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Plurality, Human Rights and What's Wrong with Liberal Inclusion?

Introduction

Liberal states like Australia, Canada, New Zealand and the US respond to indigenous claims with great caution. They may be accepted to a point—until they interfere with the idea that non-indigenous interests deserve moral priority. Political exclusion, from which indigenous mistrust of the state is perpetuated, is the consequence. Arguments that the national interest must always trump indigenous rights to culture position indigenous peoples as beyond the nation—not citizens but binary opponents of the settler public whose demands have prior claim.

Mining and other policies concerned with natural resource use show states wanting to limit plurality in the distribution of political influence and authority. In such contexts, indigenous exclusion can be explicit and unapologetic. For example, to make the Declaration acceptable, the four dissenting states 'read down' the principle of 'free, prior, and informed consent' to one of limited effect, thereby transforming their view of the Declaration into one where the instrument was not, in fact, so favourable to indigenous interests. However, consent should imply a more meaningful political authority than consultation. It should imply an indigenous share in public sovereignty, meaning that indigenous interests cannot be pitted against the common good, because they are part of that 'common', whose collective interests economic development ought to serve. However, from

some indigenous perspectives, such a share in public authority is not worthwhile or even morally defensible nor are liberal human rights such as those which the Declaration enunciates.

Just as this chapter examines the state's positioning of indigenous people beyond the public, it considers the reasoning of those indigenous people who, in fact, have no wish to be included. The chapter considers these matters by examining indigenous arguments against the Declaration's underlying liberal foundation—in particular, that its liberal values are inconsistent with indigenous aspirations and therefore inconsistent with the right to self-determination as a collective right.

The possibilities that indigenous peoples find in the Declaration are largely considered elsewhere in the book. However, this chapter's focus is to critique and contest the argument that liberal human rights per se are inconsistent with indigenous rights and to critique and contest the argument that, when human rights privilege the individual, they undermine the collective indigenous good. The chapter shows how indigenous arguments against individual rights have been used to defend sexual violence against women through contested, and often self-serving, interpretations of cultural values. Finally, the chapter shows that the denial of individual human rights means that cultural values are not open to internal contest and may only reflect the will of the physically more powerful. In doing this, it demonstrates the value of international human rights to the right to political voice within the state *and* the indigenous nation.

Mining and the Politics of the Liberal 'Public'

Liberal states have worried that the right to free, prior and informed consent constitutes a veto over land development or resource extraction. Indeed, this reservation was an important factor in the initial reluctance of Australia, Canada, New Zealand and the US to support the Declaration (Banks, 2007). State mining policy often relies on separating indigenous peoples from the 'public' through an overly simplified binary politics in which the 'public' interest favours mining and indigenous interests oppose it. However, indigenous peoples do not speak with one voice on this issue: there are differences of opinion within indigenous nations on mining and

other natural resource proposals. There are many examples of resource development and extraction occurring after informed indigenous consent and with significant benefit to indigenous communities (Langton & Longbottom, 2012). However, as the UN special rapporteur has noted in relation to Canada, these presuppose that land title is secure and that the indigenous group is able to participate in negotiations for consent with genuine authority.

Indigenous resistance to extractive industries contests the presumption of terra nullius that allowed colonial states to do as they pleased. Keim and Reidy (2015) argued that Australia's Native Title Tribunal responds to this indigenous resistance with a jurisprudence maintaining that 'a healthy mining industry is synonymous with the public interest' (p. 1). This argument separates indigenous people from the public and discounts the possibility that resistance may be to the specific characteristics of a proposal rather than to mining per se. It also discounts differing opinions within the indigenous nation on the merits of a given proposal.

