

14. Sex, Race and Questions of Aboriginality

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Human rights jurisprudence would have us believe that all people are accorded the same rights: not to be discriminated against on the grounds of sex. This 'right' is, however, experienced differently by different people. This chapter considers how that difference could be measured and scaled according to how close one is located to the centre of white privilege. Similarly, questions of race and the experience of race discrimination could also be measured against one's proximity to the centre of white privilege. My inquiry here is to consider where Indigenous identity situates in terms of discrimination experiences and how we might measure Indigenous life stories of discrimination. How do these stories situate with the Sex Discrimination Act 1984 (Cth) (SDA) and to what extent might the UN Declaration on the Rights of Indigenous Peoples create a space within which we can not only hear those stories but also effect change?

Introduction

Indigenous women of Australia suffer from multiple disadvantages linked to race and gender.¹ Indigenous identity also brings to the mix of disadvantage the experiences of a historic and continuing colonialism. Thornton's chapter raises issues about the capacity of human rights laws and in particular the SDA to address the imbalance between the 'feminine and authority'; in part, Thornton argues this imbalance is a result of the law's individualised and ad-hoc complaint-based approach to anti-discrimination, which is also interdependent with the

1 Australian Law Reform Commission (*Equality Before the Law: Justice for Women*, Report 69, Australian Law Reform Commission, Sydney, 1994, pp. 119–20, 123–4, 126), in which high levels of violence perpetrated against Indigenous women by Indigenous males were recorded. Critique of more recent Indigenous community violence is drawn from Northern Territory intervention records and the federal government response in the *Northern Territory National Emergency Response Act 2007* (Cth). For a critical analysis of the representation of Indigenous violence, see: Irene Watson, 'Indigenous Women's Laws and Lives How Might We Keep the Law Growing?' (2007) 26 *Australian Feminist Law Journal* 95; Irene Watson, 'In the Northern Territory Intervention, What is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45; Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61.

same authority that it is authorised by. The approach of Australian human rights laws is one-dimensional and incapable of addressing the multiple identities of a complainant, in particular the diverse identities of Indigenous women.

Gender Equity and Self-Determination

The subjugation of Indigenous women within colonial states is continuing and, for this reason, as well as the ones above, the Indigenous women who attended the Fourth World Conference of Women in Beijing in 1995 produced a paper titled, 'Gender Equity vs Self-Determination',² in which they argued that a global strategy of the women's movement should be in terms of self-determination for women, in preference to gender equity. Self-determination is an inclusive concept, which incorporates the right of women to determine their political status and economic and social development. Gender equity, on the other hand, is a narrow concept, focused on sex-based discrimination, which is manipulated by nation-states and avoids issues of racial, environmental, civil, political and cultural inequities, and also the injustices resulting from historical and continuing colonialism. The few cases in which Indigenous women have engaged with Australian sex-discrimination complaints-based processes that do exist illustrate the gap or the exclusion of Indigenous knowledge and how that gap or exclusion works to dispossess Indigenous peoples of even the possibility of a fair hearing of race and sex discrimination complaints.³ We might then ask: what is the point of pursuing a sex discrimination complaint by Indigenous women, particularly when the benchmark measure of equality is a white man, when the path always leads to the same one option—that is, to assimilate? The pressure for Indigenous peoples to assimilate with the dominant settler culture just goes on and on even while the possibility of another future continues to be talked up and struggled for by Indigenous women. It is the same for all women, however; they are all expected to assimilate.⁴ In earlier work, Thornton identified the problem of the state being positioned as the final fixer of inequities, particularly when the complaints of inequities are directed to the 'same masculinist state that legitimated the injustices in the first place'.⁵ And the state has no will to fix inequities that are the same inequities that hold

2 Hardcopy held by the authors.

3 Hannah McGlade, 'Reviewing Racism: HREOC and the *Racial Discrimination Act 1975* (Cth)' (1997) 4(4) *Indigenous Law Bulletin* 12; Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases*, Working Paper No. 8, Centre for Employment and Labour Relations, University of Melbourne, Vic., 1995. In their study, they identified that three complaints out of a total of 238 were made by Aboriginal people and they were all from South Australia; one of them was by a male complainant.

4 For an earlier discussion, see: Irene Watson, 'The Power of Muldarbi and the Road to its Demise' (1998) 11 *Australian Feminist Law Journal* 28; and for a more recent discussion, see: Regina Graycar and Jenny Morgan, 'Thinking about Equality' (2004) 27 *University of New South Wales Law Journal* 833, 838.

5 Margaret Thornton, 'Feminism and the Changing State' (2006) 21 *Australian Feminist Studies* 150.

its foundations together.⁶ While there is an idea that 'feminism has no theory of the state',⁷ Indigenous women's activism has historically centred claims in respect of our rights as peoples in international law, and challenged the settler states to decolonise.

At the Beijing conference, Indigenous women argued that the empowerment of women could be realised only within the context of self-determination, but that the struggle for 'gender equity' occurs outside the context of decolonisation, resulting in the preclusion of Indigenous women. They concluded that gender equity for Indigenous women could be achieved only within an anti-colonial and anti-imperialist framework.

