（2007）
>
> 首先，從歷史觀點來說，台灣本來是「無主之島」，是一個「化外之地」，即使中國清朝的康熙皇帝也承認：「台灣自古不屬中國。」
>
> 自由時報（2000）

壹、民族自決權的發展

民族自決（national self-determination 或是 self-determination of peoples）是道德上的理念、也是政治上的原則、更是法律上的權利（圖 1），是指每一個民族（nation 或 people）都有資格要求擁有（entitled to）一個自己的國

家、決定自己的政府型態（也就是民主制度）；這種國家稱為民族國家[1]（nation-state），也就是期待、或渴望在理想上能達成文化民族（cultural nation）與政治國家的結合（political state）[2]，這種信念稱為民族主義（nationalism），而自決就是實踐的過程（Cobban, 1969: 13-14, chaps. 1-2, 6; Cassese, 1995: 5; Roepstorff, 2004: 7-8; Falk, 2002: 42）。Cobban（1969: 143）乾脆把自決解析為三個面向，民族是主體，民主則是程序，而主權才是目標，就實際的操作化而言，也就是民族想要有自己的主權獨立國家。

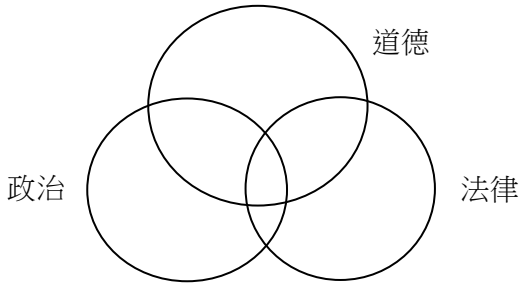

圖 1：民族自決的三個層面

民族自決理念的哲學基礎是自由、以及平等，起源於十八世紀後半葉，特別是在美國獨立戰爭、以及法國大革命之後，現代民主思潮衝擊專制王朝君權神授的正當性，人民（people）不再是任人擺佈的臣民（subject）、而是凝聚成擁有國家主權的民族（nation）：換句話說，國家締造的倡議由政府轉到人民的手上，也就是民族（Cobban, 1969: 40-41; Cassese, 1995: 11; Anaya, 2004: 98-99）。儘管這樣的理念後來因為拿破崙意欲建立帝國而變調，其他民族的集體意識已經無法壓制，進而在十九世紀中葉以後達到高潮，直到一次大戰，民族國家儼然是人民意志的最高政治表達（Cobban, 1969: 432）。

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1 借用 Jenne（2006: 9）的說法，就是「每個民族有自己的國家、每個國家有自己的民族」。

2 實際上，不只想要把文化民族變成政治國家，也要把政治國家變成文化民族；換句話說，民族國家的出現有兩種模式，除了民族想要肇建國家（中歐、東歐：德國、捷克、匈牙利），也有可能是由國家來塑造民族（美國、及西歐：英國、法國、葡萄牙、西班牙）（Cobban, 1969: 109-13, 118-21）。

在一次大戰期間，協約國[3]（Allied Powers）的美國與蘇聯競相以民族自決來號召弱小民族[4]，特別是威爾遜總統的『十四點計畫[5]』（*Fourteen Points, 1918*）將之納為戰後擘劃世界和平的原則之一，將民族自決與自由民主、以及民族主義結合，被支配的民族紛紛號召成立民族軍隊、組織民族政府，因此，戰後的巴黎和會只不過是順水接受既定的事實（Cobban, 1969: 55-56; Anaya, 2004: 99-100; Roepstorff, 2004: 8-9; Falk, 2002: 39）。由於戰勝國各有所圖，只有戰敗的奧匈帝國、及鄂圖曼土耳其帝國被解體，至於德國在非洲及太平洋的屬地則以託管名義被瓜分[6]。針對戰勝國的及雙重標準[7]，Cobban（1969: 73）直言，當強權覺得對自己有利的時候就會祭出自決原則，相對地，一旦發現不利就棄之如敝屣[8]。

儘管中、東歐的一些民族在一次戰後有幸成立自己的國家，然而，由於強權的言不由衷、為德不卒，這些中、小型國家裡頭的少數民族還是佔有相當程度的百分比，譬如捷克斯洛伐克（34.7%）、波蘭（30.4%）、以及羅馬尼亞（25%），為了保護這些少數民族，巴黎和會的作法是鼓勵簽

3 主要包含美國、英國、法國、俄羅斯、日本、以及義大利所組成，相對地，同盟國（Central Powers）包含德意志帝國、奧匈帝國、鄂圖曼帝國、以及保加利亞。

4 Cassese（1995: 14-23）認為，列寧只是把民族自決當作工具，認為被解放的民族可以促成社會主義革命；相對地，威爾遜強調的是人民主權與民主的層面，說好聽是人們不用繼續在強權的競逐中任人擺佈，實際上還是為了國際上的消費，嘴巴說說而已。事實上，同盟國也以民族自決來拉攏盟友，譬如日耳曼人支助愛爾蘭人、以及佛蘭德人（Flemish）於 1916 年在洛桑召開「民族會議」（Congress of Nationalities）（Jenne, 2006: 11）。

5 原文是：

> V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

6 譬如『凡爾賽條約』（*Treaty of Versailles, 1919*）將一些領土劃給捷克斯洛伐克、以及波蘭，並未舉辦公投（Cassese, 1995: 24-25）。

7 儘管捷克人、斯洛伐克人、以及波蘭人獲得自己的民族國家，幾百萬的日耳曼人被迫隸屬於捷克斯洛伐克、以及波蘭，而匈牙利人的大塊土地割給羅馬尼亞、以及捷克斯洛伐克（Jenne, 2006: 11）。

8 法國十八世紀末併入亞維農（Avignon）、薩伏伊（Savoy）、尼斯（Nice）、以及比利時之前，國會特別要求務必取得當地人民的首肯，實際上是判斷對於自己有利才允許公投自決（Cobban, 1969: 41; Cassese, 1995: 12）。

訂雙邊、或多邊的少數族群權利保障條約；己所不欲、勿施於人，這些國家心不甘、情不願，而『國際聯盟憲章』（*Covenant of the League of Nations, 1919*）又只提及殖民地的託管、及獨立，並未提及自決權[9]、當然也不會有起碼保障的機制，除非有人代為仗義執言；此時，希特勒高調替境外騷動的 1,000-1,200 萬日耳曼人出頭，民族自決淪為領土擴張的遮羞布（Cobban, 1969: chap. 5）。