In Australia, mining incomes have contributed to the rise of an Indigenous middle class and have extended greater prosperity to unskilled and manual workers (Langton & Longbottom, 2012). Yet it is also the case that Australian governments have allowed mining in some areas without Indigenous consent. The corporate imperative to maximise profit as quickly as possible means that there is not automatically an alliance of common interest between miners and indigenous land owners. There are alliances of principle that must also be worked out, and when these are not possible, there can be no consent. However, if there is no requirement for consent, the indigenous property right is not of the standing that liberalism would ordinarily defend. Fundamentally, the displacement of an indigenous people to accommodate a mining venture from which they derive no benefit is unjust. It is reasonable that indigenous peoples are cautious about another party's attempt to use their lands for their own benefit when land alienation is the underlying cause of cultural dislocation and relative material poverty. Coercion, by the will of a more powerful section of the community, is a routine experience for many indigenous citizens.

Indigenous resource rights are, for example, vulnerable unless they are acknowledged through formal and enforceable agreements (Gupta et al., 2014, p. 26). Yet the former UN special rapporteur James Anaya argued that consent was not in fact a veto. He may be correct when good

faith negotiations prevail; however, if an indigenous property right is a substantive one, the possibility of veto must always exist, even though it cannot be exercised until good faith negotiations have failed.

Consent raises the standard from consultation to participation. Consultation allows indigenous peoples to react to others' proposals, whereas participation allows them to raise their own.

Robust mining impact assessments are required to inform indigenous consent. Indigenous people have the right to expect some benefit from a project—to be part of the public whose interests mining apparently always and everywhere serves (UN, 2016a). Conversely, Boutilier (2017) argued that 'the duty to consult and accommodate is the closest thing to [free, prior and informed consent] in Canadian constitutional law' (p. 5). Consent is justified because 'a law exists only for the one who has made it himself or agreed to it; for everyone else it is a command or an order' (Rousseau, 1984, p. 97).

Yet the Canadian Supreme Court ruled that aboriginal consent for development is not required when development is in the 'public interest':

> the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. (*Delgamuukw*, 1997, para. 165).

In New Zealand, the *Foreshore and Seabed Act 2004* represented the most significant usurpation of a Maori property right in at least a generation, bringing the question of property rights from historic conflict into the political present. The then New Zealand prime minister Helen Clark, with the opposition's support, positioned herself on 'New Zealand's side' in a battle against 'haters and wreckers' ('Clark defends refusal', 2004). This rhetoric positioned Maori and New Zealand as holding distinct and irresolvable conflicting interests. The presumption was that the New Zealand 'public' was morally more deserving than Maori, who were positioned as outsiders—beyond the public and beyond the political. In contrast, the UN special rapporteur argued that the *Foreshore and Seabed Act* was not 'in line with international standards regarding the rights of indigenous peoples to their traditional lands' (UN, 2011, p. 16). The Act was repealed in 2011, shortly after New Zealand reversed its opposition to

the Declaration in 2010. However, the Act's repeal did not reverse all its discriminatory aspects, leading the UN special rapporteur to remind 'the [New Zealand] Government that the extinguishment of indigenous rights by unilaterally, uncompensated acts is inconsistent with the Declaration' (UN, 2011, p. 16). It was inconsistent with a politics of consent.

The Politics of Consent

The UN's guiding principles on business and human rights insist that states are responsible for 'ensuring a regulatory framework that recognises an indigenous peoples' rights over lands and natural resources' (UN, 2016a, p. 4). The regulatory framework 'requires legislation or regulations that incorporate international standards of indigenous rights' (UN, 2016a, p. 4). The maintenance of such a framework requires indigenous participation. Liberal democracy privileges personal agency over the possibility that the state will simply act benevolently to secure indigenous rights.

