

The Human Rights Framework: What Does it Offer?

Political Debate and International Documents

I think it is important, in introducing human rights treaties and international obligations into political discourse, to be in a position to provide the relevant historical, legal and philosophical context. Reference is usually made to those treaties and obligations in order to bolster an argument that is being put forth in the context of a domestic political debate. The full benefit is more likely to be obtained if those contextual issues are understood and are available to be drawn upon from time to time.

I think this is particularly important in respect of the United Nations Declaration on the Rights of Indigenous Persons (“the Declaration”), a resolution adopted by the General Assembly of the UN on 13 September 2007. The history of interaction between policy and the lives of Aboriginal and Torres Strait Islanders in Australia has been particularly vexed. The political will to find and implement good policy has often been lacking.

On the infrequent occasions that political will has been present, the difficulties of overcoming past and present wrongs have made progress slow and incremental. The result has often been that good policies, and even good implementation, have been abandoned and the opportunity lost to changes of government; changes in economic performance and through the impact of unrelated whole of government approaches.

The Declaration: its Short History and Political Debate in Australia

In that vote at the General Assembly, eleven nations abstained. 143 nations voted in favour. Four fine upstanding countries voted against the resolution to adopt the Declaration. They were Australia, Canada, New Zealand and the United States.

It was a promise of the Australian Labor Party, then led by Kevin Rudd, that, if it won the 2007 election, it would change Australia’s position and endorse the treaty. True to its word, on 3 April 2009, the government caused Australia to [endorse the Declaration](#). Happily, each of the four nations who voted against the declaration has [reversed its position](#) as have two of the abstainers, Colombia and Samoa.

International treaties and declarations are often adopted and then disappear from debate and discussion except among students and professors of international law. This has not been the case with the Declaration. Amnesty, together with a number of Aboriginal and Torres Strait organisations, were very keen to ensure that this did not occur. Very effective awareness campaigns have been conducted. As a result, the Declaration, which almost no one heard of in Australia at the time the resolution was adopted by the General Assembly, or at any time before 3 April 2009, is now on everybody’s lips, Indigenous and non-Indigenous alike.

This is an excellent result. To maximise the persuasive potential of the Declaration in domestic politics, I think that it is important that the Declaration is used to inform policy debates and not to simplify them.

The Universal Declaration of Human Rights (“the UDHR”) was adopted by the General Assembly on 10 December 1948. In many ways, the UDHR is the parent of most modern international human rights instruments. Among the most beautiful language with which the Preamble of the UDHR is written, the concluding paragraph of the Preamble gives a clue to the way in which such instruments may be used. The paragraph reads:

“Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

Like later Declarations, the UDHR was not a binding treaty. The ICCPR and the ICESCR are two general and binding treaties that may be seen to draw directly upon the rights and freedoms protected in the UDHR. However, the paragraph is, I think, informative about the way in which international human rights documents, binding or non-binding speak to us.

First, they are “a common standard of achievement for all peoples and all nations”. They provide a standard against we may continually measure our performance in the field of human rights.

Second, they provide an exhortation not just to governments but to every individual and to every organ of society.

Third, it is acknowledged that there are historical, social and economic barriers to meeting all of the standards. What is called for is “progressive measures”, perhaps, in the words of our present Prime Minister, a need to “move forward”.

Fourth, there is no doubt about the object which is sought. The object is “universal and effective recognition and observance”.

The Declaration

The rights protected in the Declaration are influenced by the history that commenced with the UDHR. Some of the provisions in the Declaration simply clarify that rights protected in other treaties like the ICCPR and the ICESCR are also protected if you happen to be an Indigenous person.

However, protecting the rights of Indigenous Peoples raises its own issues and problems and the Declaration, as a result, has provisions which do not appear in the other treaties.

The web site of the United Nations Permanent Forum on Indigenous Issues records two visits to Geneva in the 1920s by Indigenous leaders seeking to raise issues at the League of Nations. In 1923, Haudenosunee Chief Deskaheh sought to raise issues concerning his people and was refused permission to speak. The same experience was had by Maori religious leader, TW Ratana, in 1925, when he attempted to raise the failure of the New Zealand government to abide by the 1840 Treaty of Waitangi.

It is perhaps not surprising in the light of that history that it took until 2007 for a non-binding document on the rights of Indigenous Peoples to be adopted by the General Assembly.

Some Observations

An important aspect of the Declaration may be gleaned from one of the paragraphs in the Preamble to the document which states that “Indigenous individuals are entitled without discrimination to all human rights recognised in international law” and goes on to state that “indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples”.

The first half of that paragraph is important. In many countries, Indigenous members of society have been denied basic civil and political rights enjoyed by all other members of society. At the same time, the issue of basic economic, cultural and social rights like employment, education and good health have been of particular concern for Indigenous people s. Almost universally, the economic and social disadvantage of Indigenous Peoples have at least some of their historical origins in the dispossession that occurred in former colonial times.