根據 Sterio（2013: 9-10）的觀察，在一次大戰之前，任何民族只要有能耐脫離所謂的母國而獨立，其他的國家自然而然就會加以承認；戰後，民族自決的適用卻變成要看情況，原則反而成為特例。國際聯盟的具體作為大打折扣，除了心照不宣以扶植託管地（mandate）的獨立來支應，大體是以條約保障少數民族權利來交換民族自決權的實踐（Crawford, 2001: 14-15）。事實上到了 1930 年代，中、東歐各國的日耳曼、以及匈牙利少數族群不斷陳情，國際聯盟疲於奔命，相對地，背後沒有母國撐腰的猶太人、及羅姆人（Roma、舊稱吉普賽人）則任人宰割，那些保障少數族群的條約成為具文（Jenne, 2006: 12）。

自從十九世紀以來，這個道德層次的信念鼓舞了無數的民族運動者，一再被援引（invoked）作為獨立建國的依據，也影響了國際秩序的形塑；然而在實際上，抽象的指導原則往往會被國際政治權力運作的現實所左右，不管對象、地區、或範圍，並非所有的民族都被賦予（accorded, attributed）同等的自決機會，正義的伸張因此不免受到侷限；儘管如此，在二次大戰後的聯合國體制下，自決已經被確立為國際法所規範的權利，適用的範圍大為擴張，特別是在冷戰結束之後[10]（Falk, 2002: 39-50）。大體而言，我們可以將民族自決分為五波[11]：十九世紀的民族統一運動（德國、以及義大

9 美國總統威爾遜雖然提議加入民族自決原則，未被接受（Sterio, 2013: 10）。不過，第 23(b)條倒有這樣的文字，「undertake to secure just treatment of the native inhabitants of territories under their control」。

10 當然，面對強權捍衛現狀的保守態度，並不是所有學者都那麼樂觀，譬如 Simpson（1996: 35）就認為自決權的適用亂無章法，還是要看本身的武力、以及國際上的能見度。

11 Ronen（1979: chap. 2）將自決分為五種模式：十九世紀歐洲的民族自決、馬克斯主義的階級自決、一次戰後東歐的少數民族自決、二次戰後亞非國家的去殖民自決、以及 1960

利）、一次大戰後的民族獨立運動（中、東歐國家由奧匈帝國、以及鄂圖曼土耳其帝國獨立）、二次大戰後反西方殖民的民族解放運動（亞、非第三世界國家由西方國家獨立）、少數民族尋求由現有的國家分離（孟加拉）、或國家的裂解（南斯拉夫、蘇聯）、以及原住民族的自治運動。

那麼，民族自決的規範由原則到發展到成為權利，是否可以延伸適用到原住民族（舊酒新瓶）？如果『聯合國原住民族權利宣言』（*United Nations Declaration on the Rights of Indigenous Peoples, 2007*）是為原住民族另起爐灶、量身定做的新瓶新酒（即使只有局部）？在下面，我們先將盤點國際規約中的民族自決條款，接著探索一些理論上的爭議，再來回顧『聯合國原住民族權利宣言』的發展，最後，在檢視原住「民族」的定義、以及原住民族自決權的內容之後，我們將以內部自決的侷限、及可能的新解作為結論。

貳、國際規約中的民族自決條款

美國總統羅斯福與英國首相邱吉爾在二次大戰期間簽署『大西洋憲章』（*Atlantic Charter, 1941*），只委婉提及「領土變動必須取得住民自由意志下的同意」、及「尊重所有民族選擇政府形式的權利」[12]。同樣地，『聯合國憲章』（*Charter of the United Nations, 1945*）的宗旨雖然含混提到平等權以及民族自決的原則（principle of equal rights and self-determination of

年代中期以來世界各地的族群自決。Simpson（1996: 45-56）也認為在傳統的去殖民自決外，還有民族自決、民主自決、權力下放（自治）、以及分離。

12 原文是：

> Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
>
> Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;

事實上，邱吉爾在 8 月 14 日簽完『大西洋憲章』，不到一個月就反悔，他在 9 月 11 日於下議院表示，自決原則只適用於恢復被納粹佔領的國家，不適用於殖民地的獨立，特別是印度、以及緬甸等大英帝國內被殖民的民族（Cassese, 1995: 37）。

peoples）[13]，不過，也只能算是可欲的東西（desiderata）、畢竟還沒有到法律權利的層次，不像在第 2 條所盧列的主權平等、領土完整、政治獨立等原則那麼具體而有操作性[14]（Cassese, 1995: 38-43; Daes, 1993: 2; 2002: 8）。至於第 55 條再度提及民族自決的原則，其實是為了列舉聯合國推動穩定及福祉等所必須具備必要條件[15]。另外，『聯合國憲章』在其他兩個地方也間接提到自決權[16]，分別針對非自治領（non-self-governing territory）、以及國際託管體系（international trusteeship system），可以看出殖民主義的父權思維徘徊不去（Cristescu, 1981: paras. 23-24; Simpson, 1996: 39）。

聯合國在 1948 年通過『世界人權宣言』（*Universal Declaration of Human Rights, 1948*），作為未來進一步簽訂人權條約的基礎，自決權原本列入考慮，不過，由於各國代表在討論的過程對於用字沒有共識，因此最後還是沒有納入[17]（Roy, 2001: 7）。美、蘇陣營在 1960 年達成妥協，聯合

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13 在第 1 條有關於聯合國的宗旨：

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

卻立即在第 2 條做了限制：

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

14 放在第 1 條是抽象的宗旨，放在第 2 條則是聯合國必須採取的行動（Pomerance, 1982: 9）。美國對於西方殖民強權捍衛帝國的態度頗不以為然，然而，面對蘇聯的威脅，卻又不願意得罪盟邦，最後，才會出現『聯合國憲章』對於民族自決權的曖昧處理（Simpson, 1996: 38）。

15 原文是：

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

16 第 73 條(b)（to take due account of the political aspirations of the peoples）、以及 76(b)條（the freely expressed wishes of the peoples concerned）。

17 兩年後年，聯合國大會通過決議（*Draft International Covenant on Humans Rights and Measures of Implementation: Future Work of the Commission on Human Rights, 1950*），要求經濟及社會理事會（Economic and Social Council, ECOSOC）訓令人權委員會（Commission on Human Rights，現在改為人權理事會 Human Rights Council）草擬國際

國大會終於通過『許諾殖民地及民族獨立宣言』（*Declaration on the Granting of Independence to Colonial Countries and Peoples*），明文宣示「所有民族都有權利行使自決」（All peoples have the right to self-determination）[18]，用來補強『聯合國憲章』、以及『世界人權宣言』的不足[19]；然而，該宣言卻把對象限定於尚未取得獨立地位的「非自治領地」（Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence），而且限制不能破壞既有國家的民族團結（national unity）、或領土完整[20]。由於『許諾殖民地及民族獨立宣言』總共只有 7 條，竟然就有 3 項保留條款（safeguard clause），可見當時著眼的是歐洲國家所屬殖民地的獨立，把自決與獨立連結在一起，實質排除非傳統殖民地的適用（Roy, 2001: 21-22）。