The Keystone XL pipeline in the US is an example of the indigenous right to consent being set aside in ways that contravene the Declaration and broader human rights norms. The pipeline was intended to carry oil from Alberta, Canada, to Nebraska, US, where it would join an existing pipeline to oil refineries on the US Gulf Coast. As well as contravening Article 26 of the Declaration (see Chapter 3), the pipeline contravenes the following articles:

> 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. (UN, 2007b, art. 19)
>
> 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. (UN, 2007b, art. 25)
>
> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
> 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented. (UN, 2007b, art. 29)

The Standing Rock Sioux community in the US received international indigenous support for its opposition to the pipeline. This international indigenous solidarity has been politically important. For example, the Sami Parliament of Norway's intervention contributed to the decision of pension fund Kommunal Landspensjonskasse (KLP) to divest its shares in companies contracted to build the Dakota Access Pipeline. KLP's decision was 'due to an unacceptable risk of contributing to serious or systematic human rights violations' (KLP, 2017, p. 1). Its further reasoning was that the pipeline required the flooding of land, protected under the 1851 Treaty of Fort Laramie, from which the Standing Rock Sioux Tribe had been improperly alienated, according to the US Supreme Court (p. 3). The pipeline was intended for the transportation of oil; however, Sioux people argued that it would interfere with access to sacred sites and safe drinking water. The UN special rapporteur found that the pipeline had been approved without 'adequate social, cultural or environmental assessment'. It was also approved in 'the absence of meaningful consultation or participation by the tribes' (UN, 2017c, para. 11).

The Great Sioux Nation objected to the negotiations on the US's behalf being conducted by junior officers of the Army Corps of Engineers. It viewed their lack of seniority as an affront to Sioux sovereign nationhood (KLP, 2017). The UN special rapporteur identified significant dishonesty in the Army Corps's environmental assessment; in particular, that negotiations were not conducted in good faith. For example:

> Maps in the draft environmental assessment omitted the reservations, and the draft made no mention of proximity to the reservation or the fact that the pipeline would cross historic treaty lands of a number of tribal nations. (Heim, 2017, para. 7)

For its part, KLP (2017) placed 'significant weight on the UN Special Rapporteur's assessment of the situation' (p. 8). KLP noted that the requirement under US law for 'government-to-government consultation had not occurred' (p. 9). The pension fund was further influenced by Article 32.2 of the Declaration, which provided that:

> 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. (UN, 2007b, art 32.2)

KLP's approach highlighted the Declaration's moral persuasiveness.

In Australia, mining requires the negotiation of land use agreements between mining companies and native title holders. Agreements must be registered by the Native Title Tribunal. However, the tribunal is not required to satisfy itself that the agreements represent the wishes of native title holders, nor is it required to consider whether the collective wish has been determined in a fashion acceptable to the group. Agreement by way of an accepted process is the intent, though not always the practical application, of the *Native Title Act 1993* (Cth):

> acts that affect native title should only be able to be validly done if … every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. (preamble, para. xi)

However, it is procedurally unjust for a mining company to define the negotiating process. Therefore, the Declaration sets out principles to strengthen indigenous negotiating positions:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. (UN, 2007b, art. 27)

Further:

> Indigenous peoples have the right to have access to … just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. (UN, 2007b, art. 40)

While some land use agreements elicit significant benefits for native title holders (Langton & Longbottom, 2012), the *Native Title Act* does not require an equitable negotiation process. Agreements do not necessarily satisfy the requirement for free and informed consent.

Indigenous consent to Adani Australia for its proposed Galilee Basin coal mine was (and is) contested. As a matter of justice, saying 'no' should be a simple and straightforward process. It is true that economic development is in the national interest; however, Australia's economic development does not depend on a single project. It is a false dichotomy to present that national imperative as a matter of conflict with the Indigenous right to culture. They may be mutually exclusive in some cases, but, in a large and diverse First World economy, the two do not always and necessarily need to conflict.

