

A Critical Reading of the Declaration on the Rights of Indigenous Peoples

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Introduction

Indigenous populations around the world are often amongst the least well-off citizens within a nation. In Australia, in 2006 the unemployment rate amongst the Indigenous population was 15.6% or three times higher than the rest of the population;¹ in Canada, ‘Just about 27 per cent of the First Nations population between 15 and 44 years of age hold a post-secondary certificate, diploma or degree, compared with 46 per cent of the Canadian population within the same age group’;² in the United States:

Native Americans and Alaska Natives have higher death rates than other Americans from tuberculosis (600 per cent higher), alcoholism (510 per cent higher), motor vehicle crashes (229 per cent higher), diabetes (189 per cent higher), unintentional injuries (152 per cent higher), homicide (61 per cent higher) and suicide (62 per cent higher).³

And in New Zealand, ‘Maori account for 40 per cent of all convictions in the courts and 50 per cent of the prison population ... Maori life expectancy is nearly 10 years lower than non-Maori.’⁴ These are but a few key indicators in which Indigenous populations suffer in comparison to the (generally) majority populations in their countries of origin. Furthermore, as will be noted with regard to the Northern Territory Intervention and Native Title policy, Indigenous rights (at least in Australia), appear to be far more tenuous and less equal than those of their ‘mainstream’ counterparts. The circumstances of Indigenous populations have gradually garnered worldwide attention and concern, especially in post-colonial nations such as those listed above, where colonies were never removed and Indigenous populations instead had to adjust to the new presence in the land.

This gradual shift in consciousness has resulted in a push to ensure that Indigenous people are extended, and are able to utilise, their natural and inalienable human rights. The United Nations Declaration on the Rights of Indigenous Peoples (2007) (the Declaration) is one of the international instruments that has arisen from this shift. It may be considered to be the pinnacle of the rights framework with regard to Indigenous populations.⁵ However, this article will argue that the Declaration is highly symbolic but fundamentally deeply flawed. The fact that Indigenous people are forced to utilise the rights dialogue and framework to engage with the State is ultimately implicitly assimilationist, as it is an inherently biased system which fails to recognise that different cultures value rights in different ways, and is centred on individual rights which don’t recognise the encompassing connection between Indigenous populations and the land. Indigenous populations are only ever able to interact with the State in the State’s language and on the State’s terms, and will only

¹ Department of Economic and Social Affairs, State of the World’s Indigenous Peoples, UN Doc ST/ESA/328 (2009) 23.

² Ibid, [24].

³ Ibid, [25].

⁴ Ibid, [26].

⁵ Jérémie Gilbert, ‘Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 14 International Journal on Minority and Groups Rights, 230.

ever receive what the State is prepared for them to have, not what is a reflection of their true connection with each other and the land.

The flaws mean that in its current incarnation, the Declaration, and the rights framework it expresses and represents, have not and are not likely to achieve significant gains for Indigenous populations. Exploring the reasons for this, and presenting a critique of the Declaration as a result, will form the substance of this article. The article will critique the Declaration by largely using examples of the attempts by Australian Aboriginal populations to access the rights framework.

Part II examines the history of the Declaration. Part III will examine the development of human rights. Part IV presents a criticism of the inherent white Western bias within a rights framework such as the Declaration, and argues that this bias makes it unsuitable for use by Indigenous communities. Part V is an examination of the failure of rights with regard to Indigenous populations in Australia, thus asking how the Declaration, being based on rights, can truly be of use to these same Indigenous populations. Part VI will examine other methods of creating an effective Indigenous-State discourse, both individually, and then collectively in order to determine whether there are gaps all three note within the framework as it currently exists.

A brief history of the Declaration

The United Nations Working Group on Indigenous Populations (WGIP) was the result of a Guatemalan lawyer working for the UN, Augusto Willemsen Diaz, who ‘argued that the problems facing Indigenous peoples should be studied separately from issues of racial discrimination. He also wanted to disassociate Indigenous questions from the issue of minority rights’.⁶ It was established in 1982,⁷ as a subsidiary to the Sub-Commission on the Promotion and Protection of Human Rights. Muehlebach states that it is a unique international forum in that has ‘enabled such a large and diverse group of activists and their organizations to fully articulate their problems on a regular, that is, yearly, basis, and to voice their opinion on how these problems should be solved.’⁸ It perhaps as a result of this, and the fact that Indigenous voices are heard to such an extent, that the Declaration was able to be conceived.

In 1985 the WGIP decided to draft the Declaration for adoption by the General Assembly.⁹ The WGIP was ‘constituted by independent experts, as opposed to government experts’,¹⁰ and this lack of State involvement in the initial stages of the drafting process created problems later for the close-to-final product produced by the working group, as when States did eventually become involved, their dissatisfaction with the draft and subsequent demands for a reworking of it caused significant delays.¹¹ This provides for an interesting perspective on State-Indigenous interactions and discourse. The resulting structural bias and power (im)balance inherent in the process that eventually led to the adoption of a final Declaration is something that will be explored later.

In 1988, a first draft by the original WGIP was completed ‘which substantially reflected proposals submitted by Indigenous peoples’ representatives’.¹² A final draft was completed in 1993 after much discussion of the initial draft by the Working Group.¹³ In 1994, the Sub-Commission on the

⁶ Douglas Sanders, ‘UN Working Group in Indigenous Populations’ (1989) 11(3) *Human Rights Quarterly*, 406.

⁷ Economic and Social Council, *Report of the Working Group on Indigenous Populations*, 51st sess, Agenda Item 7, UN Doc E/CN.4/Sub.2/1999/19 (12 August 1999) [1].

⁸ Andrea Muehlebach, ‘“Making Place” at the United Nations: Indigenous Cultural Politics at the U.N. Working Group on Indigenous Populations’ (2001) 16(3) *Cultural Anthropology*, 415.

⁹ S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 55.

¹⁰ *Ibid.*, [56].

¹¹ *Ibid.*

¹² *Ibid.*, [55].