經過蘇聯、及第三世界國家的堅持（Cassese, 1995: 47），聯合國對民族自決權的宣示在 6 年後獲得確認[21]，『國際公民暨政治權公約』

人權公約時要研究如何確保民族自決權（the right of peoples and nations to self-determination）。聯合國大會在 1952 年的決議（I*nclusion in the International Covenant or Covenants on Human Rights of an Article Relating to The Right of Peoples to Self-Determination*），除了確認自決權是基本人權，未來國際人權公約的民族自決條款「所有的民族應該都有自決權」（All peoples shall have the right of self-determination）已經成形。

18 原文是：

2. All 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.

19 根據 Daes（1993: 2），該宣言是政治性文件，法律效用多少是值得斟酌的。

20 原文是：

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

21 意思是說「許諾」（granting），相對之下，『聯合國憲章』只是誓言「推動」（promoting）（Roy, 2001: 7）。

（*International Covenant on Civil and Political Rights, 1996*）、以及『國際經濟、社會、暨文化權公約』（*International Covenant on Economic, Social and Cultural Rights, 1966*)共同在第 1 條第 1 款揭示「所有的民族都享有自決權」（All peoples have the right of self-determination），並在第 2 款賦予「所有民族可以自由處理其天然財富及資源」，又在第 3 款敦促簽約國「促成自決權的實現」，民族自決權終於修成正果[22]。

聯合國接著在 1970 年通過『國際友誼關係暨合作之國際法原則宣言』（*Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*），儘管訓示國家有義務尊重『聯合國憲章』所推崇的的民族自決原則[23]，卻依然將自決權的適用限縮於去殖民的情況，並且禁止以實踐自決為由破壞主權獨立國家的領土完整、或政治團結[24]。另外，歐洲安

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22 Article 1：

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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

23 Principle V, The Principle of Equal Rights and Self-Determination of Peoples (para. 1)：

By virtue of the principle of equal rights and self-determination of peoples enshrined in the *Charter of the United Nations*, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

24 Principle V, The Principle of Equal Rights and Self-Determination of Peoples (paras. 7-8)：

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as

全暨合作會議（Conference on Security and Cooperation in Europe）在 1975 年通過『赫爾辛基協定』（*Helsinki Accords*），也在第 8 原則也揭櫫平等權及民族自決權原則[25]。聯合國在 1993 年舉辦「維也納世界人權會議」，通過了『維也納宣言及行動綱領』（*Vienna Declaration and Programme of Action*），對於民族自決原則大致重複宣示上述保留條款的文字[26]。

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described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

不過，Sterio（2013: 12）指出，上述「領土上的政府是否能不分種族或是膚色而代表所人民」（a government representing the whole people belonging to the territory without distinction as to race, creed or colour），其實是例外條款，因此被解釋為可以拿來作為尋求獨立的依據。同樣地，Webb（2012: 81）也認為這是跨出去殖民的限制。

25 Principle 8, Equal Rights and Self-determination of Peoples：

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

26 原文是：

I.2. 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.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning

聯合國負責督導『國際公民暨政治權公約』人權事務委員會（Human Rights Committee）在 1994 年作出『第 12 號一般性解釋』（*General Comment 21*），指出自決權的重要性在於保障個人的人權所必要，因此兩公約此才會特別在開宗明義加以揭示[27]。然而，由戰後以來到冷戰結束，聯合國對於民族自決多般限制，特別是考量領土完整、領地現狀不變（*uti possidetis juris*）、以及國際和平與安全，作法稍嫌消極，一方面將自決等同於去殖民、另一方面則排除分離主義，具體而言，就是以將民族自決等同於少數族群權利的保障（包括自治）、或是民主參與（McCorquodale, 1996: 18-22; Simpson, 1996: 37, 43; Crawford, 2001: 24-26）。

參、理論上的爭議

儘管聯合國自始就限縮民族自決權的適用，然而，由於亞洲、以及非洲的殖民地在 1950-60 年代漸次獨立，一些少數族群在 1970 年代忽然領悟他們也可以算是「民族」（people），終於發現自決權的妙處；事實上，不少獨立運動者原本在冷戰時期訴諸馬克斯主義來進行動員，在後冷戰時期轉而採取民族自決權理念、高舉民族主義的大旗（Jenne, 2006: 13）。只不過，民族作為擁有自決權的主體（subject），兩公約及接續的宣言並未詳

Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

27 原文是：

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

述其定義、或是資格（who）[28]，同樣地，到底自決權的內涵（for what）、或範圍（what）為何，大家也沒有共識；至於自決權的正當性（why）、或是時機（when），也有待釐清（Daes, 1993: 3-4）。

不管是族群、或是民族[29]，除了成員共同具有在客觀上觀察得到的一些特徵，包括血緣、語言、宗教、或是其他文化，最重要的是彼此在主觀上是否有集體認同，否則，不管怎麼樣分類，頂多只是語言學、或人類學的範疇，往往是統治者為了方便支配的恣意送做堆，甚至於暗藏否定的玄機。事實上，只要被貶抑為族群，就只能要求反歧視、或平等，沒有資格尋求自決權的實踐。那麼，族群在什麼樣的條件下才可以提升為民族的地位？Cobban（1969: 107-108）斷言，是否為具有現代意義的民族，唯一的檢驗標準是主觀意願；也就是說，這個共同體的成員是否想要生活在同一個國家，否則，瑞士根本不可能建國（p. 27）。

然而在實務上，聯合國卻堅持將民族自決矮化為「殖民地的自決」（colonial self-determination），而且將殖民地限定為受到「鹽水殖民者」（saltwater colonist）統治的地方，也就是支配者必須遠渡重洋而來的才算殖民者[30]，說穿了，就是認為遭到西方白人殖民者才有自決權[31]；由於僵化

28 在聯合國大會、以及人權委員會的討論過程，西方國家認為自決只不過是原則、並非權利，而且自決原則太過於複雜、無法轉換為法律用語，更何況『聯合國憲章』並未規範託管地必須立即以自決來達成自治，因此反對放進來；相對地，亞洲及非洲國家則堅持自決權是最基本的人權、是享有其他人權的先決條件（Simpson, 1996: 40-41）。