In this chapter, I review initiatives taken by Indigenous women to gain a space free from the terror and the colonialist policies of the state, which would enable our survival. As it is, the historical and contemporary policies of state assimilation agendas are against us. In the late 1970s, Indigenous women and men became globally engaged in the drafting of minimum international standards intended to safeguard and ensure the survival of Indigenous peoples. That process was taken up by the United Nations in the 1980s and culminated in the Declaration on the Rights of Indigenous Peoples. The Declaration has been celebrated as setting 'an important standard for the treatment of Indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million Indigenous people and assisting them in combating discrimination and marginalisation'.⁸

The following is a critical review of the Declaration and an analysis of the extent to which it is likely to advance the position of Indigenous women and their communities. While the question of sex discrimination is important, the following critique considers the larger political questions that are impacting on Indigenous life across Australia and that have an equal impact on the position of Indigenous women and the possibility of their freedom from sex discrimination. We will argue that during its drafting and passage through the United Nations, the Declaration moved away from the original intent of the Indigenous drafters and now represents a shift in focus to the illusive concept: human rights of Indigenous peoples. The original intent was to re-establish the rights of peoples to be self-determining, while also initiating a process of decolonisation for those Indigenous peoples who have survived.

6 Ibid. 155. Thornton argues that the state is unable to fulfil its promise under sex discrimination legislation for the equality of women because the social norm is inequality.

7 Ibid. 153, citing Catharine MacKinnon, *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge, Mass., 1989, p. 157.

8 *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues, <<http://www.un.org/esa/socdev/unpfii/documents/FAQsIndigenousdeclaration.pdf>>

The UN Declaration on the Rights of Indigenous Peoples

In its final version, the Declaration raised the following important question: does the Declaration have the capacity to deliver on its original intention, to eradicate the continuing discrimination faced by Indigenous peoples and to promote Indigenous self-determination and survival of genocide? In this chapter, I will critique the capacity of the Declaration to recognise the rights of Indigenous peoples as peoples. A UN declaration is not a legally binding instrument under international law. Its status, at the most, is inspirational and persuasive, providing a model for the development of international law in the form of future conventions. It is important to note that Australia maintained its opposition to the Declaration until April 2009, and New Zealand until April 2010, while Canada and the United States remain, at the time of writing, opposed to its adoption.

The Australian state has never explored the option of Indigenous self-determination in any truthful way. The term 'self-determination' has been appropriated by the Australian federal government in the enactment of various initiatives since the 1970s, but a quick examination of each of those acts and policies reveals their continuing colonial nature and intent.⁹ It is clear that to simply gain control of state institutions is not enough to enable decolonisation and, as Taiaiake Alfred suggests, 'without a cultural grounding, self-government becomes a kind of Trojan horse for capitalism, consumerism, and selfish individualism'.¹⁰ The simplistic project of gaining political space without Indigenous content is as meaningless as replacing the white mission managers with our own mob, while continuing mission policies. The interpretation of decolonisation as an act of populating white political space with Indigenous people as managers of that white political space is not an act of decolonisation; it is rather a turn in the colonial project that enables Indigenous management of the colonial project.

It is my argument that this is what the Declaration became, that it is not an act of decolonisation. It is instead an instrument that ensures the continuation of the colonial project and is intent on the assimilation of Indigenous peoples.

9 The Australian Government established the Aboriginal and Torres Strait Islander Commission (ATSIC) and promoted it as an initiative in self-determination. For a while, it did provide an element of independence, although this was more in the form of Indigenous management of the colonial state's policies than real autonomy. As a statutory body of the Australian Government, ATSIC was tied to its purse strings and was rendered ineffective due to the limited powers allowed it. Further, its role and authority were progressively restricted by the conservative Howard Government, which for more than a decade ignored numerous reports highlighting a neglect of essential services to Indigenous communities and a growing crisis across Australia. The government allowed and fomented reporting of a series of scandals involving ATSIC leadership and eventually dismantled it, citing it a failure of an Indigenous self-determination policy.

10 Gerald Taiaiake Alfred, *Peace, Power, Righteousness, An Indigenous Manifesto*, Oxford University Press, New York, 2009, p. 3.

For a real act of decolonisation to occur, we need to regain an Indigenous centre—that is, an Indigenous centre that engages in its own decolonisation and repairs the damage of the effects of colonialism—and to enable that centre to occupy the spaces of political power, rather than let it become assimilated into colonial processes of power sharing. To decolonise, the process needs to assimilate the colonisers into Indigenous processes of power sharing. It is clear that the UN declaration is light years away from undertaking that turn in power-sharing arrangements. It is also clear the Declaration will not enable Indigenous women to become more self-determining.