¹³ *Ibid.*

Prevention of Discrimination and Protection of Minorities adopted the draft Declaration and submitted it to the Commission on Human Rights.¹⁴

In 1995, the Commission on Human Rights established its own Working Group to consider the draft Declaration.¹⁵ This Working Group was made-up of member States to the Commission, and separate arrangements were made for Indigenous participation in the process.¹⁶ After 11 years of negotiation, a new draft Declaration was adopted by the Human Rights Council (the replacement for the Commission on Human Rights) and submitted to the UN in 1996.¹⁷ Adoption of the Declaration took another year as African States, who had not been heavily involved in the process until this point, began to realise that the Declaration would apply to them. The delay was a result of further negotiations involving these African States.¹⁸

The Declaration was adopted on September 13, 2007, through General Assembly Resolution 61/295. Australia was one of the countries (along with Canada, New Zealand and the United States) to vote against the 2007 Declaration.¹⁹ The lack of support arose out of concerns surrounding the issue of self-determination, as Australia ‘did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government.’²⁰ With a change of government in 2009, Australia eventually decided to support the Declaration.²¹

As rights are the foundation on which the Declaration is based it is necessary to explore inherent biases that exist as a result of the history of rights and the subsequent framework that was developed. This alters the ‘meanings’ that may be attached different rights, which, it is argued, changes based on one’s perspective. This will form the substance of the following Part.

The development of human rights

A link can be seen between the development of human rights and the contexts of war or conflict, in, or primarily involving, North American and Western European countries.²² Examples of these, from the earlier points in history onward, include: the Magna Carta being forced onto King John by his feudal barons, which required him to accept that ‘men’ were entitled to certain liberties; the French Revolution (out of which resulted the Declaration of Rights); the American Revolution (out of which resulted the Bill of Rights); World War I (out of which resulted the League of Nations); and World War II (out of which resulted the United Nations and ultimately the Universal Declaration of Human Rights).

Against this backdrop (and there may be an element of ‘the chicken or the egg?’ here) many influential philosophical rights discourses arose from the theorists who originated in North America or Western Europe. Examples include Thomas Aquinas,²³ Immanuel Kant,²⁴ and Dworkin.²⁵ These theorists, respectively, demonstrate a shift in rights theories over time, from one of the original

¹⁴ Ibid.

¹⁵ Ibid, [56].

¹⁶ Ibid.

¹⁷ S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 56.

¹⁸ Ibid, [56-57].

¹⁹ Ibid, [57].

²⁰ ‘General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights For All, Says President’ (Media Release, GA/10612, 13 November 2007).

²¹ S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 57.

²² Heiner Bielefeld, ‘“Western” Versus “Islamic” Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights’ (2000) 28(1) *Political Theory*, 92.

²³ Denis Meyerson, *International Law* (Routledge-Cavendish, 2007) 35.

²⁴ Ibid, [124].

²⁵ Ibid, [122].

theories whereby rights exist due to God's greater plan, through to the theory of rights by virtue of our very humanity, to the theory of rights as a result of structures of governance. It should be noted that there are numerous other theorists and theories, but discussions of rights theories constitute whole articles in their own rights, and that is not, strictly speaking, the intention here.

At the same time as the development of human rights discourse as a result of war, there was ongoing conflict or conquest primarily (or entirely) by white men against Indigenous populations: America was engaged in both outright and more insidious forms of warfare against Native Americans (whilst importing and using African slaves); Britain had colonies in places including Sudan, Sierra Leone, Kenya, Nigeria, India, Burma, New Zealand and Australia; and France had colonies in places including Senegal, Algeria, parts of what is now Vietnam and parts of what are now Syria and Lebanon. Decolonisation for a majority of these nations did not start to occur until after World War II, and indeed for places such as America, Australia and New Zealand, did not occur at all.

Inherent bias within the current rights framework

The decolonisation process occurred around the same time as the 'world-wide' rights discussion bore some fruit from its slow and gradual growth over the previous centuries (the Universal Declaration of Human Rights). However, the process of decolonisation and a 'universal' human rights discourse were quite separate. Where, after all, were the Australian Aboriginal representatives at the discussion on drafting the Universal Declaration? Where were the Maori, the Native Americans, the Algerian, the Sudanese, the Kenyan representatives? The drafters were in fact from Lebanon, China, USSR, France, United Kingdom, Chile, and non-Indigenous representatives from Australia, Canada and the US. The reasons for decolonisation are complex, but they did not include anything more than lip-service to human rights as a consideration. It can be seen from the above that when human rights were being discussed, they were not really meant to include Indigenous 'natives'. Or, they were, but only as a 'benevolent' and patriarchal father extends small liberties to his teenage daughter in an attempt to keep her happy and complacent (and non-rebellious).

Even now, it is difficult to say that Indigenous populations, having been excluded from the rights framework for so long, are willing to use the language of rights. The reality is probably significantly closer to Satre's interpretation of the feelings of native populations with regard to their colonists (even in the post-colonial era), 'By and large, what they were saying was this: "You are making us into monstrosities; your humanism claims we are at one with the rest of humanity but your racist methods set us apart".'²⁶ Kirk supports this, arguing that 'For large periods of human history it has not been at all obvious that all human beings possess innate rights to life and liberty.'²⁷

The consequence of human rights history then is this – human rights are a construct, an artefact, which are inimitably linked to white Western culture. It is not the language that most Indigenous populations would naturally utilise to express their hopes, needs and desires to their colonisers. Indeed, to insist upon the rights dialogue as it currently exists is to unavoidably suppress any native dialogue Indigenous populations may choose to express themselves in. Rights are a human creation, but they are a creation by a very limited group of people, and representative of very few cultures.

Human rights as a white Western construct has consequences for the reading of rights in international texts. However, although it is argued that the dialogue of rights is incompatible with justice for Indigenous populations – like trying to put a square peg in a round hole – it is currently the only real system available for any kind of discussion on this issue. Therefore, it is necessary to examine rights from the internal aspect as well – what rights actually mean for various interested parties within the

²⁶ Jean-Paul Satre in Frantz Fanon, *The Wretched of the Earth* (Présence Africaine, 1961) 8.

²⁷ Andrew J. Kirk, 'Is the Concept of Human Rights a 'nonsense on stilts'?' (2011) 3(2) *Baptistic Theologies*, 108.

rights framework as it currently exists. The creation of ‘universal’ rights occurred only in certain cultures and was then assumed to extend to all of humanity, creating an inherent bias within the rights system as a whole. It will be discussed below that a consequence of being within the rights system is that a population (unless they are primarily white Western males, and to a lesser extent, females) will then be constantly and consistently subject to this bias.

State sovereignty (enforceability)

Different rights instruments confer different obligations on States who are a party to them. State sovereignty, or the ultimate power of a State to involve itself (or not) with a particular instrument, plays a primary role in determining which instruments and obligations a State is bound by and its citizens receive the protection of.

