

**DO UNIVERSAL HUMAN RIGHTS PROMOTE
INDIGENOUS RIGHTS?**

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Abstract

The Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and nations. There is no specific reference to Maori or other Indigenous peoples. Recourse for a breach or non recognition of these universal human rights lie within an application to the relevant United Nation bodies.

For Maori, there has always been an expectation that the rights and duties will be adhered to. This has not always been the case. Despite respected international human rights bodies finding that the actions of the New Zealand Government towards Maori are discriminatory this has not been heeded.

For Pacific peoples, the effects of colonisation and past events suggest that any proposed regional human rights mechanism for the Pacific should be developed through an Indigenous lens. With an Indigenous starting point the mechanism can then draw not only on universal human rights but, more importantly it can also be sourced to core Pacific values. Nevertheless, any human rights mechanism for the Pacific peoples must be a culturally legitimate one to effectively promote and protect Pacific human rights.

Key words

Maori – Indigenous Rights – Foreshore Seabed – Public vs Private Rights - Human Rights Mechanism for the Pacific

Introduction

The Universal Declaration of Human Rights arose directly from the experience of the Second World War and decrees a universal expression of rights to which all human beings are inherently entitled. However, recourse through the international human rights framework for recognition of these rights has not always been successful for Maori. The first part of this paper will address the effect the Universal Declaration of Human Rights has had on the recognition of Indigenous rights for Maori. A case study and a judicial decision will highlight why reconciliation of these two positions is difficult.

The Pacific Peoples are developing a Regional Human Rights Mechanism. The second part of this paper will touch on this Regional Human Rights Mechanism for the Pacific and how the development of this mechanism may hold some valuable lessons for the recognition of Indigenous rights.

Part One

Universal Declaration on Human Rights

The Universal Declaration on Human Rights (UDHR) together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) is often described as the International Bill of Human Rights (McKay 1999: 11). The UDHR is not a legally binding international instrument; it is merely a statement having the approval of the United Nations General Assembly. Nevertheless, it is recognised as the first largely successful international effort at agreeing a shared understanding of human rights and provided the platform for later binding human rights instruments (Butler & Butler 2005: 63).

The ICCPR and the ICESCR are legally binding instruments on States that are party to them and give effect to the UDHR. These two Covenants are backed up by a system of monitoring and reporting on their implementation. States that are party to these Covenants must report periodically on the measures they have adopted that give effect to the rights in each Covenant.

The opening preamble of the UDHR emphasises human rights must seek to guarantee people conditions that reflect their inherent dignity. The UDHR proclaims that it is a common standard of achievement for all peoples and all nations. In achieving this standard the UDHR employs universal terms; everyone has the right to life, liberty and the security of person, all persons are entitled to equal protection against discrimination (Article 7), no one shall be subjected to torture (Article 5) and no one shall be held in slavery (Article 4). In addition to declaring these rights the UDHR refers to individual duties. Article 29 underlines the duties individuals have to the community and that rights and freedoms may be subject to certain restrictions proscribed by law.

The UDHR contains civil and political rights (Articles 3 - 21) and also economic, social and cultural rights (Articles 22 – 28). There is no specific reference to the Treaty of Waitangi (an agreement signed between the Crown and Maori in 1840 to

recognise and guarantee certain rights) or Maori. However, Maori rely on the UDHR for recognition of these human rights.

Case Study

Whether the Universal Human Rights adequately recognises and promotes Indigenous rights for Maori, a useful case study of the international human rights framework together with the effect of a judicial decision will inform this analysis.

Foreshore Seabed Bill

In New Zealand, despite intense national opposition to the Foreshore Seabed Bill, Parliament passed legislation in 2004 vesting the foreshore and seabed in the Crown. The strongest grounds for challenging the Foreshore and Seabed Act 2004 (FSA) lay in the right to freedom from discrimination. New Zealand is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Te Runanga o Ngai Tahu asked the United Nations Committee on the Elimination of Racial Discrimination (the CERD Committee) to consider the FSA against New Zealand's obligations under CERD. The CERD Committee issued a report in March 2005.

In this report the CERD Committee reviewed the compatibility of the FSA with the provisions of CERD in the light of information received from both the Government of New Zealand and a number of non-governmental organisations, and taking into account its general recommendation No XXIII on indigenous peoples. In noting the political atmosphere, the haste with which the legislation was enacted, insufficient consideration to alternative responses which might have accommodated Maori rights within a framework more acceptable to Maori and other New Zealanders, and the scale of opposition, the CERD Committee stated that the foreshore and seabed legislation, on balance, discriminated against Maori by extinguishing the possibility of establishing Maori customary title over the foreshore and seabed, and by failing to provide a guaranteed right of redress. The Committee suggested that the Crown resume dialogue with Maori and try to find ways of lessening the discriminatory effects of the FSA, including where necessary through legislative amendment.