The Passage of the Declaration

The Declaration was adopted by the UN General Assembly in New York in September 2007. It was a shadow of the Indigenous Declaration that had been initially developed by the UN Working Group in Geneva. In the final UN General Assembly Declaration, a number of articles essential to the recognition of self-determination had been expunged. Indigenous peoples' rights to exercise their free, prior and informed consent were violated in 2007 when the United Nations voted on the passage of the Declaration. At that time, Indigenous peoples were given only three days' notice of the document coming before the General Assembly for the final vote, and it was impossible in that time for their representatives to examine it and to act to remedy any deficiencies or betrayals within it. It therefore should not be construed that Indigenous peoples had fair and constructive notice of its passage. As it happened, the UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly. Some 143 countries voted in its favour, 11 abstained and four voted against. Australia, Canada, New Zealand and the United States were the four countries that voted against the Declaration. On 3 April 2009, however, the Australian Government changed its position and formally supported the Declaration.¹¹ Evidently, the Australian Government came to realise that the Declaration posed no threat or risk to the state's hegemony. The likelihood of the Declaration enabling the rights of Indigenous peoples to self-determination was nil and, by 2009, the Australian Government had become confident enough that it provided no risk to its paramountcy and continuity.¹² It was clear that the colonial project would emerge intact, indeed virtually undisturbed, with the Declaration upheld as a major initiative in the recognition of Indigenous rights.

11 Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, 3 April 2009, Speech delivered at Parliament House, Canberra, <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>

12 In 2007, the newly elected Rudd Labor Government was also likely to have influenced the federal government's endorsement in 2009 of the UN Declaration on the Rights of Indigenous Peoples.

Human Rights or Rights of Peoples? A History of the Declaration

Indigenous peoples initiated the drafting of the Declaration and at the beginning the drafting process was Indigenous business. In the beginning, the process had no relationship to the UN system but this was to change in 1981 when it was taken up by the United Nations and vested with the Working Group on Indigenous Populations (WGIP) in Geneva. Notably, the drafting being taken up by the WGIP took place without the consent of Indigenous peoples. Nevertheless, the WGIP went ahead with a mandate to draft standards and also to review recent developments. The drafting of the Declaration did fulfil these two objectives and, while the WGIP sessions during the 1980s and 1990s involved Indigenous peoples, the same sessions also included state governments, including those of Canada, New Zealand, Australia and the United States. Once the drafting had become incorporated into the UN system, states began their own manipulations, principally lobbying Indigenous groups to surrender inherent rights as peoples.

In 2006, the drafting of the Declaration moved from Geneva to New York where Indigenous people working close to governments participated in its final drafting. It was at this stage that it was expunged of articles that referred to the UN Charter and rights to self-determination. The Declaration does refer to 'internal rights' to self-determination; these are rights that are determined by the various colonial states that occupy Indigenous peoples' lands. References to international standards in the Declaration are now redundant and the focus has shifted from the rights of peoples to self-determination under international law to Indigenous peoples' rights as human rights issues within their respective colonial states. Thus, Indigenous peoples are further encumbered; rather than retaining the rights of peoples as enshrined in the UN Charter, we have become objects of local human rights issues. The UN Declaration that was ratified by the General Assembly has been stripped back to a human rights instrument rather than an instrument that would provide a mechanism for advancing Indigenous peoples as peoples. The Declaration enables recognition of a range of human rights but fails to progress in any meaningful manner the Indigenous right of peoples to self-determination as recognised under the UN Charter. Until the drafting was shifted from Geneva to New York, Indigenous peoples held the line on the international-law recognition of our status as peoples. With the dismantling of the Commission on Human Rights and the Inter-Sessional Working Group, a new UN body—the Human Rights Council—decided to move the Declaration along to the UN General Assembly in New York.

When the Declaration did move to the General Assembly, there was no presentation made that described the historical process and how the Declaration had evolved. This was important; the historical context of the Indigenous

struggle for self-determination was not given the context it should have been. Instead, indigenes and others who participated in this final process appear to have looked at it as simply a process of getting the Declaration through. There should have been a further critical analysis of its final content with final submissions made by Indigenous peoples as to its inadequacies or otherwise as a statement on Indigenous peoples' rights in international law. The following discussion refers to articles—part of the Geneva draft of the Declaration—which were removed from the final document, accepted and passed by General Assembly in 2007.

The Geneva Draft: Colonisation

The Geneva draft of the Declaration referred to colonialism in reference to Martinez Cobo's definition of Indigenous peoples; this had developed from Cobo's UN study on discrimination practised against the world's Indigenous peoples. In his study, Cobo had worked towards the development of a universal definition of 'Indigenous people':

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹³

Cobo discussed the process he had adopted in coming to a definition of Indigenous peoples in these terms:

- (a) Indigenous peoples must be recognised according to their own perceptions and conception of themselves in relation to other groups co-existing with them in the fabric of the same society;
- (b) There must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies;
- (c) The right of Indigenous peoples to define what and who is Indigenous, and the correlative, the right to determine what and who is not, must be recognised;

¹³ Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations. Volume 5, Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7 Add.4, paras 379 and 381.

(d) The power of Indigenous peoples to determine who are their members must not be interfered with by the state concerned, through legislation, regulations or any other means; artificial, arbitrary or manipulatory definitions must be rejected. The special position of Indigenous peoples within the society of nation-states existing today derives from their historical rights to their lands and from their right to be different and to be considered as different.