The second half of the paragraph is equally important. The Declaration recognises a need that was not a major concern for most other international human rights instruments which have been developed in the wake of the UDHR. For Indigenous peoples, human rights do not begin and end with how each of them is treated as an individual. What is at least equally important is how their tribe, clan, family group and/or Indigenous nation is able to maintain and express its identity, its culture and its hopes and fears in a modern society and modern nation state.

The Declaration reflects these two themes contained in this one opening paragraph. Many of the articles seek to ensure that Indigenous individuals and groups are entitled, without discrimination, to all of those rights recognised and protected in international law. These rights include civil and political and ESC rights. Article 21 talks about a “right, without discrimination, to the improvement of ... economic and social conditions”. Article 22 talks about protection from violence of Indigenous women and children. Article 24 talks about the right to “the highest attainable physical and mental health”.

But the second major theme that runs through the articles is the protection of Indigenous group rights. These rights are given equal prominence and are of particular importance.

Two concepts are of particular importance in this provision for protection of Indigenous collective rights. One is self-determination. Article 3 states that “Indigenous peoples have the right to self-determination [by which] they freely determine their political status and freely pursue their economic, social and cultural development”. The theme of self-determination is picked up and used in other articles.

The second of the two concepts is “free, prior and informed consent”. Article 10 states that “Indigenous peoples shall not be forcibly removed from their lands or territories” and that “no relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned”. Article 19 makes a more general statement that free, prior and informed consent should be sought “before adopting and implementing [any] legislative or administrative measures that may affect [Indigenous Peoples]”.

The concepts are related but have a different focus. While self-determination has a potentially broad meaning, it certainly has relevance to the group's control of its inner workings and, perhaps, its day to day happenings. Free, prior and informed consent is outward and, perhaps, defensive. Free, prior and informed consent is a standard to be applied when other groups in the society and, especially, the governmental institutions of the nation state are seeking to carry out actions which may impact on the Indigenous group.

Both concepts raise obvious difficulties, especially, in Indigenous societies which have lost cohesion because of the effects of colonial dispossession or otherwise. Most of the difficulties relate to how decisions are to be made on behalf of the Indigenous group. The problems extend to a higher level. Who is to make the decisions about who is to make the decisions? This applies to self-determination, generally.

For free, prior and informed consent, the questions are the same but more specific. If consent is to be obtained, who are empowered to grant that consent and what procedures and conditions must be gone through or satisfied before those individuals may make the decision on behalf of the group?

There is a hint in article 46 that these questions about self-determination raise deeper fears. The old nation state, no matter how arbitrary and how dependent on past decisions of a colonial secretary its boundaries may be, it does not give up without a fight. Article 46 states that "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 ... which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". In a fight between self-determination and the political unity of the State, the State wins.

There are no right or wrong answers to the self-determination and consent issues. These are matters that must be worked on and worked through. Decisions of different scales may require different decision making structures. A shire decision on a waste dump may require a different form of decision making compared to a proposal to instate a large scale nuclear waste facility on tribal lands. Good will will help. Sometimes, the state may have to pass laws to support Indigenous decision making. On other occasions, informal structures and processes may work well and need only informal recognition.

There are some clues in the Declaration. Article 43 states that the "rights recognised herein constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world". There is that word standard again. There may be no right and wrong answers but measure your performance against the Declaration. If what you are doing is about denying self-determination, then chances are you are not complying with the Declaration. If, on the other hand, you are engaged in an attempt, in good faith, to promote self-determination and free, prior and informed consent is taken seriously, there may still be room for both improvement and criticism but the terms of the Declaration will be your friend.

Article 46 (2) states that, "in the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected". If you are claiming that your treatment of your family or clan is a form of self-determination, but you are responsible for restricting the human rights of the members of your family or clan, you may not be exercising self-determination. You may be usurping power and taking on the role of a small scale oppressor.

Just because something is difficult does not mean it is not either important or worthwhile. There are concepts in the Declaration which are difficult. That is one reason why it took until 2007 to get the Declaration. Self-determination for Indigenous Australians is important as is the proper recognition of free, prior and informed consent. It is worth working at.

The final preambular paragraph of the UDHR provides further guidance.

Let us treat the Declaration as our common standard of achievement for all peoples and all nations and our country in particular.

Second, remember that the Declaration does not just talk to our governments. It talks to every individual and to every organ of society including each of us.

Third, we need to accept that there are historical, social and economic hangovers which add to the difficulty of achieving the standards laid down in the Declaration. But let us pursue “progressive measures”. Let us “move forward”.

Fourth, let us be clear about what we ultimately want to achieve. Let us be content with nothing less than “universal and effective recognition and observance”.

Let's do it.

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