The international mining industry is developing standards for the acquisition of consent. It would be hugely ironic if the mining industry were to take more seriously the moral argument for free, prior and informed consent than nation-states. However, Adani is not a member of the International Council on Mining and Metals and thus has not committed to the international mining industry's view that free, prior and informed consent means that the industry ought to:

- respect the rights, interests, special connections to lands and waters, and perspectives of indigenous peoples, where mining projects are to be located on lands traditionally owned by or under customary use of Indigenous Peoples
- adopt and apply engagement and consultation processes that ensure the meaningful participation of indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation

- work to obtain the consent of Indigenous Peoples where required by this position statement. (International Council on Mining and Metals, 2013, Overview, para. 1)

The Adani case is an extreme one; its environmental and cultural impact is profound, and its economic case is weak. By December 2017, 25 commercial banks had declined loans to support the project (Slezack, 2017).

Good reasons to consent are culturally informed and politically contextualised by colonialism, which is a unique determinant of political experience. The Declaration not only imagines safeguards to protect indigenous interests but also values arrangements that give meaning to the withholding of consent by indigenous peoples. The ability to withhold consent is a matter of political capacity. According to the UN (2016b), 'consultation and consent are not a single event, but should readily occur at all stages of a project from exploration to production to project closure' (p. 5). This is because consent without deliberation could reflect a genuine lack of interest in a policy decision. It could also reflect an individual's lack of confidence in the prevailing decision-making arrangements.

The criteria for reaching publicly reasonable decisions are substantive as well as procedural. Arguments are valid only 'in terms of whether they advance the common good of citizens and the justice of the political society' (Christiano, 1997, p. 243). Therefore, denying indigenous peoples' authority over their lands requires one to argue that such denial is in the interests of the common good, including the good of the indigenous people to whom the argument is being directed. The test is high: 'my proposal P is justified only if, supposing all members of the public were rational, all would accept it' (Gaus, 1997, p. 209). If a prejudicial position must be defended and open to challenge by the reasonableness of others, its intellectual foundation will be exposed.

Democracy might then reappraise public sovereignty to include indigenous peoples and perspectives in the national public. The relationship between the distribution of political capacity and political outcomes makes participation a requirement of justice. The Declaration helps liberal postsettler societies find ways of ensuring the influence of indigenous conceptions of fairness and rationality in the deliberative process. Mitchell (2014) suggested that one would not find conflicts over the commercial exploitation of indigenous natural resources if the right to self-government was secure. This does not mean that resource extractions,

or other usages, by non-indigenous corporations could not occur; rather, that there would have to be benefits to indigenous landholders, and that the landholders themselves would decide the acceptability of any associated costs. Secure land rights would ensure indigenous landholders' decision-making capacity. Decisions would be made with respect to the landholders' conceptions of the common good, with themselves part of the 'common'.

To presume that indigenous interests are always and everywhere inconsistent with those of a separate public, and that commercial resource exploitation is always and necessarily in the public interest, is erroneous. As Bohman and Rehg (1997) argued, 'the political process involves more than self-interested competition governed by bargaining and aggregative mechanisms' (p. x). Indigenous conflict with resource development is not inevitable. However, conflict is always likely to occur when the 'public interest' is exclusively defined and when it presumes that development always and everywhere serves a non-indigenous interest with moral priority.

Article 28 of the Declaration contests the presumption of non-indigenous moral priority. However, its far-reaching implications, and postsettler states' rejection of these, have caused some indigenous people to be wary of the Declaration's value. Like all articles in the Declaration, Article 28 is aspirational. The knowledge that it is unlikely to be implemented may compromise its value to indigenous people seeking self-determination's fuller expression. It states:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress. (UN, 2007b, art. 28)

The Declaration and Liberal Human Rights: Indigenous Objections

Indigenous scholarly objections to the Declaration sometimes understate the relative and relational character of self-determination. While some emphasise an isolationist politics, others privilege polemic arguments against universal human rights as a concept of value to indigenous cultures. The latter follow Kulchyski's (2013) presumption that self-determination is incompatible with a liberal human rights framework and insistence that a 'human rights agenda must inevitably dismiss aboriginal cultural distinctiveness' (p. 73). Such critics of the Declaration presume that rights discourses compromise indigenous aspirations by locating them within a state-centred politics. These objections do not accept liberalism's capacity to create a politics of nondomination. They make indigeneity contingent on a political status of perpetual victimhood rather than aspiring to make domination a temporary state.