The Cobo definition highlights that in many cases Indigenous peoples have been dispossessed by the processes of colonisation and have not been able to decolonise due to political circumstances. This definition applied to Indigenous peoples of the Americas, Canada, Australia, New Zealand and parts of the Pacific. It was very clear who was being embraced by the Declaration. There is a link between colonisation, territories, lands and resources, but these references were removed from the final UN General Assembly Declaration in 2007. Moreover, the Declaration broadens the concept of 'Indigenous' and, as a result, it is no longer clear to whom it applies. This is particularly problematic for Indigenous peoples who have not had the opportunity to deal with the key issues of colonialism and the power to develop decolonisation processes.

The New York Declaration and Individual/Collective Rights of People

The UN Declaration added reference in the preamble to individuals; previously the draft had referred to collective rights of Indigenous peoples. The following is taken from the draft:

Recognizing and reaffirming that Indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples. (Emphasis added)

The following is taken from the Declaration; in addition to the preamble, Article 1 was added:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

It is difficult to imagine how the choice between being a member of a collective or an individual within a nation-state might work. In the early days of drafting

the Declaration, Indigenous peoples were not thinking about individual human rights but rather the inherent rights of peoples to their lands and the right of the group to be self-determining. The tension between individual and collective rights is manifest in the 2007 Declaration, which further provides no guidance as to how collective rights might be attained and recognised by the state. What impact does this dual position then have on the idea of a collective right of Indigenous peoples? For example, are you an individual citizen of the state or a member of an Indigenous nation, and does the individual identity position work to erode that of the collective?

Exercising in Conformity with International Law

Indigenous peoples originally began working on a declaration because the existing international legal norms did not protect them. The work was supported by the Cobo report, which reported on the high levels of discrimination Indigenous peoples experienced. Instead of referring to international legal norms and guaranteeing the same standards to Indigenous peoples, the 2007 UN Declaration ensured that legal matters were internalised and that international legal norms were absent: ‘*Convinced* that the recognition of the rights of Indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the state and Indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.’

So does the above leave anything that might compel the Australian state to desist from further breaches of Indigenous rights? Rhetoric concerning principles of justice, democracy, respect and good faith is beguiling, but unlikely to shift the genocide process in Australia or that suffered by any first nations peoples.

When Indigenous peoples initiated the Declaration’s drafting, we were lobbying not for human rights but for recognition of our rights as peoples. Why would we develop a separate and distinct set of human rights standards? It is the recognition of the right to self-determination that was claimed, the logic being that if the right to self-determination was realised, so would basic human rights, including the right of women not to be discriminated against.¹⁴ The process of recognition should have been in reference to international legal norms as expressed in the UN Charter and intended to apply to all peoples.

14 The Declaration concept is layered with allusions to recognition—allusions that are impossible to realise due to tensions with the state. Consider Justice Brennan in *Mabo v The State of Queensland* (1992) 175 CLR 1 30, in which he declared that any rupture within the foundation of the Australian state would disrupt founding principles of law. In *Mabo*, that rupture would have been a claim to sovereignty made by Indigenous

So what was the intent of developing a distinct standard of human rights for Indigenous peoples, particularly when Indigenous peoples live within democracies such as Australia, Canada, the United States and New Zealand, which are deemed to uphold justice and human rights? The problem is that when it comes to recognition of Indigenous peoples, the human rights track record of these states is poor, and all of them have breached international norms regarding Indigenous peoples. So how might they give recognition when the UN Declaration does not call these states to comply with international legal norms when dealing with Indigenous peoples?

Indigenous peoples lobbied for recognition as peoples and as members of the international community at the United Nations for more than three decades. The quest was for recognition of our rights as sovereign peoples, not just human rights. In an important way, human rights diminish the collective rights of Indigenous peoples because they concern individuals within the paradigm of a particular state. Just as we do not talk about the human rights of the state, we talk about the territory and the sovereignty of the state.

Human rights, applied universally, also have the capacity to negate the Indigenous world view, in which we have both obligations and rights. The individual rights angle is a Western notion and has never been a good fit for Indigenous peoples. The right of individuals is often at odds with those of the collective and the collective relationship to the lands and territories and the natural environment of each people. While also within the collective, Indigenous women hold women's laws and gendered spaces. The agents of *terra nullius* ignored this fact as they also ignored the existence of Aboriginal laws in general.

Genocide and the Declaration

Article 6 of the original Draft Declaration, read as follows:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence including the removal of Indigenous children from their families and communities under any pretext. In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.¹⁵

The above clause was removed and replaced with Article 7, which again elevates the rights of the individual over the collective:

peoples. For further discussion on human rights and state tensions, see: Wendy Brown, 'The Most We Can Hope For: Human Rights and the Politics of Fatalism' (2004) 103(2/3) *South Atlantic Quarterly* 451; Jacques Ranciere, 'Who is the Subject of the Rights of Man?' (2004) 103(2/3) *South Atlantic Quarterly* 307.