The type of instrument that is created is of importance. For example, United Nations Declarations represent ‘aspirational’ goals rather than binding law.²⁸ This is in comparison to international Conventions which, once signed and ratified, place obligations on States to translate the international instrument into domestic legislation, and to abide by its requirements.²⁹ There are two points that may be taken away from this. The first is that an argument could be made that the creation of one kind of instrument over another (for example, creating a Declaration rather than a Convention) is recognition by international bodies of the (un)likelihood of States choosing to be bound by a particular instrument. In reference to the Declaration that is the subject of this article, it is arguable that the international community recognised that States would not willingly choose to be bound by an instrument that placed specific obligations on them with regard to their treatment of their Indigenous populations.³⁰ And so the less powerful Declaration was chosen instead. Secondly, it highlights the ability of States to choose whether or not to involve themselves with a particular instrument, whatever form it takes.

International instruments also often contain provisions, which are similar to Article 46(1) of the Declaration,³¹ and which ultimately recognise State sovereignty as the final trump card. It should be noted, as Anaya states, that Indigenous representatives were not pleased with this addition, but were faced with the prospect of not achieving the Declaration at all or only achieving it in this restricted form.³²

Finally, there is no distinct mechanism within the Declaration that may be utilised by Indigenous populations for recourse against the State.

²⁸ United Nations, *Declaration on the Rights of Indigenous Peoples*, United Nations

<http://www.un.org/en/events/Indigenousday/pdf/FAQsIndigenousdeclaration_FINAL.pdf>;

Jerome J. Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20(2) *Human Rights Quarterly*, 204.

²⁹ United Nations Population Fund, *FAQs on Human Rights*, UNFPA

<http://www.unfpa.org/derechos/preguntas_eng.htm>.

³⁰ ‘the federal government’s indignant response to the report is to be noted as it signals an emerging resentment towards external monitoring of human rights standards... We are not, the government asserted, bound by the United Nations... I would assert that it is precisely because our domestic arena contains so few avenues of rights protection that we will need to rely on the developing norms and standards of international law in order to hold governments accountable for their actions.’

Larissa Behrendt, ‘The Relevance of the Rights Agenda in the Age of Practical Reconciliation’ in Hunter and Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Aldershot: Aldgate, 2005) 137, 148.

³¹ ‘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.’

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/Res/61/295 (13 September 2007).

³² S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 57.

This is not to say that there are not consequences when a State fails to adhere to international obligations, such as Turkey being prohibited by joining the European Union as a result of its poor human rights record.³³ However, they are ultimately external criticisms that may or may not change the reality for the affected populations. For example, whilst Turkey appears to be making some changes in order to improve its human rights record (such as banning the death penalty),³⁴ Australia has ignored a number of Human Rights Committee's judgements but has suffered no consequences as a result.³⁵ Consequently, the Declaration, as a rights instrument, is distinctly lacking in the necessary kind of power Indigenous populations need to achieve substantial and lasting change. There is no obligation to create binding domestic legislation that might be of some use, and it can be ignored by the State with no adverse consequences.

State sovereignty is partly a reflection of the classification of different types of rights, in that the type of rights that form the basis of international law are recognised to be the sort that do not impinge on this sovereignty. That is, as will be explored later, they are not 'legal' rights. As Shestack notes, "rights" is a chameleon-like term that can describe a variety of legal relationships.³⁶ Fundamentally, it is necessary to understand that there *are* different types of rights, because lacking this understanding may lead to the conclusion that all rights are inherently enforceable. Certain types of rights are significantly more enforceable than others, and it is important to understand the differences between them before attempting to forge a tool that is actually of some use. It is also important therefore to understand the meanings that may be attached to the different types of rights, as this helps us to understand the bases of their enforceability. Shestack notes:

*Understanding the nature of the 'right' involved can help clarify one's consideration of the degree of protection available, the nature of derogations or exceptions, the priorities to be afforded to various rights, the question of the hierarchical relationships in a series of rights, the question of whether rights trump competing claims based on cultural rooting, and similar problems.*³⁷

The three types of rights that are considered to arch broadly over all other rights, and thus are relevant to this discussion, are moral, legal and human rights.³⁸

The difference between Legal, Moral and Human rights

Legal rights, in the context discussed here, are the exclusive domain of domestic law. They are the foundations on which a country is ordered, and are a distinct reflection of that country's cultural influencing factors. More importantly, they are the rights that directly impact on the individuals within a State. Legal rights (and obligations) are a reflection of the interactions between different individuals and the State, codified into governing law and extended to the citizens of a State (discussions of the ability to access rights/participate in the legal structure of a State aside).³⁹

³³ Helena Smith, 'Human Rights Record haunts Turkey's EU Ambitions', *The Guardian* (online) 13 December 2004 <<http://www.guardian.co.uk/world/2004/dec/13/eu.turkey1>>.

³⁴ *Ibid.*

³⁵ Michael Walton, "Are we listening to the United Nations? Australia and the UN Human Rights Committee" (2003) 12(3) *Human Rights Defender* 20.

³⁶ Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20(2) *Human Rights Quarterly*, 203.

³⁷ *Ibid.*, [204].

³⁸ Costas Douzinas, 'What Are Human Rights?', *The Guardian* (online), 18 March 2009 <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/mar/18/human-rights-asylum>>.

³⁹ Costas Douzinas, 'Identity, Recognition, Rights or What can Hegel Teach us about Human Rights?' (2002) 29(3) *Journal of Law and Society*, 382.

However, they are the rights that least relevant to the context of this article, because they are the type of rights, perhaps, for which the Declaration is aiming, but has not yet reached. That is, the rights are not directly applicable to the State and Indigenous parties, with the resulting respective *enforceable* obligations and benefits.

There are a number of theories about the origin of moral rights. Most rights theories seem to agree that they are a result of natural rights, or rights that should be extended to humans as a result of their humanity.⁴⁰ They are the parents of the other forms of rights.⁴¹ However, and this is a crucial point, moral rights have no legal standing/binding force, they are, as they stand, normative. Meryerson observes that:

*It is obvious that we enjoy legal rights. Legal rights are those rights, enforceable through the courts, which are granted us by statute, common law and constitutional provisions. But do we enjoy moral rights against the government? Such rights – if they exist – are claims which we are justified in making regardless of whether the legal system recognises these claims and even if it denies them. They therefore serve as the basis for criticising governments which fail to respect them.*⁴²

The consequence of this discussion on moral rights is that they form the basis of human rights, and thus this lack of enforceability also extends to a large degree to human rights.

The above two types of rights both feed in to human rights, which fall between them, although they fall far more heavily on the side of moral rights. Human rights are classified by Shestack as ‘a set of moral principles and their justification lies in the province of moral philosophy.’⁴³ Due to their place in international law, under which States are ‘bound’ by some international instruments and customary international law, they provide avenues for recourse in certain situations. However, with instruments such as the Declaration, the opposite is true – Declarations have no real binding force and thus no force as a law. It can generally be assumed that human rights, in the true international sense of the world, are essentially unenforceable against the State.