However, the New Zealand Government dismissed the report. The Government belittled the report by suggesting it was unimportant and the CERD Committee did not really understand the complexity of the issue. Jackson (2008) noted that the Government suggested that even if there were some 'discriminatory aspects' in the FSA, this did not necessarily mean a breach of CERD when in fact any evidence of discrimination is a breach of international law. Unsurprisingly, the report did not prompt any change in Government policy.

In November 2005, following Government criticism of the report issued by the CERD Committee, Professor Stavenhagen, a Mexican researcher, and the United Nations' Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, arrived in New Zealand at the invitation of the Government. Professor Stavenhagen's final report was completed in March 2006. It was highly critical of the Government in a number of areas, including the FSA. The report recommended that the FSA should be repealed or significantly amended.

The Government's response to this further criticism was again negative, with Professor Stavenhagen's report described as "disappointing, unbalanced and narrow." It was suggested by the Government that this report was unimportant and did not really address the complexity of the issue. The Deputy Prime Minister claimed that the report was unbalanced without providing any evidence as to what that means.

Nevertheless, the Stavenhagen Report is the product of the United Nations, the world's most important international human rights institution, and it has become glaringly obvious to the United Nations top human rights official, the High Commissioner for Human Rights, that New Zealand is in breach of the fundamental laws that it expects its own citizens to uphold. Jackson (2008) stated that: "for New Zealand to belittle a report that is the product of the most important international human rights institution there is; is to belittle the very notion of human rights."

The third chapter in this case study was the July - August 2007 review of New Zealand's performance in implementing CERD. The CERD Committee considered New Zealand's 15th- 17th periodic report at its 71st session in Geneva. The Government was required to explain not only its response to the March 2005 CERD report but also to answer questions on the status of the Treaty and Maori participation in decision making. The CERD Committee repeated its previous findings and suggested renewed dialogue between the Crown and Maori about the FSA. However, Flavell (2008) noted that the Minister of Foreign Affairs dismissed the CERD Committee as "meddlesome." If the New Zealand Government does not heed the decisions of International Human Rights bodies what recourse is available to Maori?

Can judicial decisions affect human rights for Maori?

For Maori the Marae (cultural meeting place) is central to maintaining their culture and tino rangatiratanga rights (self determination). A recent judicial decision from the New Zealand Court of Appeal, in terms of human rights, adversely affects the ability for Maori to maintain their culture.

Is the Marae a public place?

Justice Hammond in *The Queen v Tame Iti* (New Zealand Court of Appeal) recently confirmed that a Marae is a public place:

the public place (marae) in law covers the whole area, even though parts which ought not have been accessed.

Why should this matter?

Public Place and Private Rights

The domestic Human Rights Act 1993 (HRA) in New Zealand is applicable in all public places. An important function of the Human Rights Commission is to investigate complaints of unlawful discrimination in public life, this includes access to public places.

Public place has been defined in the *Summary Offences Act 1981* s 2 as:

a place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place...

Statistics New Zealand (2008) classify a Marae as “other non private dwelling not further defined.”

For Maori a Marae is a place that is fundamental to maintaining their tikanga (law and custom). Hawke (1978) stated:

To Maori the Marae is their sacred land and symbolises the history of the tribal group. It is where they build their meeting house, for the Marae represents the soul of the people. It is a place to tangi, to cry for the dead of today and for those who went before.

A Marae is one of the few places where the agenda is controlled by Maori and if self determination has any meaning at all, then it finds fuller expression in the politics, procedures and leadership of the Marae (Durie 2004: 221). Although a Marae may have been classified as a “public” place, where subject to protocol the public have access, it is a private place in the sense that tikanga Maori applies. Notwithstanding that in law, the concept of a private space within a public space is problematic.

What does this mean in terms of the UDHR and human rights for Maori and the Treaty of Waitangi?