15 UN Doc E/CN.4/Sub.2/1994/2Add.1, Draft Declaration on the Rights of Indigenous Populations.

Article 7

1. Indigenous individuals have the right 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.¹⁶

The gutting of the original is of particular concern especially when we are reminded that the prime reason for the Declaration was to provide minimum standards that would prevent the continuing genocide of Indigenous peoples.

Self-Determination

The possibility of addressing the power differentials that exist between Indigenous peoples and states was seen to require the most significant intentions of the Draft Declaration on the Rights of Indigenous Peoples. It was Article 3 that referenced the right to self-determination: 'Indigenous peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.'¹⁷

More importantly, Article 3 was reinforced by Paragraph 14 in the preamble:

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Any reference or nexus to the UN Charter so as to affirm the significance or possibility of a core or solid recognition of self-determination was, however, removed from the Declaration. As a result, the final version of the Declaration was reduced in its capacity and potential to provide for the recognition of the right to self-determination and as a result Indigenous peoples will remain captives of the colonial state, contained by its internal rights discourse or 'domestic paradigm', which Schulte-Tenckhoff argues is the regime Indigenous

¹⁶ The Declaration on the Rights of Indigenous Peoples is available online (<<http://www.iwgia.org/sw248.asp>>).

¹⁷ UN Doc E/CN.4/Sub.2/1994/2Add.1.

peoples continue to live under.¹⁸ In limiting the right to self-determination, the Declaration has no external or international law meaning and is without capacity to effectively negotiate a true Indigenous space and in particular a space for Indigenous women. Article 5 provides for a superficial recognition of self-determination—Indigenous development will be enabled within the confines of the state: ‘Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.’

Without a nexus to the UN Charter, Indigenous peoples are, however, reduced in our capacity to participate more fully within the UN system. It will continue to remain the position that whenever Indigenous ways of knowing the world collide with the agenda of the state, the state will take over and determine the outcome. For example, where Indigenous peoples are opposed to development that is in conflict with their political, legal, social and cultural values but is sanctioned by the state, there will remain no mechanism, in spite of the existence of the Declaration, which will assist in determining pathways to coexistence. Instead, the state’s perspective will overtake and determine the development, or otherwise. As we know, much of the history of colonial contact with Indigenous peoples has been a long process of genocide. The Declaration will not perform against that historical and continuing trend.

The 2007 UN Declaration ensures that the principle of self-determination as it is applied to Indigenous peoples is limited and this is noted in its preamble in the following: ‘Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect.’

These are fine words, but the truth of respect and partnership can be realised only where the differentials of power are balanced and this will not occur while the position of Indigenous peoples is determined by the state. It will not occur while international legal norms are disabled from applying to the Declaration and this is evident in the preamble, which has no relevance to them. You cannot have partnership where an imbalance of power works against the possibility of that partnership being realised. This position will not correct itself unless international legal remedies are able to compel states to comply. The state remains the final determiner of all things within the life of the state, including the lives of Indigenous peoples. This has been the way since the advent of colonisation and nothing in this Declaration is likely to shift power imbalances that exist and that continue to determine the future of Indigenous peoples.

18 Isabelle Schulte-Tenckhoff, ‘Re-assessing the Paradigm of Domestication: The Problematic of Indigenous Treaties’ (1998) 4 *Review of Constitutional Studies* 239.

Article 9 of the Declaration is rendered ineffective in a similar way: 'Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.'

Again, the above clause stands able to be interpreted by nation-states that the right to perform as communities or nations as might be determined or permitted by them. Therefore core concepts of Indigenous obligations to care for country will be determined by the state. The same will go for the keeping of Indigenous women's laws. It is also clear that the state will not permit the return of Indigenous lands or prevent their development where any developments are in conflict with state agenda.

Throughout the Declaration, changes have occurred and reduced the capacity of Indigenous peoples to determine our futures. For example, Articles 12, 13, 14 and 15 of the Draft Declaration have been changed and now pose a limit to the possibility for the development and continuing sustainability of Indigenous cultures. The UN Declaration focuses on the present and has no commitment to revitalising past practices or to providing for the restitution of a stolen past. Without such recognition, Indigenous peoples engaged in rebuilding their communities stand without a remedy or assistance to regenerate their communities.

The Territorial Integrity of States is what Matters

In addition to the many alterations made to the draft, the UN Declaration added Article 46, which reads:

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would *dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States* [emphasis added].
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of

securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The fears that the Australian and other governments had of the Declaration—that it might threaten their hegemony—were without foundation. Article 46 makes clear that continuing subjugation could continue while also rendering it impossible that Indigenous peoples would be able to develop and articulate a decolonised Indigenous space.

The Draft Declaration, created by Indigenous representatives, ended with Article 45: ‘Nothing in this Declaration may be interpreted as implying for any State or group or person any right to engage in any act or activity or to perform any act contrary to the Charter of the United Nations.’

This draft provided the nexus to the Charter of the United Nations and the intention was that it be interpreted in accord with the legal norms of international law. At last, however, Article 45 reads: ‘Nothing in this Declaration may be constituted as diminishing or extinguishing the rights...Indigenous peoples have or may now acquire in the future.’