In summary, the classification of rights under these three broad headings demonstrates that human and moral rights, which constitute the Declaration, are amongst the least powerful rights for achieving change. Furthermore, there is likely to be significant disparity between the belief of Indigenous communities with regard to how powerful the Declaration is going to be as a tool for their use and the reality of the State acceding to this. The consequence of this is that with regard to human rights instruments more generally, and the Declaration in particular, Indigenous communities are likely to attempt to utilise these as legal tools to force the State into initiating changes to improve any number of issues currently afflicting the communities. The State is likely to see these instruments as unenforceable, with few negative consequences to them if there is a general failure to improve conditions for their Indigenous citizens. The consequence of this discrepancy in perspective, and the resulting inequality in position it reveals, is one of the reasons why any real form of justice for Indigenous populations is lacking – the expectation of Indigenous communities is unlikely to reflect

⁴⁰ Denis Meyerson, *International Law* (Routledge-Cavendish, 2007) 118.

⁴¹ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007) 161.

⁴² Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 117.

⁴³ Jerome J. Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20(2) *Human Rights Quarterly*, 202.

the reality (as can be seen below in the discussion on Native Title and the Northern Territory Intervention).

Rights ranked according to values

Different ‘meanings’ may be attached to the concept of rights, both generally and as outlined in the Declaration, based on the value judgements that are attached to the different expressions of rights by the parties involved.⁴⁴ Patricia Williams argues that what creates a difference in perception is actually based on power.⁴⁵ Tribe and Dorf note that ‘What causes one reader to prefer one ending and a different reader to prefer a different ending is not consistency in the abstract, but aesthetic value judgments of one sort or another. These value judgments are necessarily external to the text’.⁴⁶

The content of a ‘right’ does not itself change. However, to provide examples: disagreement as to whether a right is fundamental or conditional; or disagreement as to the definition of what the right is for (for example, the right to *self-determination*) can alter the meaning of the right. Therefore, the meaning that may be attached to a right is prefaced entirely on one’s perspective and is influenced by a variety of factors including gender, culture, sexuality, religion and so on.

Kelada states that the federal legislation legalising the Northern Territory Intervention (which started in 2007 and continued after Australia decided to support the Declaration in 2009)⁴⁷ included disallowing Indigenous communities to control permits restricting who could come onto their land, government acquisition of 5-year leases over the land and federal and state governments to retain ownership of buildings on the land that are constructed or improved with government money.⁴⁸ Rights under the Declaration that were violated include the right to self-determination,⁴⁹ the rights to be free from dispossession of land, territory and resources,⁵⁰ the right to free, prior and informed consent with compensation for any attempted removal of them from their lands⁵¹ and the right to participate in decision-making.⁵²

It is clear from the discussion above with regard to the Northern Territory Intervention that Australia values certain rights over others. Although in violation of certain rights, the State was in fact exercising their right to ensure other aspects of the Declaration were upheld, including Article 22 with regard to the protection of children from violence and Article 24(2) with regard to ensuring Indigenous people are able to enjoy the highest standards of health. Indigenous criticisms of the process clearly reveal their higher valuation of different rights such as that of involved decision-making and the right not to be dispossessed of their land⁵³ (perhaps ultimately believing that ensuring

⁴⁴ Lawrence H. Tribe & Michael C. Dorf, ‘Levels of Generality in the Definition of Rights’ (1990) 57(4) *The University of Chicago Law Review*, 1060.

⁴⁵ Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991) 148.

⁴⁶ Lawrence H. Tribe & Michael C. Dorf, ‘Levels of Generality in the Definition of Rights’ (1990) 57(4) *The University of Chicago Law Review*, 1073.

⁴⁷ Julian Drape, ‘Australia backs UN on Indigenous Rights’, *The Sydney Morning Herald* (online) 26 March 2009 <<http://news.smh.com.au/breaking-news-national/australia-backs-un-on-Indigenous-rights-20090326-9buw.html>>.

⁴⁸ Odette Kelada, ‘White Nation Fantasy and the Northern Territory “Intervention”’ [2008] 4(1) *Australian Critical Race and Whiteness Studies Association eJournal*, 4.

⁴⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 3.

⁵⁰ *Ibid*, art 26(1).

⁵¹ *Ibid*, art 28(1) and art 28(2).

⁵² *Ibid*, art 27.

⁵³ Irene Watson, ‘In the Northern Territory Intervention What is saved or rescued and at what cost?’ (2009) 15(2) *Cultural Studies Review* 45, 46; Jumbunna Indigenous House of Learning, Commonwealth, *Listening But Not Hearing* (2012) 5.

these rights remain respected creates a far more open dialogue with their communities that is more likely to achieve long-term success).

It is clear, then, that interested parties value rights differently. Rights that are less valuable are more likely to be violated. Such decisions are made based on a range of factors, and are usually implemented by the body holding the power (such as the State). These differences create different expectations as to outcomes and consequences for the various parties.

Rights are centred on the individual

The final point to make with regard to the inherent bias of the human rights framework is the fact that human rights as a concept are centred on the individual. This arises from the notion that human rights exist and belong to a person by the very virtue that they are human.⁵⁴ Furthermore, as Wiles notes, ‘The principal human rights instruments largely set out rights in individual terms, and there has long been a widespread liberalist reluctance to conceive of them in any other way.’⁵⁵

It is key to grasp this concept – the theories elevate the status and rights of the individual as essential to the satisfaction of society as a whole, *but the starting point is still the individual*. Meyerson states that ‘whereas the public interest focuses on the total or average amount of welfare, rights give priority to the basis interests of individuals even at the expense of society.’⁵⁶

The above information reveals two primary elements – the individual, and those who are a risk to the individual’s human rights (usually the State or sovereign). In the case of Indigenous populations however there is usually a third element – the land. The existence of this third element creates a set of obligations, as well as limitations on human rights, that are inconceivable to Western culture.

It is impossible to provide individual ‘human’ rights to a group of people whose very humanity is defined by reference to the land in which they born. It is the land that grants them ‘rights’ and expects them to fulfil their obligations in return. Indeed, what is the point in one person ensuring their human rights are respected and enforced, when it takes a community to care for the land and ensure the stories are passed on?

Consequences of the above discussion of rights

The incompatibility between a human rights framework and Indigenous communities points toward a likely difference in understanding of how the human rights framework works for Indigenous communities versus the State. This true in two senses; firstly, perspective of how powerful human rights are a framework for achieving things for Indigenous communities; and secondly how individual rights themselves are understood.