29 民族可以是指比較嚴謹的 nation、也可以是指概括的 people，而兩個都是含混又歧義的概念。有些人主張將 nation 譯為「國族」，然而，如果依據德國歷史學家 Meinecke，nation 又可以分為 Kulturnationen（cultural nation 文化民族）、以及 Staatsnationen（state nation 國家民族、亦即透過國家所塑造的政治民族），豈不是要分別譯為文化國族、及國家國族？至於 people，比較鬆散的意思是人民、或人們（folk），其實就是指相對於權貴（privileged elites）的老百姓（common man），譬如「人民主權」（people's sovereignty 或 popular sovereignty）；而 people 的另一個意義則是 volk，其實就是指帶有共同血緣、或是文化上的 nation，也就是前述的文化民族（Wikipedia, 2017: People's Republic; Populism; Volk (German Word)）。相關的討論，請參考施正鋒（2015、2016）。

30 葡萄牙、西班牙、以及法國甚至於主張，他人所謂的殖民地並非真的是殖民地，而是宗主領土（metropolitan territory）完整的一部分。

31 至於西藏人（之於中國）、孟加拉人（之於巴基斯坦）、果亞人（之於印度）、西新幾內亞人（之於印尼）、厄利垂亞人（之於衣索比亞）、伊夫尼人（之於摩洛哥）、或是比亞法拉人（之於奈及利亞），即使再如何被欺凌也沒有資格，因為他們並非受到「異族」（＝歐洲人）支配，頂多只能算是一個國家內部的少數族群（Simpson, 1996: 44）。

的民族定義、及縮水的自決適用，難怪被譏為是「膚色的自決」（pigmentational self-determination）（Simpson, 1996: 44-45）。換句話說，要是沒有白人因為良心不安而撐腰，非白人殖民地（包括原住民族）的自決權是被否定的。

Kingsbury（2001: 88-89）將國際社會認為適格自決權的對象分為 5 類：非自治領地、國家未能履行義務照顧的政治地理個體、聯邦體制的解體、原有獨立國家被非法併吞後復國、以及各方經過協商後而願意適用的領土。Anaya（2004: 100-101）將當下對於自決權適用與否的看法歸納為三種，正面列舉（只限定適用於傳統的殖民地）、負面列舉（排除國家內部的群體）、以及適用於所有的少數民族（包含原住民族）（圖 2）：

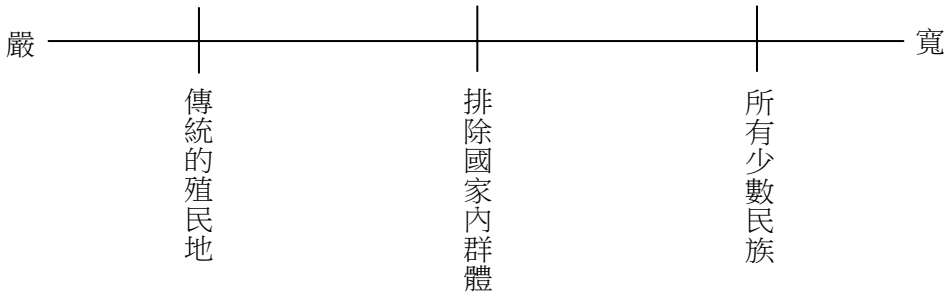

圖 2：適用自決權的主體

既然對象要適用於「所有民族」、又要限定在現有國家的框架之內，為了要兩全其美，這時候，只好將腦筋動到依據範疇（domain, sphere）分為傳統的外部自決、及新創的內部自決，也就是民族自決的適用變成內外有別（Barelli, 2011: 2）。對內而言，自決是用來拒絕專制的舊政權（ancien régime），意味著內部民主（internal democracy），對外而言，自決是用來對抗外來的強權，意味著外部解放（external liberation）（Cassese, 1995: 5-6; Daes, 1993: 4）。Roepstorff（2004: 17-21）進一步將外部自決分為獨立自主（不受外力介入內政）、反殖民解放（不接受異族統治）、及分離，而內部自決則可細分為民主、以及自治（圖 3）。

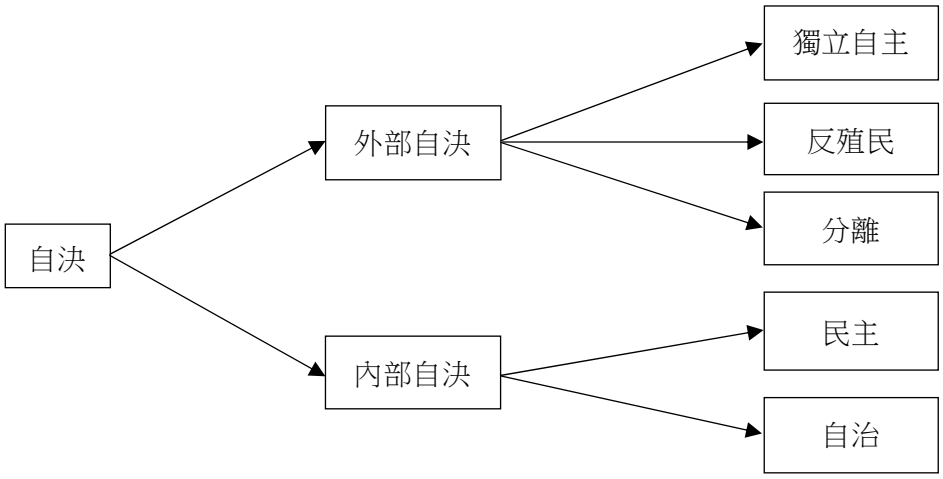

圖 3：自決權的分類

如果反殖民跟分離就是尋求法理上的（*de jure*）獨立建國，而獨立自主是還要追求實質上的（*de facto*）主權獨立，自治則是退而求其次的內部實踐方式，至於民主只能算是無魚蝦也好的自決形式。坦誠而言，如果只是限於內部自決，頂多也只有民主化的課題，那是便宜行事，畢竟，民主只是實踐自決的途徑之一（Roepstorff, 2004: 6）。話又說回來，如果觸及外部自決，少數民族多半會想要有自己的國家，現有的國家則擔憂是否會威脅領土的完整，而強權則會考量戰略、或經濟利益，未必會允許住民公投（Cassese, 1995: 25-26）。另外，如果同一塊土地有不同民族犬牙交錯般的混居，試圖採取領土劃分（partition）可能會有實務上的困難（Daes, 1993: 5）。

儘管聯合國大會在 1960 年通過『許諾殖民地及民族獨立宣言』，第二天卻又做出決議『聯合國憲章第 73 條 e 款規定的原則』（*Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, 1960*）特別點出，非自治領想要達成通盤自治（full measure of self-government）的方式，除了成為一個主權獨立國家，也可以選擇跟其他國家締結自由結合（free association）、或是採行合併（integration）。由這種進一步、退兩步的作法，我們可以看到聯合國對於民族自決權的實踐戒慎小心，唯恐裂解現有的國家（state-breaking）。