Again, we have been cut away from international legal standards and as Indigenous peoples deemed to sit outside (or perhaps inside) international law, wherever the states determine our existence or otherwise. As a result of the limitations the UN Declaration places on the position of Indigenous peoples, our rights in international law have in fact been diminished rather than affirmed. The link to the UN Charter was critical to the survival of Indigenous peoples up against the genocidal practices of states and without that link the Indigenous future remains a question as unresolved as it was when Indigenous peoples negotiated their entry to the United Nations in the early 1970s. The Charter is supposed to uphold peoples’ rights. It was important to link the Declaration on Indigenous Peoples back to the Charter, because of the reference to nations and peoples. The Charter does not say anything about states having rights to self-determination. It refers to peoples and nations, and that is why the original Indigenous draft Declaration was linked to the Charter. The Indigenous people who were involved in the final ratification of the UN Declaration were not the same and did not have the same historical background as those who had begun the process three decades earlier; they also had limited knowledge of international law. Knowledge of international law was critical to the process ensuring Indigenous peoples were favourably treated. As a result, we have

ended up with a UN Declaration that is largely rhetorical and full of hollow statements without power to provide a remedy, and with a document that is far less significant to Indigenous peoples than the draft Indigenous declaration we began with. The ratified UN Declaration does still promise some advantages. In the following, I briefly analyse some of its possibilities, remaining clear, however, that the disadvantages outweigh any perceived advantages.

Advantages

It is possible that the UN Declaration will be used as an international standard to negotiate domestic reform and frameworks for engagement with Indigenous peoples. There is, however, no mechanism to enforce any of those reform measures or frameworks for engagement. The Declaration resides purely in the realm of the goodwill of the state and the more powerful economic interests that limit or conflict with Indigenous peoples' interests. A further advantage could be that the Declaration is used as a tool by the judiciary to assist in the interpretation of the terms used under human rights legislation.

Disadvantages

The biggest problem with the Declaration is that it is not clear to whom it applies. The definition developed by Cobo clearly applied to Indigenous peoples living in colonial states and territories, included Indigenous resources controlled by the colonial state and also applied to Indigenous peoples who did not have the opportunity to be listed and considered by the UN decolonisation committee. This definition applied to Indigenous peoples of Australia, Canada, the Americas, parts of the Pacific and New Zealand. The ratified UN Declaration is broad in its definition of Indigenous peoples and as a result it is unlikely to assist Indigenous peoples who were included in the Cobo definition of Indigenous peoples.

Indigenous peoples sought out UN fora in the 1970s to secure land rights and self-determination, and Indigenous women supported this process as a means of attaining self-determination so as to position the rights of women. This aim remains unfinished business between states and Indigenous peoples and is now further limited and marginalised by the UN Declaration. There are currently no effective UN mechanisms to promote Indigenous peoples' concerns. The UN Indigenous structures that do exist include the Indigenous Permanent Forum and the Indigenous Expert Mechanism; however, both these fora are controlled by the states; the state governments make decisions about what these mechanisms can or cannot do in the setting of agenda. The Permanent Forum, for example, hears presentations from Indigenous peoples, the body then reports on those sessions and those reports are sent off to the Economic and Social Council (ECOSOC). The Permanent Forum is one of a number of bodies

that feeds into the ECOSOC agenda. Documents that might be forwarded and reviewed will not, however, be progressed through the UN system, as there are no mechanisms to further advance them. The Permanent Forum cannot draft standards or hear complaints.

The standard-setting and complaints procedures that existed while the UN Working Group on Indigenous Populations was at work in Geneva no longer exist and, as a result, the studies that were developed by the WGIP, such as the Study on Treaties and other Constructive Arrangements between States and Indigenous Populations,¹⁹ remain in a state of limbo, shelved and gathering dust. Without mechanisms that could bring those studies before UN bodies, they are likely to disappear within the UN system. Indigenous peoples now have nowhere to present general complaints and report recent developments occurring on our territories. Under the now disbanded WGIP, Indigenous peoples were able to participate in the forum and to provide information about recent developments. If there was a major event occurring then that information could be moved up through the system, to the sub-commission and then to the Human Rights Commission. The event could also engage the Human Rights Centre and the possibility for the involvement of the High Commissioner for Human Rights. With the advent of the Declaration, the recently created UN Indigenous Expert Mechanism agenda is set by the states. For example, the agenda set for 2008 proposed to meet for three days and discuss Indigenous education. In 2009, the agenda set by the states proposed discussions on housing issues. This forum commits each calendar year as a particular 'policy year' (where a 'special theme' is discussed) and each odd calendar year as a 'review year' (where the implementation of the forum's past recommendations on specific themes is reviewed).²⁰

Since the disbanding of the WGIP there are no UN fora or mechanisms by which Indigenous peoples can raise general complaints affecting them; instead, the Indigenous Expert Mechanism reports to the Human Rights Council, and this is considered within the context of all other priorities that come before the Human Rights Council. In the past those priorities have prompted focus on Palestine, Darfur and Afghanistan. It is clear within this context that a report on the lack of education of Indigenous peoples would not be considered a priority.