To enunciate further on this second point (the first having been discussed in greater detail above), it is clear from, for example, articles referring to the contentious issue of self-determination,⁵⁷ that this right is read in a completely different light depending on whether the State or an Indigenous community is doing the reading. Essentially, the issue is that the right to self-determination may be considered a conditional or contextual right, from the perspective of the State.⁵⁸ So, for example, the

⁵⁴ Rhonda E Howard & Jack Donnelly, ‘Human Dignity, Human Rights and Political Regimes’ (1986) 80 *The American Political Science Review* 801.

⁵⁵ Ellen Wiles, ‘Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality’ (2007) 41(3) *Law & Society Review*, 726.

⁵⁶ Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 122.

⁵⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 3 and art 4.

⁵⁸ ‘There is substantial disagreement at the international level over what self-determination requires in any particular context, and especially over how the right to self-determination interacts with another fundamental

State may be prepared to consent to ‘self-determination’ with regard to consultation with Indigenous communities on particular matters concerning health or crime, but would not be prepared to split the education system in two and cede complete control of Indigenous education or justice to Indigenous people themselves.

The consequence of the above discussion is that forcing Indigenous people to utilise human rights as a means of engaging with the State is an insidious form of assimilation. It convinces both Indigenous populations and the State that when Indigenous communities achieve a ‘right’ that this is a just outcome, and a further step towards true equality between Indigenous and non-Indigenous citizens. It fails to account for the fact that colonisation removed almost everything from Indigenous populations, and has then insisted that if they want to get any of it back, they must utilise white Western processes to do this. Furthermore, it also fails to account for the often tenuous nature of any rights achieved (discussed further in relation to the Northern Territory Intervention and Native Title below).

Oppression of Indigenous rights

As the Declaration is not a legally binding instrument, there are no examples of its use by Indigenous communities in Australia against the State. However, there are numerous examples of State suppression of Indigenous voices throughout Australia’s history, in the field of human rights. Some of these will be explored as a demonstration of the ways in which Indigenous rights continue to be curbed in a way that is not experienced by ‘mainstream’ white society, as a result of the incompatibility between the rights framework and Indigenous culture.

Northern Territory Intervention

The Northern Territory Intervention occurred on the basis of the 2007 *Little Children Are Sacred Report*, which detailed significant instances of child abuse and domestic violence amongst Indigenous communities.⁵⁹ The Federal Government solution was a military intervention in the area in an effort to control the communities. The following will examine the criticisms of the process, namely the lack of Indigenous consultation and the inherent human rights abuses it entailed.

Lack of Indigenous consultation

Watson states that the intervention occurred ‘Without negotiating with Aboriginal communities’.⁶⁰ This is confirmed by a multitude of other sources, such as the *Concerned Australians* report to the UN,⁶¹ and the *Listening But Not Hearing* report.⁶² It should be noted that the voice of Watson and those in the *Listening But Not Hearing* report are Indigenous. It is difficult as such to understand government insistence that the consultation process was ‘thorough and fair’.⁶³ If it is not clear enough from the denial by Indigenous people as to their satisfaction with the process, then it is abundantly clear from the Second Reading Speeches to the Bills that passed or altered the necessary legislation,

principle, state sovereignty, as expressed through the protection of a state’s territorial integrity and its political unity.’

Rachel Davis, ‘Summary of the UN Declaration on the Rights of Indigenous Peoples’ (Briefing Paper, Jumbunna Indigenous House of Learning, 2007) 6.

⁵⁹ The Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory, *Little Children are Sacred* (2007).

⁶⁰ Irene Watson, ‘In the Northern Territory Intervention What is saved or rescued and at what cost?’ (2009) 15(2) *Cultural Studies Review*, 46.

⁶¹ Michele Harris & Georgina Gartland, ‘Children of the Intervention: Aboriginal Children Living in the Northern Territory of Australia’, Submission to the UN Committee on the Rights of the Child, June 2011, 5.

⁶² Jumbunna Indigenous House of Learning, Commonwealth, *Listening But Not Hearing* (2012) 5.

⁶³ Michael Gordon, ‘Report Claims Intervention Process A Sham’, *The Sydney Morning Herald* (online), 9 March 2012 <<http://www.smh.com.au/opinion/political-news/report-claims-intervention-process-a-sham-20120308-1un29.html>>.

that there was next to no consultation with relevant Indigenous communities,⁶⁴ and is further clear from the timeline of events (the intervention occurred a mere week after the release of the report)⁶⁵ that such consultation was not even possible.

Human rights violations

This lack of dialogue between the Indigenous communities and the State in the lead up to, and throughout, the Intervention, was symptomatic of the human rights abuses that would occur as a result (which have been discussed above in relation to the valuation of rights). Watson states that the intervention is a clear demonstration of how small a distance we have moved away from historical patriarchal protectionist regimes that were obviously racist in their treatment of Indigenous people as second class citizens – ‘under the protectionist policies of the Aborigines Acts our lives were totally controlled.’⁶⁶ Was there any real difference with the State conduct in 2007?

It is key to note that in order to continue with the Intervention, the Federal Government *had to suspend the Racial Discrimination Act 1975* (Cth), the legislation it was required to create as a signatory to the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* (1966). It is ludicrous to suppose that the Intervention ever had any intention of respecting the human rights (one of which is to be free from discrimination)⁶⁷ of the Northern Territory’s Indigenous populations. The *Listening But Not Hearing* report noted the concern of many international organisations on the basis of this.⁶⁸ Also of importance to note is the willingness of the government to abandon binding international obligations in order to violate the rights of Indigenous populations.

Native Title

It is perhaps important to begin a discussion on Native Title by examining the centrality of the land to Indigenous communities. This will be done by looking at an Indigenous story. In doing this, it is possible to extrapolate the importance of the land to the very existence of Indigenous communities, at least in Australia, and to draw conclusions as to the consequences of the severing of this connection.

For his delectation, Baiame endued certain gum trees with the power to form buumbuul, or manna. This sweet substance was like limbs or bags of sugar which hung on the leaves and twigs. It could be eaten raw, or mixed with acacia gum and hot water to make a refreshing drink. Baiame warned the men and women who lived in those far off days that the trees were sacred, and must never be touched. The women resented the prohibition. They longed to taste the food of the gods, but the men respected Baiame’s orders and refused to allow them to touch the buumbuul or even to go near the trees. Baiame was aware of their temptation, and of their strength in character in resisting it.