Later chapters will show that there is a larger and broader indigenous scholarship that more readily finds value in the Declaration as an instrument of political authority. They will show that there are strong indigenous alternatives to the view that 'nothing in this Declaration is likely to shift power imbalances [that] exist, and [that] continue to determine the future of Indigenous Peoples' (Watson & Venne, 2012, p. 91). For example, there is a body of scholarship on indigenous potential that rejects the presumption of perpetual victimhood. Instead, it recognises the power of resilience and agency and presents indigenous peoples' claims to self-determination in ways that help people to create lives that they have reason to value (O'Sullivan, 2017). The counterpoint is that such discourses run the risk of 'seeking political and/or economic solutions to contemporary challenges that require sustainable spiritual foundations' (Corntassel, 2008, pp. 115–116). Further, Garrow (2012) asked whether the Declaration should be used at all to support indigenous claims to the restoration of political authority. In his view, the Declaration lacks legitimate purpose because, as an instrument of Western human rights law, it does not acknowledge indigenous accounts of sovereignty.

Howard-Hassman (2014) described the Declaration's value as limited because it is not a treaty. With reference to Canada, Maciel (2014) suggested that an 'ontological conflict' between the state and indigenous claims obstructed the Declaration's implementation. In the Australian context, Mansell (2011) argued that:

> The fundamental values that make up Australia are based on the belief of white supremacy … that notion is likely to ensure the Declaration does not become part of domestic law. (p. 659)

Other indigenous commentators reject the Declaration's capacity for meaningful implementation: 'To the extent that we litigate our right to sovereignty through this legal framework, we have lost the true essence of our sovereignty' (Coffey & Tsosie, as cited in Carroll, 2012, p. 146). This is because 'The politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous peoples' demands for recognition have historically sought to transcend' (Coulthard, 2007, p. 437).

Champagne (2013) proposed that, rather than being an instrument of self-determination, the Declaration is a 'sophisticated form of assimilation' (p. 9). It 'treats indigenous peoples either as citizens of nation-states or as ethnic minorities with certain collective political, cultural and economic rights and historical claims' (p. 11), thereby redefining 'indigenous peoples into citizens and ethnic groups' (p. 11). For Ward (2011):

> The only substantive result ensuing [from the Declaration] is that the very structure of relations Indigenous peoples sought to challenge through the processes of the UN have been legitimated in law, the terms of the law itself having been subverted to accommodate legitimation. (p. 549)

Carroll (2012) also read an assimilationist effect into the Declaration, arguing that its inability to:

> recognize formally indigenous political institutions or to restructure indigenous peoples' political relationships with 'the States' reinforces the established construction of geographical scale (and indigenous nations' place on this scale) at international law. (p. 146)

Going even further, Corntassel (2012) described the Declaration's consideration of resource rights as assimilationist: 'the word resource is a way of commodifying and marketizing Indigenous homelands; in contrast Indigenous peoples view their homelands and communities as a complex web of *relationships*' (p. 92, emphasis in original).

Watson and Venne (2012) argued that the Declaration focuses not on 'the rights to self-determination under international law' but on indigenous rights as 'human rights issues within their respective colonised states' (p. 90). Indigenous peoples are therefore 'further encumbered: rather than retaining the rights of peoples as emphasised in the UN Charter, [indigenous peoples] have become objects of local human rights issues' (p. 90). In their view, self-determination is meaningless if it is concerned only with 'gaining political space without indigenous content' (p. 88). They argue that the Declaration's inattention to political space makes it a 'human rights instrument rather than an instrument [that] would provide a mechanism for advancing Indigenous Peoples' rights as nations and peoples' (p. 91).