19 Miguel Alfonso Martínez, *Human Rights of Indigenous Peoples: Study on Treaties and other Constructive Arrangements between States and Indigenous Populations*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-First Session, Item 7 of provisional agenda, E/CN.4/Sub.2/1999/20 22 June 1999, United Nations, New York, <<http://www.unhcr.ch/huridocda/huridoca.nsf/0/696c51cf6f20b8bc802567c4003793ec?opendocument>>

20 International Service for Human Rights, *Permanent Forum on Indigenous Issues: 7th Session*, Human Rights Monitor Series, International Service for Human Rights, <http://olddoc.ishr.ch/hrm/nymonitor/new_york_updates/permanent_forum/nyu_perm_forum_7session_a_fresh_approach.pdf>

The Human Rights Centre provided support for Indigenous peoples in the past, but this is no longer available, and the Indigenous experts who have been appointed are not engaged full-time. The Indigenous Rapporteur is a UN position, but it is a voluntary and unpaid appointment. Therefore the capacity of Indigenous people to act internationally has been substantially reduced as the resources are limited and those used in the past to bring the Declaration into existence no longer exist.

In the past, UN studies would be recommended by the working group and passed on to the sub-commission, or a body of UN experts would approve or otherwise and make their recommendation to the Human Rights Commission. The commission would make a resolution, which, when passed, would have attached to that resolution its financial implications. Funding would be sourced for the study by the secretariat from the Human Rights Centre, which would also provide a warm-body technical support person to assist it. This process ensured that there was institutional support for any studies that were proposed. The Indigenous Expert Mechanism is, however, not part of the new Human Rights Council Advisory Body of Experts, and as they have no relationship to the secretariat, they cannot initiate studies.

At a time when Indigenous peoples have more reason than ever to appeal to the United Nations, the means to argue the importance of our issues are reduced. We have to compete with the large number of issues that comes before the Human Rights Council; we are prioritised. This brings into question the future of both the UN Indigenous Permanent Forum and the Indigenous Expert Mechanism and what they might be able to achieve within the current shifts and the illusionary space the passage of the Declaration has created. Having taken control of the drafting process in its final stages, the state governments crafted the Indigenous Permanent Forum and the Indigenous Expert Mechanism to ensure they are now unable to effectively draft standards and report on and advance complaints that reflect on the current position of Indigenous peoples across the globe. For example, in 2008, a number of Indigenous peoples attending the Expert Mechanism Forum came to speak on recent developments in their territories; one group reported on the massacre of a number of Indigenous people in South America. A widow who came to speak was shut down by the chairperson and advised that unless she was able to speak to the agenda item (at the time it was education) then she could not speak.

The shifts that took place and the current UN responses to Indigenous peoples no longer enable a space for the complaints of Indigenous peoples, which address issues of survival and genocide, to be heard. It is clear today, after more than three decades of Indigenous work within the UN system to develop humane standards for the states and the international community to engage and create coexistence, that we are no more advanced than when the process first began. It

is clear that we must return to the main body of the United Nations, as we are finding the UN Indigenous Mechanisms are disabled from hearing our issues. The issue of colonialism has not been addressed and we must continue to argue that the colonial processes remain alive and continue to threaten the survival of Indigenous peoples. We need to ensure that the states of Australia, Canada, New Zealand, the United States and those of South and Central America are not let off the hook for their continuing role as colonialist states, and we must continue to argue the possibilities of decolonisation. For those Indigenous peoples whose lands and lives are controlled by those states, we remain without any effective mechanism to deal with the many issues of our survival and futures.

What is There for Us to Do?

There is a need to return to the main game inside the UN fora; we have to go back to those spaces, out of the side alleys and UN ghetto spaces that we have been herded into. We are peoples and we belong in the main game—that is, to humanise the world and its treatment of all peoples.

In reclaiming our spaces within the main game, we also note that for Indigenous peoples colonialism remains the main object. The colonial states continue to offer assimilation as the only solution. The promise of strong international human rights standards and the Australian Government's acceptance of the Declaration are unlikely to shift the position of Indigenous people here. The assimilation agenda of colonial states continues the reductionist approach to Indigenous rights, the states seizing and setting policies for Indigenous survival and development.

We need to hold the line and our right to conceptualise the Indigenous position. Why should we hand over our right to name who we are to the states—at either a domestic or the international level? The work continues and, as Indigenous people, we have an obligation not to trade off our inherent rights in the form of any agreement, compact or partnership that falls short of recognition in accord with the norms of international law, and our right to determine the future of our lands and lives.