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 August 2007, 35 (Chris Evans); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 August 2007, 118 (Linda Jean Kirk).

⁶⁵ Odette Kelada, ‘White Nation Fantasy and the Northern Territory “Intervention”’ [2008] 4(1) *Australian Critical Race and Whiteness Studies Association ejournal*, 3 <<http://acrawsa.org.au/files/ejournalfiles/60OdetteKelada.pdf>>.

⁶⁶ Irene Watson, ‘In the Northern Territory Intervention What is saved or rescued and at what cost?’ (2009) 15(2) *Cultural Studies Review*, 48.

⁶⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁶⁸ Jumbunna Indigenous House of Learning, Commonwealth, *Listening But Not Hearing* (2012) 7.

'As a reward for your steadfastness,' he told them, 'I will give the buumbuul to you as food. Look on the coolabah and bibbil trees and you will find that the food that was reserved for the gods has now been given to men.'

There was great joy when the sweet food of the gods was made freely available to men and women. Year after year it was gathered and eaten, and was the most highly esteemed of all foods.

There came a time when the supplies were so plentiful that the sugar ran down the bark of the trees and hardened into large lumps. It was another sign of the tenderness of the Great One because, shortly afterwards, a great drought came to the land. Mankind might not have survived had not Baiame given them his own food with such a prodigal hand.

So it is that when the buumbuul is found in greater quantities than usual, men know that a long drought will come to the land.⁶⁹

The moral themes in this story will be left to the reader to discern. However, what can be seen from this is that the land is the beginning of everything in Indigenous cultures. From the land flow the stories, and from the stories flow the, for lack of a better word, boundaries for Indigenous conduct. By denying Indigenous communities their relationship with the land, it essentially destroys what it means to *be* Indigenous. However, stories such as this one are considered to be mythical fables by the State, similar to moral Western stories such as 'The boy who cried wolf', with the associated fictional qualities.⁷⁰ This then goes some way towards explaining the treatment of Native Title.

The decisions in *Mabo*⁷¹ and *Wik*⁷² (which concluded the grant of pastoral leases did not necessarily extinguish Native Title over the same area)⁷³ aroused significant concern amongst the agricultural community of Australia with regard to protection of *their* property interests.⁷⁴ On the basis of the subsequent lobbying by the agricultural sector, the government introduced the Wik 10-Point Plan.⁷⁵ It is clear from the Plan that the powerful and wealthy agricultural sector was far more influential than Indigenous voices, and the voices of the supporters of Indigenous property interests. Second Reading Speeches to the *Native Title Amendment Bill 1997* (Cth) (which implemented the 10-Point Plan) confirm this.⁷⁶

Furthermore, it is difficult to see how such an unequal basis between pastoralists and Indigenous populations in the negotiation of property interests could be anything other than racially discriminatory. It appears, at the very least, to be in contravention of section 10 of the *Racial Discrimination Act 1975* (Cth), concerning equality before the law.⁷⁷ Indeed, as another Second Reading Speech states, 'More than anything, the Native Title Amendment Bill is racially

⁶⁹ A W Reed, *Aboriginal Myths, Legends & Fables* (New Holland, 1999) 291.

⁷⁰ Irene Watson, 'In the Northern Territory Intervention What is saved or rescued and at what cost?' (2009) 15(2) *Cultural Studies Review*, 49.

⁷¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁷² *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁷³ *Ibid*, [131].

⁷⁴ David Godden, 'Attenuating Indigenous Property Rights: Land Policy After the *Wik* Decision' (1999) 43 *The Australian Journal of Agricultural and Resource Economics*, 1.

⁷⁵ Brian Stevenson, 'The *Wik* Decision and After' (Research Bulletin No 4/97, Parliamentary Library, Queensland, 1996) 16.

⁷⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1997, 9405 (Hon. Nick Bolkus).

⁷⁷ *Racial Discrimination Act 1975* (Cth), s 10.

discriminatory because it takes rights away from one group on the basis of race—and you cannot put it any simpler than that’.⁷⁸

These are but two (recent) examples of the abrogation of Indigenous rights in Australia. It is clear from these examples that not only is Australia prepared to ignore international expectations arising from its accession to instruments such as the Declaration, but it is actively prepared to suspend its own domestic legislation in order to conduct itself in such a way that is in violation of human rights. Based on this, it is difficult to see how the Declaration as it currently exists could significantly alter the stance of State in this regard.

Suggestions going forward

Justice

The following discussion does not provide concrete practicalities about how to achieve justice. It presents justice as an abstract concept that should be kept in mind and aimed for when trying to establish the best systems for Indigenous-State interactions. The key point to note about the justice discussion to follow is that it attempts to avoid the inherent bias within and incompatibility of the rights discourse, alluded to above and discussed in greater detail below. It does this by refusing to come to a conclusion on precisely what would constitute justice for Indigenous populations (unlike human rights), but rather submits that justice can be a process from which a just result, whatever that might be, can flow. This process should be applicable across all people, regardless of culture, religion, gender, or any other differentiating factor. There are two foundations to justice as a process that will be argued here – equality and truth.

Rawls is one the leading modern theorists on the concept of justice. His work forms the basis of the discussion of equality here. Rawls argues that the concept of justice is a political one – if a group of citizens meet and make decisions in a particular way, then this will lead to the creation of just institutions from which the agreements reached by the citizens can be administered.⁷⁹ Equality must be a foundation of this meeting. Rawls achieves this by drawing a ‘veil of ignorance’ around his citizens,⁸⁰ effectively blocking them off from any of knowledge of the others’ situations. Therefore, each citizen must bargain on the basis of knowledge of his/her situation alone. What he is achieving by doing this is equality amongst this citizen in respect to one another, which is essential for achieving justice as a process. Only if citizens meet in this way can they truly express themselves effectively without knowing they are likely to be overwhelmed by the powerful situation of the others they are dealing with, or by being in the powerful situation and knowing as a result that they are likely to dominate the outcome.

The other foundation of justice as a process is truth.⁸¹ That is, parties must be truthful with one another with regard to past interactions with each other. This is often lacking in interactions between States and Indigenous populations. States are hesitant to admit to past fault for fear of being exposed liability or obligations. Tatz outlines a number of other countries who appear to be doing significantly more for their Indigenous populations than Australia. However this seems to be a costly exercise,⁸² and thus if Australia avoids admitting any wrongdoing then they may escape such financial burdens.

⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1997, 9419 (Hon. John Phillip Faulkner).

⁷⁹ John Rawls, *Justice as Fairness* (Harvard University Press, 2001) 11.

⁸⁰ *Ibid*, [48].