Watson and Venne (2012) questioned whether the Declaration's dual focus on human rights and collective rights means that the 'individual identity position works to erode that of the collective' (p. 93) and argued that '[i]n an important way, human rights diminish the collective rights of Indigenous Peoples because they concern individuals within the paradigm of the particular state' (p. 96). They worried that allowing the UN Convention on the Rights of the Child to take priority over the Declaration gave states, rather than indigenous peoples, the authority to determine the child's best interests. The final Declaration did not include the draft declaration's statement preventing 'the removal of indigenous children from their families and communities under any pretext' (Iorns, 1993, 'Draft declaration', pt. II art. 6).

The context is clear: in the past, the pretext for removal has been genocidal. However, the final Declaration's seventh article does provide strong safeguards against the removal of children on that pretext:

> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group. (UN, 2007b, art. 7)

Watson and Venne (2012) objected to Article 7, claiming that it elevated 'the rights of the individual over the collective' (p. 97). However, as a work of indigenous peoples internationally, the Declaration remains an authoritative expression of indigenous peoples' political aspirations. Despite not gaining universal approval, its level of indigenous support shows a strong confidence in human rights as both a legal concept and political philosophy.

Watson and Venne (2012) also objected to the Declaration's equal application to men and women because equality undermined male and female distinctiveness in indigenous cultures and undermined an indigenous culture's capacity to define that distinctiveness for itself. Article 44 of the Declaration is explicit: 'All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals' (UN, 2007b, art. 44). Elsewhere, the Declaration maintains that:

> 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
> 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. (UN, 2007b, art. 22)

In a perspective that contrasts with Watson and Venne's, Kuokkanen (2012) argued that self-determination movements pay inadequate attention to violence against women and that:

> One can only conclude that it is prevailing and persistent gender injustice in both indigenous and mainstream societies that lies at the heart of the problem of indigenous women's human rights, not the conflict between individual and collective (or between universal and local) rights. (p. 237)

In the Australian context, violence against women is the most common offence for which Indigenous men are imprisoned (Australian Human Rights Commission, 2017). In the US, one in three indigenous women are raped. In 86 per cent of cases, the perpetrator is a non-indigenous man on a reserve and his non-indigenous status prevents prosecution by reserve authorities (Kuokkanen, 2012). Violence logically and necessarily obstructs women's self-determination (Kuokkanen, 2012; Raya, 2006; Smith, 2013); this shows the importance of self-determination as a right of individuals as much as for groups.

The National Congress of Australia's First Peoples consciously attends to women's self-determination by ensuring equal male and female representation. In contrast, in the Northern Territory, Australia, in 2012, in what the Chief Justice described as an 'extremely difficult case', the Supreme Court accepted cultural values as a mitigating factor in a 55-year-old man's nonconsensual sexual encounter with a 14-year-old girl:

> You [the defendant] believed that traditional law permitted you to strike the child and to have intercourse with her … The Crown accepts that you believed that intercourse with the child was acceptable because she had been promised to you [at the age of four] and had turned 14 … The Crown also accepts that, based on your understanding and upbringing in your traditional law, notwithstanding the child's objections, you believed that the child was consenting to sexual intercourse. (Chief Justice Martin, 2005, para. 17)

In accepting the defendant's explanation of his actions, the Court accepted the complainant's lesser humanity and lesser right to participate in the settlement of a contested cultural value. The claim that sexual contact is a cultural right that extinguishes the need for explicit consent can only hold if there is uncontested agreement about the practice in the indigenous nation in which the claim is made. In this context, the view that collective values are prior to individual values is no more than an argument that physical force determines cultural values. Neither principle nor broad acceptance is relevant to the construction of a cultural practice. In contrast, a liberal theory of indigeneity is concerned with all persons as repositories of a right to self-determination and with all persons' right to deliberate in the formation of shared values. Self-determination does not make sense if it is the preserve of the physically more powerful at the exclusion of the collective values and preferences of other members of a community.