Conclusion

The Australian Government's acceptance of the Declaration is unlikely to shift the continuing regression of Indigenous policy and the position of Aboriginal women in Australia. The assimilation agenda of Australia, which we are

witnessing in the Northern Territory intervention, continues as ever, since 1788. We live in a moment when Indigenous law and self-determination as forms of social control are referred to by Peter Sutton as follows:

The ancient social order, while resting on a mixture of internal and external constraints like any other, depended very highly on external mechanisms of control. This meant fear of consequences more than anything else, including fear of ostracism, exclusion, and humanly imposed physical or supernatural harm or death. In this sense the authoritarian and patriarchal regimes of most of the early Christian missions were, bizarre as this might sound, ‘culturally appropriate’ in a way that the liberalised and more chaotic regimes of recent times have not been. This is not, of course, to suggest that this particular clock can or should be turned back.²¹

Sutton’s suggestion is not that we turn the clock back, but he nevertheless refers to the successes of a patriarchal regime that he saw as having the capacity to pull everyone into gear. This is the Northern Territory intervention model: the state has asserted its power to intervene and elevate its policies of assimilation, with the corollary of the eventual erasure of Indigenous peoples in Australia. We might encourage white women to ask the Angela Davis question: who might the state come for next?

The question of where Indigenous peoples sit in the context of sex discrimination is an important one, but in the light of recent developments and the evident policy shift back to assimilation, those questions need to be measured against the larger political questions that are impacting on Indigenous life across Australia.

Bibliography

Books and articles

Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No. 69, Australian Law Reform Commission, Sydney, 1994.

Brown, Wendy, ‘The Most We Can Hope For: Human Rights and the Politics of Fatalism’ (2004) 103(2/3) *South Atlantic Quarterly* 451.

Cobo, Jose Martinez, *Study of the Problem of Discrimination Against Indigenous Populations. Volume 5, Conclusions, Proposals and Recommendations*, UN Doc E/CN 4/Sub 2/1986/7 Add 4, United Nations, New York, 1986.

21 Peter Sutton, *The Politics of Suffering. Indigenous Australia and the End of the Liberal Consensus*, Melbourne University Press, Carlton, 2009, p. 109.

- Graycar, Regina and Morgan, Jenny, 'Thinking About Equality' (2004) 27 *University of New South Wales Law Journal* 833.
- Hunter, Rosemary and Leonard, Alice, *The Outcomes of Conciliation in Sex Discrimination Cases*, Working Paper No. 8, Centre for Employment and Labour Relations, University of Melbourne, Vic., 1995.
- McGlade, Hannah, 'Reviewing Racism: HREOC and the *Racial Discrimination Act 1975* (Cth)' (1997) 4(4) *Indigenous Law Bulletin* 12.
- Macklin, Jenny, Statement on the United Nations Declaration on the Rights of Indigenous Peoples by the Minister for Families, Housing, Community Services and Indigenous Affairs, 3 April 2009, Speech delivered at Parliament House, Canberra, <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>
- Moreton-Robinson, Aileen, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61.
- Ranciere, Jacques, 'Who is the Subject of the Rights of Man?' (2004) 103(2/3) *South Atlantic Quarterly* 307.
- Schulte-Tenckhoff, Isabelle, 'Re-assessing the Paradigm of Domestication: The Problematic of Indigenous Treaties' (1998) 4 *Review of Constitutional Studies*, 239.
- Sutton, Peter, *The Politics of Suffering, Indigenous Australia and the End of the Liberal Consensus*, Melbourne University Press, Carlton, 2009.
- Taiaiake Alfred, Gerald, *Peace, Power, Righteousness, An Indigenous Manifesto*, Oxford University Press, New York, 2009.
- Thornton, Margaret, 'Feminism and the Changing State' (2006) 21 *Australian Feminist Studies* 150.
- Watson, Irene, 'The Power of Muldarbi and the Road to its Demise' (1998) 11 *Australian Feminist Law Journal* 28.
- Watson, Irene, 'Indigenous Women's Laws and Lives: How Might we Keep the Law Growing?' (2007) 26 *Australian Feminist Law Journal* 95.
- Watson, Irene, 'In the Northern Territory Intervention, What is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45.

Case

Mabo v The State of Queensland (1992) 175 CLR 1

Reports and miscellaneous primary sources

Draft Declaration on the Rights of Indigenous Populations, UN Doc E/CN.4/Sub.2/1994/2Add.1, United Nations, New York.

International Service for Human Rights, *Permanent Forum on Indigenous Issues: 7th Session*, Human Rights Monitor Series, International Service for Human Rights, <http://olddoc.ishr.ch/hrm/nymonitor/new_york_updates/permanent_forum/nyu_perm_forum_7session_a_fresh_approach.pdf>

Martínez, Miguel Alfonso, *Human Rights of Indigenous Peoples: Study on Treaties and other Constructive Arrangements between States and Indigenous Populations*, June 1999, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-First Session, Item 7 of provisional agenda, UN Doc E/CN.4/Sub.2/1999/20.22, United Nations, New York, <<http://www.unhcr.ch/huridocda/huridoca.nsf/0/696c51cf6f20b8bc802567c4003793ec?opendocument>>

United Nations Declaration on the Rights of Indigenous Peoples

United Nations, *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues, United Nations, New York, <<http://www.un.org/esa/socdev/unpfii/documents/FAQsIndigenousdeclaration.pdf>>