⁸¹ Rose Weston, ‘Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States’ (2001) 18 *Arizona Journal of International and Comparative Law*, 1017.

⁸² Colin Tatz, ‘Genocide in Australia’ (1999) 1 *Journal of Genocide Research*, 345.

Furthermore, Tatz argues that there are Australian fears that to admit wrongdoing may lead to some kind of treaty with Indigenous peoples, and that this may result in a push to recognise two separate nations.⁸³ However to leave truth out of the process would be the same outcome as that described above – one party deciding on a ‘just’ outcome based on their perceptions or what they are willing to acknowledge/admit to.

Achieving justice is two-step process. First, parties must meet as equals, and secondly, these parties must be truthful with one another with regard to their past interactions with one another. From here, an outcome suitable to all parties may be reached. This is not the same as the human rights discourse, in which outcomes (the rights) have already been determined and applied. Justice as a significant consideration for designing a system of Indigenous-State interactions is important and worthy of greater exploration because it should provide Indigenous populations with an equal voice in any process. This is something that appears to be lacking in current frameworks. Indigenous populations are not regularly asked what it is that *they* want to achieve, and if they do have the opportunity to express themselves, such as in the drafting of the Declaration, States will usually be involved in the same process only with great clout to limit Indigenous rights and their own obligations.

We need to work within a rights framework – Larissa Behrendt

Larissa Behrendt is an Australian Aboriginal (Eualeyai/Kamillaroi woman)⁸⁴ legal scholar who is representative of the argument that the best way forward for Indigenous-State interactions *is* through a rights framework. She argues that:

an agreed standard of rights creates a medium through which to communicate harms suffered. In a more positive way, the language of rights can provide a means of communicating political aspirations... the rights framework already provides minimum standards against which we can hold the federal government accountable and therefore provides the basis for objective assessment of performance in relation to the recognition and protection of Indigenous rights.⁸⁵

However she acknowledges that the rights framework as it currently exists is not working as a useful tool. Rather than putting this down to an incompatibility between the rights framework and Indigenous culture, she explains that ‘there is a link between economic status and the ability to access rights frameworks,’⁸⁶ and also that the rights framework as it is currently applicable to Indigenous people is significantly lacking in Indigenous voices.⁸⁷ From this, it is important to note that Behrendt does not appear to fully support the rights framework in its current incarnation. She does support the idea of rights as a means of Indigenous communities engaging in dialogue with the State, but argues that there needs to be substantial changes before it is widely accessible, and truly representative of Indigenous people. She truly sees it as a tool that utilises a common language (and in this lies its strength) rather than a rigid framework where the lack of flexibility is its failing.

⁸³ Ibid.

⁸⁴ University of Technology Sydney, *Our People: Professor Larissa Behrendt* (13 December 2011) <<http://datasearch.uts.edu.au/rilc/members/detail.cfm?StaffId=2450>>.

⁸⁵ Larissa Behrendt, ‘The Relevance of the Rights Agenda in the Age of Practical Reconciliation’ in Hunter and Keyes (eds) *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 137, 141-142.

⁸⁶ Ibid, [143].

⁸⁷ ‘Whatever “self-determination” may mean “officially”, it cannot be argued that the implementation of policy has ever been done with the Indigenous definition of what it might mean as a starting point.’ Larissa Behrendt, ‘The Relevance of the Rights Agenda in the Age of Practical Reconciliation’ in Hunter and Keyes (eds) *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 137, 145.

Behrendt makes a compelling argument, and one that is backed up by other supporters of the rights discourse. Tribe and Dorf, in examining Harlan J's dissent in *Poe v Ullman*,⁸⁸ note that:

*From a set of specific liberties that the Bill of Rights explicitly protects, he inferred unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense.*⁸⁹

There is an argument that can be made here that rights are not as specific as the Western conceptualisation of them would make out. Just because white Western concepts of rights have been expressed in a certain language and in a particular way does not mean that this is an exhaustive list of all rights.⁹⁰ This supports Behrendt's theory that whilst a rights framework does currently exist, only a small part of this framework is consistently acknowledged or recognised. Where there is a willingness to engage in a discussion of the impact of cultural differences on the expression and valuation of rights, then the different elements of the rights framework may become exposed, and a recognition that whilst many of these elements overlap, it may be important to keep certain aspects of the framework culturally specific for them to have the greatest effect. Meyerson supports this, 'rights set out only 'minimum goals'; they do not purport to provide a 'complete social programme' (Waldron, 1987, p 173) ... This leaves plenty of room for diversity in cultural practices and moral beliefs once the minimum is secured.⁹¹ Patricia Williams argues that 'What is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights.'⁹²

Christopher Stone presents another aspect to this argument, stating that:

*The fact is that each time there is a movement to confer rights onto some new "entity", the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us" – those who are holding the power at the time.*⁹³

It is linked on a more abstract level to Behrendt's argument that economic disparity causes an inability to access the rights framework. If rights are truly held by those with power, who feel a reluctance to expand the circle of those who are protected by those rights whenever they are challenged, then it is distinctly possible that the rights framework is significantly more expansive and culturally diverse than is currently practiced.

Finally, Patricia Williams also states that 'In discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance'.⁹⁴

⁸⁸ *Poe v Ullman*, 367 U.S. 497 (1961).

⁸⁹ Lawrence H. Tribe & Michael C. Dorf, 'Levels of Generality in the Definition of Rights' (1990) 57 *The University of Chicago Law Review*, 1068.

⁹⁰ For example: Arab League of Arab States, *Revised Arab Charter on Human Rights*, 22 May 2004, entered into force March 15, 2008, reprinted in: (2005) 12 *International Human Rights Report* 893.

⁹¹ Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 129.

⁹² Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991) 149.

⁹³ Christopher Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects* (W. Kaufmann, 1974), 8.

⁹⁴ Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991) 165.

It is clear from this discussion that there are those in the academic community who value rights, just not necessarily in the limited form in which they currently exist. They have begun to form part of a common universal language, they hold significant symbolic value for those who are lacking in a number of them, and they are familiar. It may not be necessary to do away with the concept of rights as a whole, but rather to recognise that rights belonging to a culture must be defined and expressed by that culture, and a rights dialogue between two different cultures can occur where there are overlaps in their expressions. Where overlaps are lacking, mutual respect should guide dialogue towards a consensual understanding. The rights framework needs to be expanded and needs to be representative of all cultures and peoples, but this may not require its destruction to be achieved.