If an indigenous person is prevented from claiming priority for their own culture—if they cannot say 'your cultural value is not mine'—their equal humanity is effectively denied. It follows that if one accepts unequal human worth in an indigenous community, one must accept the logic that justified colonialism: a hierarchy of human worth.

In the absence of an individual right to self-determination, the powerful are able to dominate others and frame their domination as reflecting the collective will—the collective construction of the values by which all must live. However, one cannot object to colonialism's inherent violence

then also claim extant cultural values in defence of one's own violence. Indeed, a report on violence by the International Indigenous Women's Forum argued that 'it is not "culture" that lies at the root of violence against women, but practices and norms that deny women gender equity, education, resources, and political and social power' (Raya, 2006, p. 30). When the self-interested cultural conceptions of the physically powerful are privileged:

> analyses can run the risk of an idealised cultural determinism, especially if they focus exclusively on the semantics of cultural translation and provide wholly cultural answers to what are fundamentally political questions. (Wilson, 2008, p. 310)

It is unjust and illogical for violent men to propose that it is they alone who determine the cultural practices that all must share.

Pauktuutit, the Inuit women's association of Canada, made violence its most important priority. Commenting on the need for such measures, Kuokkanen (2012) noted, 'It appears that, for indigenous self-determination, violence against women is considered neither an indigenous rights issue nor a human rights issue' (p. 238). Violence is a contravention of another's capacity for self-determination. Borrows (2017) observed that '[i]t would be tragically ironic if nation-states began recognising and protecting the rights of Indigenous individuals, while Indigenous governments did not take the same action' (pp. 25–26).

As Kuokkanen (2012) argued, to suppose conflict between collective and individual indigenous rights 'is spurious as it appears to apply only to women's rights' (p. 227). The supposition is grounded in essentialist and grossly simplified accounts of Western and indigenous political philosophies. It requires an absolute and simplistic distinction between the two. Indeed:

> since Native women are the women most likely to be killed by domestic violence, they are clearly not surviving [as peoples]. So when we talk about survival of our nations who are we including? (Smith, 2013, para. 5)

In Maori thought, sexual abuse is more than violation of the individual, it is violation of all 'past and future generations' (Pihama et al., 2016, p. 9). Although its significance is broader than a human rights discourse can admit, this does not make the right to personal safety invalid or culturally alien.

The right to protection from violence is not a private affair. The argument that individual rights are inconsistent with, and subservient to, collective rights is a self-serving one used by individuals claiming moral authority for their own interests by claiming them as the uncontested values of the collective. Violence against women is an important case study in human rights discourse. One must take care not to remove the indigenous from the human in developing conceptions of self-determination. Recognition of the rights of indigenous women means that one must 'conceive both indigenous peoples' rights and indigenous women's rights as human rights [that] exist in a continuum' (Kuokkanen, 2012, p. 249) where 'securing indigenous women's rights is inextricable from securing the rights of the peoples as a whole' (p. 236).

Watson and Venne's (2012) view that 'the rights of the individual are often at odds with those of the collective' (p. 96) diminishes the reciprocal nature of individual–collective relationships. If the collective does not serve its members, it has no purpose and thus no durability. For these reasons, Watson and Venne's argument illustrates why the liberal rights of citizenship are worth claiming. For most people, the transfer of power from the state to indigenous elites is not self-determination.