Buchanan（2017）從政治哲學的角度，將分離權（外部自決）的正當性分為基本權、以及修復式兩大類[32]（圖 4）：前者的依據是基本權利，可以視情況而選擇要求（claim）實踐，也就是只要有意願就可以片面逕行分離，不用再去找其他的理由；後者則是在某些必要條件下，在道德上有訴諸（invoke）自決的正當理由（justification），譬如在人權遭到嚴重侵犯的情況下，分離是不得已的修復手段。自決的基本權理論又可以分為歸屬（ascriptive）自決、及住民（plebiscitary）自決：前者是因為獨特的身分而來，尤其是民族，大體上就是指民族自決；後者則端賴一塊領地住民的意願，不管這些人是否已經構成一個獨特的民族，看多數人對於前途安排的決定是什麼。

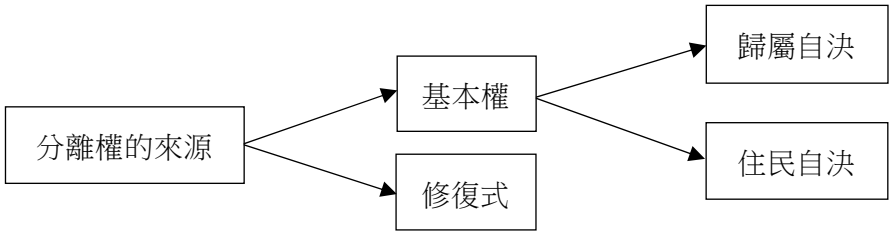

圖 4：外部自決的正當性

肆、『聯合國原住民族權利宣言』

有關於原住民族自決權的依據，除了由一般化的國際人權規約著手，包括國際公民暨政治權公約』、『國際經濟、社會、暨文化權公約』、以及區域性的人權規約，也可以從特殊化的原住民族專屬規約、或宣言切入，包括國際勞工組織（International Labour Organization, ILO）的『原住暨部落人口公約[33]』（*Indigenous and Tribal Populations Convention, 1957*）與『原

32 除了正當性，另一種切入自決權的途徑是考察其可欲性（desirability），也就是自決權的實踐可以帶來什麼好處（Buchanan, 1991: chap. 2; Bartkus, 1999: 15-18）。

33 本公約主要涉及原住民族的土地權，因此，各國政府不太願意承認（Webb, 2012: 83）。

住及部落民族公約』（*Indigenous and Tribal Peoples Convention, 1969*）、以及聯合國的『原住民族權利宣言』。

雖然國際勞工組織在 1989 年通過的『原住及部落民族公約』並沒有提到民族自決，倒也在前言承認原住民族渴望掌控自己的制度、生活方式、以及經濟發展，同時又能維持並發展自身的認同、語言、及宗教；只不過，後面加上了「他們所生活的國家框架之內」，狗尾續貂，可見是有侷限性的[34]。儘管聯合國大會在 1960 年通過的『許諾殖民地及民族獨立宣言』明言適用的對象包括「受到異族征服、支配、以及剝削的民族」[35]，然而，隨後的決議『聯合國憲章第 73 條 e 款規定的原則』（1960）卻又大踩煞車，一開頭就澄清有關於『聯合國憲章』第 11 章的宣示（非自治領）只適用於殖民地，也就是那些尚未十足達成自治的領地（Principle I），必須在地理上與統治的國家分隔（geographically separate）、而且在族群或文化上有所不同，似乎是認為原住民族並不是被異族所殖民的非自治領、因而加以排除[36]。

另外，根據『國際公民暨政治權公約任擇議定書』（*Optional Protocol to the International Covenant on Civil and Political Rights, 1966*），聯合國人權事務委員會只接受個別受害者針對第 2～26 條提訴[37]，至於第 1 條所規範

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34 原文是：

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, . . .

35 原文是：

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

36 Principle I :

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

Principle VI 寫得更清楚界定限於「a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.」。

37 Article 2：

Subject to the provisions of article 1, individuals who claim that any of their rights

的自決權屬於集體權[38]，因此不適用；面對這樣的盲點，議者建議原住民族援引第 26 條（基於種族差異的反歧視）、或是第 27 條（少數族群的文化權）的適法性（admissibility）（Charlesworth, 1998: 79-80; Evatt, 1998: 93-94; McCorquodale, 1996: 13; Lâm, 2004: 134-35）。人權事務委員會在 1994 年作出『第 23 號一般性解釋』（General Comment 21），認為少數族群權利保障的第 27 條適用於原住民族[39]；終究，人權事務委員會認為民族自決原則適用於原住民族[40]，並針對原住民族的處境，向加拿大、挪威、墨西哥等國循循善誘（Castellino & Gilbert, 2003: 170-71; Anaya, 2004: 112-13; Kingsbury, 2001: 78-87）。

聯合國經濟暨社會理事會（Economic and Social Council, ECOSOC）在 1982 年訓令人權委員會所屬防止歧視暨保護少數族群小組委員會（Sub-committee on Prevention of Discrimination and Protection of Minorities）成立原住人口工作小組（Working Group on Indigenous Population, WGIP），主要的工作之一是草擬『原住民族權利宣言』。自始，原住民族的代表就主張自決權是宣言的核心、堅決反對加上任何限制，否則，要是刻意分為「所

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enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

38 有關於集體權（collective rights、group rights），見 Kymlicka（1995）的討論。

39 原文是：

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

40 原文是：「The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, . . .」（Human Rights Committee, 1999: para. 7）。

有民族」、及「原住民族」，豈不就是雙重標準？草案經過十年的討論在 1993 年出爐，大致上是接受原住民族的建言；然而，儘管絕大多數的原住民族並未追求分離，大部分國家的代表對於草案有關於自決權的文字相當保留，擔心如果沒有加以任何限制，萬一原住民族弄假成真，日後可能會威脅到國家領土的完整（Barelli, 2011: 4-6; Pritchard, 1998: 45-46; Dodson, 1998: 64）。

防止歧視暨保護少數族群小組委員會在 1994 年把 WGIP 的草案往上呈遞，人權委員會發現各國的隱憂，因此另外成立一個原住民族權利宣言草擬工作小組（Working Group on the Draft Declaration on the Rights of Indigenous Peoples, WGDD），又花了十年來協商文字，自決權依然是每年會議的焦點[41]：一些國家強烈反對承認原住民族的自決權，另外一些國家則當和事佬表示願意加以承認，只不過建議能加上一段澄清的文字，強調領土完整、以及限定適用於自治，問題是，此舉無疑在實質上是將自決權等同於自治權，原住民族無法接受（Barelli, 2011: 7-9）。當宣言草案送進聯合國大會第三委員會討論時，非洲國家在美國、澳洲、加拿大、及紐西蘭的慫恿下，要求明確加入領土完整的原則，而最後的妥協是不要更動第 3 條的民族自決權文字，條件是必須在結尾的地方加上但書，也就是在第 46 條第 1 款東施效顰聯合國『國際友誼關係暨合作之國際法原則宣言』（1970），限制不得破壞主權獨立國家的領土完整、或政治團結[42]（Barelli, 2011: 10-11: Daes, 2008: 16-17）。