Article 2 of the Treaty affirms tino rangatiratanga rights for Maori. Frame and Meredith (2002) note that the Marae is the last bastion of maoritanga, the link to the past and the location of their identity as Maori. From a Maori perspective the Marae is pivotal to their mauri (life principle). The Marae is traditionally the best forum in which to absorb matauranga Maori; Maori knowledge and information. The whare itself also serves as a reminder of ancestral precedent, and is a metaphorical representation of a world in balance, which is the ultimate aim of tikanga Maori (Maori law); the physical building represents what we are striving for, a solid foundation balanced by four walls, in which all components fit together in harmony. It is the last respite for Maori where the human right guaranteed to Maori under Article 2 of the Treaty, tino rangatiratanga or self determination, remains unchallenged.

If the Marae is classified as a “public place” then the rights accorded, such as the right for equality, in the HRA will apply. These rights superimposed upon the right of self determination is problematic and perhaps fatal for tikanga Maori. Again, if the New Zealand Government does not heed the decisions of International Human Rights bodies what recourse does Maori have to redress this impasse?

What does this mean in terms of Universal Human Rights promoting Indigenous Rights?

This case study highlights a number of issues. Although Maori have succeeded in accessing international human rights mechanisms, and those mechanisms found in their favour, the actual outcome for Maori was no change to the status quo. A number of questions are raised such as why is the international human rights framework ultimately not delivering for Maori and how viable is the international human rights framework when the State can simply ignore their recommendations? With respect to

judicial decisions, if a New Zealand Court of Appeal decision proves fatal for Maori culture in terms of human rights what redress is then available? Civil unrest?

It is suggested that entrenchment of the rights contained in the Treaty of Waitangi may be a way forward, or perhaps lessons can be learnt from the current approach in the Pacific.

Part Two

A Regional Human Rights Mechanism for the Pacific

Pacific Peoples (people of the sixteen member states of the Pacific Islands Forum; Australia, Cook Islands, Federated States of Micronesia, Fiji Islands, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu) are defined by their culture and their custom. Wickliffe (1999: 166) states:

No one can ignore the central role culture plays in determining the way people in the Pacific relate to each other and their communities ... it reflects the values and norms of Pacific societies ... it can either assist or hinder the promotion and protection of human rights.

The exact composition and requirements of a Pacific regional human rights mechanism (PRM) are unclear and remain to be developed in the months and years ahead. However, human rights experts suggest that any such mechanism must be underpinned by universal human rights; rights that are identified in the UDHR (Jalal 2008: 7). These universal rights would inform the content of the PRM. Although it is envisaged that these universal human rights are to be a floor rather than a ceiling; (Boyle 2008) this creates a challenge for Pacific Peoples, as universal human rights standards are not sourced from custom, but primarily from Western values. Inevitably a tension arises between maintaining local values and customs and implementing universal human rights. This will be a significant challenge. Ultimately, for the PRM to be culturally legitimate, robust and viable in the long term, it must reflect the wisdom of both custom and human rights.

Toki and Baird (2008) argue that a Pacific regional human rights mechanism offers a huge - and exciting - potential for advancing the cause of human rights in the Pacific. However, the lessons from the negative impacts of past practices and colonisation on Pacific Peoples should not be forgotten. Rather than have the content and scope of a PRM pre-determined by existing understandings of human rights, Toki and Baird (2008) suggest that an Indigenous starting point should be adopted. It is through an Indigenous lens that any such mechanism should be developed and it is an Indigenous starting point that will ultimately ensure a culturally legitimate, robust and viable human rights mechanism for the Pacific.

Using an Indigenous lens, Toki and Baird (2008) suggest some building blocks for the mechanism. In addition to the Indigenous lens, two other procedural building blocks are essential. Effective participation of all Pacific Nations is required. Human rights education, both during the development of the mechanism and once it is operational, is also important.

Recognition of group rights in addition to individual rights is likely to be necessary to position individual rights within their collective context. The possibility of individual duties alongside rights will also require careful consideration. Although the prospect of a legally binding mechanism may seem daunting, Toki and Baird (2008) suggest that in order to ensure strong protection of rights, decisions from the regional mechanism should be binding. It is however acknowledged that small steps may be required initially, with a binding mechanism a longer-term goal.

Conclusion

The ability for international human rights to recognise and promote Indigenous rights is problematic. The context of when the UDHR was adopted has changed. The times have also changed. A case study and judicial decision highlights the need to address whether these international human rights mechanisms are effective for Indigenous peoples. This paper suggests that domestic entrenchment of human rights contained within the Treaty as a way forward. A brief snapshot of the developing human rights mechanism in the Pacific is also a useful reminder that an Indigenous lens should be adopted to view these rights.

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