Like Watson and Venne (2012), Boldt and Long (1984) failed to convincingly address the question of which liberal human rights people would deny themselves as incompatible with, or obstructive of, their values. Boldt and Long described the individual as the:

> repository of responsibilities rather than … a claimant of rights. Rights can exist only in the measure to which each person fulfils his responsibilities towards others. That is, rights are an outgrowth of every person performing his obligation in the cosmic order. In such a society there is no concept of inherent individual claims to inalienable rights. (p. 166)

It is important not to overemphasise indigenous objections to the Declaration. Wider indigenous support suggests that such objections reflect a minority view. At the same time, such objections are philosophically interesting for the questions they raise about relationships between the nation and the person. They are also important because, as McIvor (2004) argued, discrimination against women is by necessity an obstacle to indigenous self-government: 'after 135 years of sex discrimination by Canada, we were afraid of self-government. Why would neo-colonial Aboriginal government, born and bred in patriarchy, be different from Canadian governments?' (p. 128).

Until 1985, indigenous Canadian women's Indian status was revoked upon marriage to a non-indigenous man. Yet the reverse did not apply: not only could Indian men retain their status on marriage, but their non-Indian wives were also automatically accorded membership of the Indian nation (Kuokkanen, 2012). The state, not indigenous peoples, determined who was or was not Indian. The test of indigeneity was not a cultural one determined according to indigenous norms and values but one enshrined in state law to foster the destruction of indigenous communities. As Kuokkanen (2012) explained, 'For Indian women, "marrying out" literally meant a reality of exile from the communities, and hence from their rights and ties to their families, cultures, and identities' (p. 233).

In 1974, the Supreme Court of Canada rejected a challenge to the validity of the *Indian Act* (*Attorney-General of Canada v Lavell*, 1974). However, the Act was subsequently amended after the UN Human Rights Committee found that revoking indigenous women's status on marriage violated their human rights. This established an important international precedent for appealing to authorities beyond the state. However, the amendment still precluded those who had 'married out' from passing on their Indian status to their children. Indigeneity was not to be a matter of culture or ancestry but the marital status of one's mother. Further appeals saw minor amendments to the law (Kuokkanen, 2012). The indigenous women who mounted these cases and their supporters were 'harshly criticized for being anti-Indian and accused of betraying the self-determination struggles and of cooptation into colonial, Western discourses of individualism' (Kuokkanen, 2012, p. 235). However, such objections can only hold if women have no legitimate voice in the construction of collective self-determination.

Cultural maintenance cannot occur in women's absence. The codification of the right to self-determination in liberal terms is especially significant for women and children. The Declaration's presumption of equality is the underlying value that makes it an instrument of self-determination.

On the other hand, liberal democracy conflicts with the view that 'our [indigenous] rights are unconditional, not subject to mediation, and not susceptible to being settled by legislative or adjudicative mediation or compromise' (Garrow, 2012, p. 195). International human rights may then require a political trade-off that some indigenous peoples are not willing to accept. Human rights may override certain collective rights and conceptualising rights within a liberal paradigm may expose them to

political contest in a non-indigenous arena. However, the alternative may be that indigenous peoples wish to exist in closed communities beyond the nation-state as holders of a singular citizenship pursuing an isolable self-determination. In contrast, as Chapter 6 explains, the First Peoples of Fiji may find it problematic that they are excluded from prevailing international definitions of 'indigenous' and thus from the provisions and protections of the Declaration.

Conclusion

Plurality in the distribution of political influence and authority is an essential constituent of the right to self-determination. It is the basis for indigenous inclusion in the sovereign public and for the participation of men and women in the development and evolution of cultural practices.

Mining policy provides insight into the political values motivating state resistance to substantive indigenous inclusion in public decision-making. It demonstrates an 'us' and 'them' binary that inaccurately portrays mining as always and everywhere in the public (i.e. non-indigenous) interest and always and everywhere opposed by indigenous people. This exclusive binary shows the political importance of indigenous inclusion in the sovereign whole as self-determining liberal citizens as well as the relevance of indigenous rights to human rights.

This chapter's critique of indigenous objections to the Declaration demonstrates the self-serving nature of some indigenous arguments against human rights as a contribution to discourses of self-determination, and supports the book's recurring argument in favour of a liberal theory of indigeneity requiring substantive and equal indigenous citizenship of both the state and the indigenous nation.

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