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41 相較於 WGIP 是由獨立專家主導，WGDD 的討論由各國代表支配，不只是過程冗長，原住民族參與也大打折扣；此外，由於工作小組的主席 Luis-Enrique Chávez（秘魯籍）曲意奉承奉承美、澳、紐、加等國，堅持採取共識決，因此，只要美國杯葛，就不會有共識，特別是卡在自決權；終究，聯合國大會在 2007 年通過宣言在，只有這四個國家反對（Lâm, 2004: 133; Webb, 2012: 85-86; Daes, 2008: 22）。

42 Article 46.1：

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

聯合國終於在 2007 年通過『原住民族權利宣言』，於第 3 條正式揭示「原住民族都享有自決權」（Indigenous peoples have the right to self-determination），幾乎是『國際公民暨政治權公約』及『國際經濟、社會、暨文化權公約』第 1 條「所有的民族都享有自決權」（All peoples have the right of self-determination）的翻版，而後面的「By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.」更是一模一樣。接下來要問的是：究竟誰是原住民族？又要如何來界定？原住民族自決權的內容為何？

伍、原住「民族」的定義

『聯合國憲章』雖然提到民族自決權，使用的字眼是 peoples、而非 nations，並未針對甚麼是民族作出定義。同樣地，『國際公民暨政治權公約』、及『國際經濟、社會、暨文化權公約』宣示所有的民族都有自決權，字字斟酌，刻意避開了 nation、選擇使用 people。國際勞工組織針對原住民族通過『原住暨部落人口公約』（1957）、以及『原住暨部落民族公約』（1989），前者用的是 Indigenous and Other Tribal and Semi-Tribal *Populations*，後者用的則是 Indigenous and Tribal *Peoples*；儘管兩者對於原住民族有類似的起碼的定義，而且後者還指出，不管法律上規定的地位如何，自我認定才是基本的（fundamental）條件，然而，卻特別澄清不要作太多的國際法聯想，也就是對自決權先做消毒[43]。

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43 『原住暨部落人口公約』Article 1：

1. This Convention applies to--

(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more

回顧聯合國在 1980 年代開始成立相關原住民族的機構（附錄 1），包括原住人口工作小組（Working Group on Indigenous *Populations*, 1982）、原住民族權利宣言草擬工作小組（Working Group on the Draft Declaration on the Rights of Indigenous *Peoples*, 1985）、原住人口基金（United Nations Voluntary Fund for Indigenous *Populations*, 1985）、原住民族人權特別報告人（Special Rapporteur on the Rights of Indigenous *Peoples*, 2001）、原住民議題常設論壇（Permanent Forum on Indigenous *Issues*, 2002）、以及原住民族權利專家機制（Expert Mechanism on the Rights of Indigenous *Peoples*, 2007），由此可以看出來，越是工作性質、或是層級較低的單位，不是 population（人口）、就是 issue（議題），頂多使用 people，避免使用 nation，斤斤計較，以免有自決權的弦外之音[44]。小組在『原住民族權利宣言』草擬的過程，甚至於連原住民族的英文用字應該是單數（people）、還是複數（peoples），就足足吵了二十多年（Calma, 2004）。

事實上，聯合國原住人口工作小組一開頭就對原住民族的定義有相當的討論，特別是客觀條件、以及主觀的意願，原本的期待是希望能有普世

in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

『原住暨部落民族公約』Article 1：

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

44 譬如 Dodson（1998: 62）就提到，當年原住人口工作小組稱為 population、不用 people，就是避諱跟民族自決權牽連在一起。

皆準的定義，不過爭議不斷[45]；最後，因為面對中國、印度、孟加拉、以及馬來西亞的壓力，結論是沒有必要特別做具體的定義，只在宣言草案明文「原住民族及個人有權隸屬原住民社群或民族[46]」就好，也就是強調自我定義、及反對國家強加定義（Pritchard, 1998: 43-44; Daes, 2008: 8-9, 12-13）。日後，聯合國原住民議題常設論壇針對原住民族這個概念研究，最後還是採取當年人權委員會所轄防止歧視暨保護少數族群小組委員會特別報告人 Martinez Cobo（1983）研究報告的工作定義[47]（附錄 2）：除了個人的主觀認同、以及具有集體意識，客觀條件包括共同的祖先、文化、語言、及居住地，尤其是與傳統領域（ancestral lands）的聯繫（Permanent Forum on Indigenous Issues, 2004: Daes, 2008: 10）。

在草擬『原住民族權利宣言』的過程，一些國家堅持原住民族不是民族、因此沒有自決權（Kingsbury, 2001: 88）。Nettheim（1988: 119）質問，難道原住民族不是民族（Are not indigenous peoples “peoples”?）? Kingsbury（2001: 88）直言，這根本是一個轉移焦點的假議題，充其量只不過是學者的掉書袋。而原住人口工作小組的主席 Daes（2008: 10-11）更指出，原住民族（indigenous peoples）跟民族（peoples）其實並沒有什麼不同，真的硬是要說彼此有何差異，應該是前者在當代民族國家建構的過程並未實踐過自決權。她特別澄清，如果對於原住民族概念有不一致、或是不精準的地方，並不是因為缺乏科學、或是法律上的分析，而是政府想要限制原住民族的權利，千方百計區隔原住民族與非自治領地；也因此，為了同時滿足精確度、以及限制性，定義自是刻意含糊其詞（p. 11）。

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45 譬如有些原住民族的代表被指控沒有原住民族身分，另外，也有一些政府堅稱他們國家境內沒有原住民族（Daes, 2008: 9）。

46 Article 9：

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

47 不過，Nettheim（1988: 119）指出，防止歧視暨保護少數族群小組委員會所關注的議題分為防止歧視、以及保護少數族群兩大類，Martinez Cobo 的報告比較偏向歧視的範疇、而非少數族群。

陸、原住民族自決權的內容

表面上看來，『原住民族權利宣言』似乎否定原住民族在常態下沒有脫離現有國家的權利，然而，在特別的情況下，也就是在族人的人權遭到嚴重戕害之際，是否可以訴諸修復式自決權、要求獨立建國？Barelli（2011: 12-13）指出，雖然現有的國際法並未明確規範原住民族有修復式自決權，而國家在實際上也因為政治考量很可能不會支持，不過，『國際友誼關係暨合作之國際法原則宣言』（1970）第 5 原則（The Principle of Equal Rights and Self-Determination of Peoples, para. 7）對於捍衛國家領土的完整、或政治團結的保護，並非無限上綱；也就是說，當這個國家不能遵守平等權及民族自決權、不能代表該領土上所有人民之際，就不能援引領土完整、或政治團結原則[48]。