Rights are oppressive – Irene Watson

Irene Watson is also an Australian Aboriginal (Tanganekald and Meintangk peoples)⁹⁵ legal scholar. She argues that to even engage in a rights discourse, whether in its current form or the more improved form suggested by Behrendt, is to utilise an alien language and to participate in the suppression of Indigenous voices and culture. Watson finds the expression of Hawaiian native, Hanuani-Kay Trask, persuasive, often referencing Trask in her works. At one point she references Trask, who states,

Once Indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These Indigenous, Native practices are not 'rights' which are given as the largesse of colonial government ... When Hawaiians begin to think otherwise, that is, to think in terms of 'rights', the identification as 'Americans' is not far off.⁹⁶

There are other supporters of the view that rights are an alien language to many cultures worldwide and that forced attempts to overcome this may not be the best methods of achieving success in this area. Meyerson argues:

If what is good for people arises not out of universal needs and interests but out of their particular way of life – their society and its practices – it is a mistake to attempt to evaluate such ways of life by reference to external standards which make no sense in the context of particular, local practices.⁹⁷

Bielefeld referencing Huntington argues that 'For people from other civilizations, he says, the only way in which to have full access to human rights is to adopt essentially "Western" values and hence to implicitly convert to Western civilization.'⁹⁸

Furthermore, not only does Watson see the rights as a language incompatible with Aboriginal law, she is expressly critical of heavy State involvement with current rights instruments, which often

⁹⁵ University of South Australia, *Staff Profiles: Irene Watson*

<<http://www.unisanet.unisa.edu.au/staff/homepage.asp?name=irene.watson>>.

⁹⁶ Irene Watson, 'There Is No Possibility Of Rights Without Law: So Until Don't Then, Don't Thumb Print Or Sign Anything!' (2000) 5 *Indigenous Law Bulletin*, 4.

⁹⁷ Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 128.

⁹⁸ Heiner Bielefeld, 'Western' Versus "Islamic" Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 *Political Theory*, 91.

further alienates them from the very groups they designed to protect.⁹⁹ The involvement of States in the later stages of the draft Declaration, and their efforts to alter its course, is also noted by Anaya:

As expected, state delegations took a much more active role in the discussions of this working group [to the Commission on Human Rights] ... It was apparent from the outset that almost all states participating in the Commission working group would not accept the draft declaration as approved by the Sub-Commission without substantial amendments, and this resulted in a near stalemate in the deliberations for a number of years as many participating Indigenous representatives insisted on nothing less than the Sub-Commission draft.¹⁰⁰

Watson's is an 'extreme' but powerful perspective on the way Indigenous-State dialogue should occur. Even using the phrase 'should occur' is not an accurate representation of Watson's views. Unlike Behrendt, Watson does not offer practical examples based on current practices of the best way to move forward. In many ways, her expression is similar to Rawls's hypothetical scenario of the veiled representatives – she states that without Indigenous populations being heard in *this* way, and without State's responding in *that* way, the consequences are essentially assimilation of Indigenous populations into the existing State framework. But perhaps this is Watson's point. By highlighting the consequences of the current system, and refusing to suggest an alternative that is anything less than active Indigenous participation and high-level decision-making any control, any practical suggestions she could make would be useless, therefore there is no point to offering any until this hurdle requirement is satisfied.

It is impossible to say that 'this' way of doing things will fix the circumstances of Indigenous populations or 'that' way of creating a dialogue would be a vast improvement of the situation as it currently stands. There are a huge range of factors that impact on the Indigenous-State discourse, and not the least of these is that Indigenous populations and their governing bodies differ greatly from State to State. It is entirely possible that there is no 'one solution fits all'. However the above discussions about justice and represented by Larissa Behrendt and Irene Watson reveal some powerful considerations that seem to be lacking from current international and domestic efforts. They primarily all argue that a consequence of the Declaration and the rights framework it represents will ultimately fail to achieve actual and long-lasting change for Indigenous communities. Furthermore, they all argue that one of the main reasons for this is a lack of Indigenous input, which is as a result of the power imbalance between Indigenous populations and the State. It could be that recognition of these two points, and a commitment to build a framework that actively seeks to avoid these, would be a reasonable place to start.

All three discussions present different ideas of what might be required to achieve some measure of success – equality and truth in a process of justice, a reworking and expansion of the rights framework, or full recognition of Indigenous law as a base from which to treat. All are compelling,

⁹⁹ 'The articles by Ward Churchill and Sharon Venne illustrates how it is that the UNDRIP position has shifted from the original intentions of Indigenous peoples. They place this shift in the context of earlier advocacies, such as that of Deskeheh before the League of Nations in the 1920s and that of Russell Means and others before UN bodies in 1977. That original intention was to empower Indigenous peoples to be self-determining in relationship to our traditional lands. Instead, under the pressure of the states, the UNDRIP shifted to a generalist human rights approach, and its focus shifted away from the concerns of Indigenous peoples' survival as peoples – and with that, the possibility of relieving the genocidal impact of state assimilationist policies and practices.' Irene Watson, 'The 2007 Declaration On The Rights Of Indigenous Peoples: Indigenous Survival – Where To From Here?' (2011) 20 *Griffith Law Review*, 507.

¹⁰⁰ S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 56.

but the most compelling aspect about them comes from viewing them in conjunction, where it is becomes clear that, whether you believe the systems as they currently exist are working or not, there are a clearly a number of factors that are simply being ignored. Addressing these issues should be a logical consequence of transparency at the very least, but at most could signal the start of an equal and powerful discourse between Indigenous populations and the State.

Conclusion

It would be unfair and untrue to say that Indigenous populations in post-colonial nations have not managed to achieve significant recognition of their culture, social structures and the (illegal) conduct that has been perpetrated against them. However, it is because of the fact that there has been this recognition that the disparity between Indigenous and non-Indigenous populations is highlighted, because we do not still expect to see it. The Declaration is the latest in a number of international instruments designed to reduce this disparity.

It is however based on a flawed rights system, which is distinctly Western-normative and lacking in the flexibility necessary to provided an effective basis from which different cultures may treat with each other. Furthermore, because it is Western-normative, the majority of the power in the discourse is held by the State, which is representative of the majority (who are non-Indigenous). This often results in the ‘justified’ suppression of Indigenous rights, and a failure to acknowledge that whilst the State represents the non-Indigenous majority, Indigenous communities may be of the view that as they never ceded their sovereignty and thus the State cannot be representative of their voices and dialogue.

There is no single ‘solution’ that may be applied to these situations. However, by deconstructing the myths surrounding a loss of State power as a result of full and equal recognition of the status of Indigenous populations, we may be able to break down the walls that are currently muffling Indigenous voices, and find some common ground to build a more effective framework.