另外，『原住民族權利宣言』第 46 條第 1 款雖然借用『國際友誼關係暨合作之國際法原則宣言』（1970）第 5 原則的文字，卻沒有上述的條件，是不是因此就實質排除了原住民族的修復式自決權？Barelli（2011: 14-15）認為未必如此，因為『原住民族權利宣言』在前言指出民族自決權的依據包括『聯合國憲章』、『國際公民暨政治權公約』、『國際經濟、社會、暨文化權公約』、以及『維也納宣言及行動綱領』（1993），而且後者完全留用『國際友誼關係暨合作之國際法原則宣言』的條件式文字，前言的位階自當高於條文，更何況第 46 條第 1 款並沒有明文否定原住民族的修復式自決權；只不過，在草擬宣言的過程，大家避談這種可能，留下未來進一步討論的空間。

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48 原文如下（斜體為筆者所加）：

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*.

有別於一般內部自決、以及外部自決的二分法，Anaya（2004: 103-10）從現象學（phenomenology）著手，將原住民族的自決權分為實質式（substantive）自決、以及修復式自決兩大類，而前者又分為構成式（constitutive）自決、以及持續式（ongoing）自決（圖 4）。構成式自決是指政治制度在建構的過程是否能起碼反映人民、或是民族的集體意志（will of the people），以保障他們的集體利益，特別是領土上國家的肇建、更易、或是擴張的那一剎那，就是是否透過參與、並獲得同意，換句話說，就是統治的正當性如何來確立；相對地，持續式自決則強調在政府運作的過程，人們是否能持續被允許做有意義的選擇，基本上就是採行民主政治、頂多再加上對於多元文化的尊重。Anaya（2004: 105-106）斬釘截鐵指出，『原住民族權利宣言』第 1 條所謂原住民族可以「自由決定他們的政治地位，自由追求他們的經濟、社會、及文化發展」（freely determine their political status and freely pursue their economic, social and cultural development），前者就是構成式自決、而後者則是持續式自決。

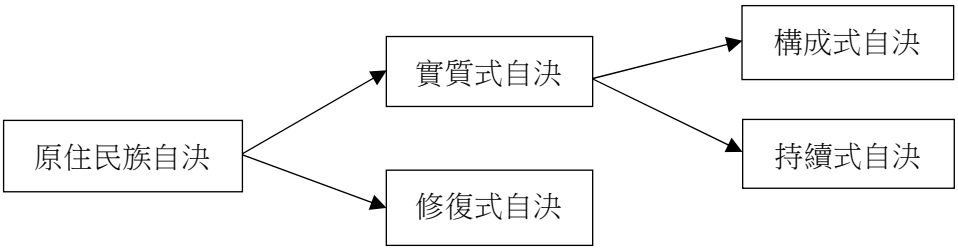


圖 4：原住民族自決權的種類

至於修復式自決，則是針對過去被侵犯的自決權所做的平反（redress），也就是尊重人民、或是民族的當下意願，決定是否改變目前被納入的現狀，特別是當實質自決權、以及基本人權被侵犯之際，姑且不論是否被認定是殖民地，被支配的原住民族有權利要求採取合宜的修復措施，包括跟現有的國家揮別（Anaya, 2004: 105-10）。由此可見，原住民族的自決權並不限於內部的範疇，在必要的時候也可以著手外部自決，也就是追求獨立。

整體而言，『原住民族權利宣言』所賦予原住民族的自決權，並沒有超越現有的國際法規範，也就是侷限於內部自決。然而，在全盤否定原住民族外部自決與斷然尋求獨立的光譜之間，是否有其他的選項？如果我們接受 Kymlicka（1998: 6-7, 30）的說法，原住民族並非放棄自決權，而是要國家對於原住民族其他權利保障的程度，暫時接受自治的安排，那麼，就持續式自決來看，可以包含哪些項目？Anaya（2004: chap. 4）就認為，原住民族自決權的實踐包含 5 個必要的成分：反歧視、文化權、土地資源權、社會福利及發展、以及自治與參與。由『原住民族權利宣言』的條文來看，至少包括自治權（第 4 條[49]）、參與權（第 18 條[50]）與同意權（第 19 條[51]）、以及土地權與資源權（第 25～26 條[52]）。表面上看來包山包海、俗又大碗，

[49] 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.

[50] Article 18：

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

[51] Article 19：

States shall consult and cooperate in 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.

[52] Article 25：

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26：

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

實際上是失焦，跟我們一般所理解的自決概念還是有所距離（Young, 2007: 42; Kingsbury, 2001: 98）。

如果把原住民族的自決權當作程序權，也就是民主參與的權利[53]，只能勉強算是次佳的選擇（Barelli, 2011: 14-15, 19）。當然，要是把原住民族自決的焦點放在自治的實踐，除了原則性的第 4 條，也可以把第 31～36 條都擴大解釋算進來（Pritchard, 1998: 49）（附錄 3）。只不過不管 autonomy、或 self-government，『原住民族權利宣言』相關條文的內容還是相當籠統，並沒有提及自治政府的領域、財政、或是司法等權限，而且政府很可能只拿身分隸屬就可以支應、而非原住民族所企盼的地域式安排（Kingsbury, 2001: 93）。如果自治是自決的特例，那還可以勉強接受；萬一把自治等同於自決，把特例當作常態，實際上是否決原住民族外部自決的可能，這是充滿種族主義的雙重標準（Daes, 2008: 15, 17）。

柒、內部自決的侷限與新解

儘管 Daes（2008: 8）認為自決是原住民族既有的（inherent, pre-existing）權利，然而，『原住民族權利宣言』並沒有說原住民族可以分離、也沒有說不可以。我們大體可以看到，國際社會擔心實務上會造成「國滿為患」，因此對於民族自決權適用的態度是大打折扣，也就是限於傳統亞非洲的殖民地，對於一般多元族群國家的少數民族有所忌諱，更不用說墾殖國家的原住民族。問題是，既然所有民族都有自決權，為何獨排原住民族？第一種不適格的說法是原住民族根本不是民族，第二種是即使算是民族，嚴格來說，不是真正被殖民的民族。

如果回到殖民的定義被異族征服、支配、壓榨，原住民族幾百年來被墾殖者欺凌，即使不能算是典型的外來殖民統治，至少也是內部殖民吧（Daes, 2008: 25; Tully, 2000: 37）？希伯來大學的國際法教授 Pomerance

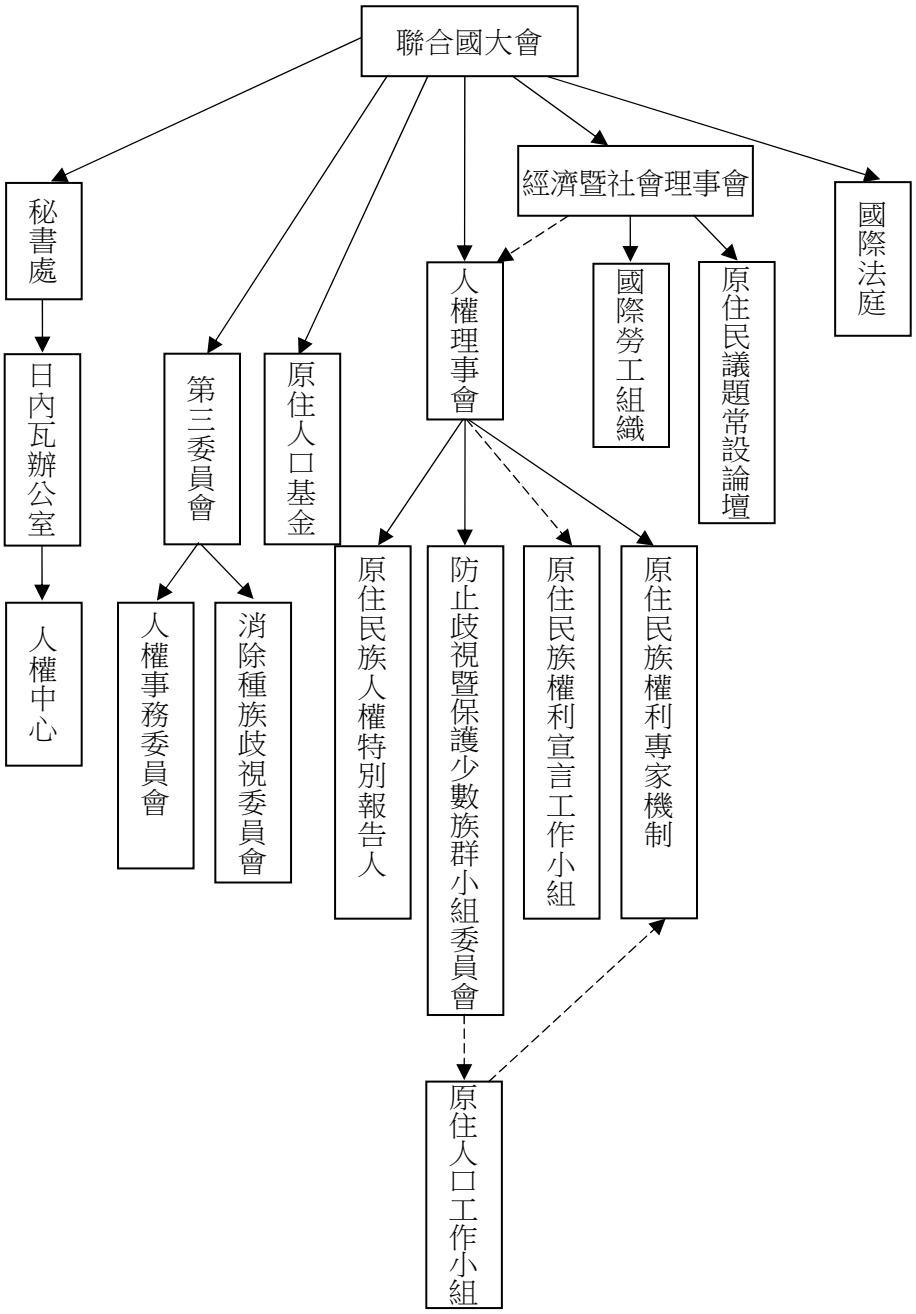
53 聯合國原住民族權利專家機制（Expert Mechanism on the Rights of Indigenous Peoples, 2010: para. 5）指出，參與決策的原則跟原住民族的自決權有明顯的關係。

（1982: 15）不禁搖頭：在一次大戰後，強權會說，「你們不是民族、只是少數族群，所以沒有自決權」；現在則換了另一套說法，「你們不是真的被殖民、或是異族統治，而是一種非殖民狀態」，所以不適用。悲哀的是，即使由分離（獨立）限縮到自治（自主）、民主（參與），甚至於基本人權的保障，依然要看人臉色、仰人鼻息[54]。

Young（2007）主張，傳統的自決觀點對自由的詮釋是免除於他人的介入（noninterference），而實務的操作是透過分離（獨立）來確保主權（國家），她認為在這相互倚賴的社會，應該改弦更張為非支配（nondomination），也就是不接受外人恣意頤指氣使；在這樣的理解下，原住民族為了實踐自決權，應該是與非原住民族建立關係，透過特定的制度（聯邦制）來達成自主，她稱為關係性的自決[55]（relational self-determination）。誠如 Daes（1993: 8-9）所言，原住民族從未參與家的肇建，墾殖國有必要從事「遲來的國家建構」（belated state-building）。只不過，這樣的新解與 Anaya（2004）的構成式自決，並沒有多大差別；至於持續協商來建立關係，恐怕也是淡化灌水吧（Castellino & Gilbert, 2003: 174）？

54 Lâm（2002: 143）的用字是「good or bad will」，輕描淡寫。
55 參見 Kingsbury（2000）、Lino（2010）。

附錄 1：聯合國有關原住民族權利的機構



說明：原住人口工作小組為原住民族權利專家機制取代，原住民族權利宣言工作小組功成身退。

附錄 2：Martinez Cobo 的原住民族定義[56]

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

380. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:
   a) Occupation of ancestral lands, or at least of part of them;
   b) Common ancestry with the original occupants of these lands;
   c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
   d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
   e) Residence on certain parts of the country, or in certain regions of the world;
   f) Other relevant factors.

381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

382. This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference".

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[56] Martinez Cobo（1983: paras. 379-82）。

附錄 3：『聯合國原住民族權利宣言』有關於自治權的條文

Article 31.1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32.1. peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33.1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

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 the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35. Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36.1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

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The Right to Self-Determination of the Indigenous Peoples

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Abstract

In this article, we endeavor to understand whether the norm of national self-determination, evolving from principle to right, can be extended to Indigenous Peoples. We shall start with the historical development of right to self-determination followed by an inventory of relevant regulations in international conventions. After exploring some theoretical controversies, we will examine the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, we will probe the concept of Indigenous "People" and the content of Indigenous right to self-determination. Conclusions will be on the limitation of internal self-determination, and the possibility of fresh interpretations.

Keywords: right to national self-determination, indigenous self-determination, *United Nations Declaration on the Rights of Indigenous Peoples*