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ABORIGINAL RIGHTS ARE NOT HUMAN RIGHTS

PETER KULCHYSKI

Abstract

This article argues that the universalist notion of human rights cannot encompass Aboriginal rights, which are located in local relationships of people and places, practiced through cultures. These are specific rights best conceptualized as cultural rights. These rights are threatened by capitalism, and the universalist human rights discourse is poorly equipped to take this up. The conceptual confusion between the two forms of rights undermines Aboriginal rights struggles.

Sommaire

Cet article maintient que la notion universaliste des droits de l'homme ne peut pas couvrir les droits autochtones, qui se situent dans les relations locales entre personnes et places, telles que pratiquées par les cultures. Il s'agit là de droits spécifiques que l'on pourrait appeler droits culturels. Ces droits sont menacés par le capitalisme, et le discours universaliste sur les droits de l'homme est mal équipé pour les défendre. La confusion conceptuelle de ces deux types de droits nuit à la lutte pour les droits autochtones.

"Politics is not made up of power relationships;
it is made up of relationships between worlds."
—JACQUES RANCIÈRE, *Disagreement*

The growing discourse around Aboriginal rights has suffered from a conceptual confusion between Aboriginal rights and human rights. Human rights have emerged from a European historical context and are inextricably linked to the notion of a universal humanity. While notions of universal human rights should not be lightly dismissed, they have on occasion served colonial projects by justifying interventions into indigenous practices. Aboriginal rights were historically not an outgrowth of the western 'march of progress', but rather emerged from local indigenous community struggles for land and culture. They must be conceptualized as 'cultural rights' that act to counterbalance universal notions of human rights with an appreciation for the cultural distinctiveness of indigenous peoples. What follows will advance both a conceptual and historical argument pertaining to the difference and will subsequently analytically specify between human rights, Aboriginal rights, and indigenous human rights. This paper discusses the United Nations Declaration on the Rights of Indigenous Peoples, the Aboriginal rights provisions of the constitution of Canada, a variety of legal decisions from Canada, and examples from indigenous communities and peoples in northern Canada with whom the author works.

I. The Confusion

Two years ago, as allies of a new indigenous activist organization called "Defenders of the Land" in Canada, the on-line members engaged in a debate about a document called our "basis of solidarity." I had paid passing attention to the debate, preoccupied with other concerns and with helping establish the organization's basic capacity. Late in the increasingly sharp on-line debate, I decided to review the draft. I noted that the words "Aboriginal rights" had disappeared from the draft, in spite of the fact that our indigenous leaders has been committed to them, and inquired why the concept had been dropped. I then learned that a large sector of the social justice activist community was opposed to the idea of 'rights', seeing rights as a justification for state or imperial interventions rather than as a tool for marginalized communities. I intervened in the debate through a lengthy (but in academic standards quite schematic) email as follows:

> I'm going to write a paragraph on indigenous rights here, because I hadn't realized the issue was quite so controversial in our groups. So you can skip this if you haven't time, etc. The notion of rights is not liberal or capitalist. It comes in the western tradition as far back as the plebs of Rome/Greece trying to wrest power from the aristocrats, and from poorer people in a variety of situations around the world using the same idea, often as a way of limiting unrestrained power of the rich.

> It's fair to say that the rich also always promoted a notion of rights, property rights, that also goes back a long ways. The notion of rights became individualist in western Europe from around the Enlightenment, and possessive individualism became a core foundation of capitalist legal frameworks and is still with us today. The UN Declaration of Human Rights, and the many other similar declarations, tended to be universalistic, Eurocentric and individualist, though it still has value as an obstacle to unimpeded capitalist development in certain contexts. Neoliberalism is indeed associated with an individualist property rights agenda. Aboriginal rights have an entirely different origin. They come from the struggle of indigenous peoples to have their customary practices and land ownership respected. They were not enshrined by the UN until decades after the universal declaration. They are by nature collective (though can be and most often are invoked by individuals on behalf of the collective: Roberta Keesig's fight to build a cabin was a fight for all Anishnabwe). If we truly respected indigenous rights we would be putting up a major, perhaps fatal, obstacle to neoliberal capitalist development. Hence, I have no hesitation about my unqualified support for indigenous rights at the same time as having some serious questions about so called 'universal' human rights (which need and sometimes do include a right of association) and absolutely despise possessive individual property rights (22 October 2009).

The language of Aboriginal rights was eventually maintained and strengthened in the Defenders of the Land "Basis of Unity" and other statements (see www.defendersoftheland.org). But the debate helped me realize that there were many well-motivated people who had little understanding of the specific nature of Aboriginal rights and in general tied the idea quite closely to broader notions of human rights, the latter of which for a variety of legitimate ethical-political reasons they had come to be suspicious of. It was this event and discussion that prompted me to write these words. The confusion can be found in the analysis by close observers of the processes that lead to the United Nations adoption of the resolution, such as Alex Neve, the Secretary General of Amnesty International Canada, and is found in the Declaration on the Rights of Indigenous Peoples itself. In what follows I will discuss briefly and schematically the varying histories of human rights and Aboriginal rights, show how the conceptual confusion between them operates to undermine Aboriginal rights, and lay out a structure for clarifying the problem. I will use the term 'indigenous' to describe the varieties of peoples with whom the Declaration and my analyses are concerned. I will use the term 'Aboriginal rights' to discuss the specific rights of indigenous peoples, and indigenous

human rights to describe the human rights of indigenous peoples. The 'rights of indigenous peoples' is a term that encompasses, for better or worse, both forms of rights. The term 'the declaration' will be my shorthand for the United Nations Declaration on the Rights of Indigenous Peoples, while 'universal declaration' will be a reference to the Universal Declaration of Human Rights.

II. The Courts

In Canada, the confusion can be traced (or became evident) in the late sixties through the decisions the Supreme Court was faced with in the *Drybones* case and in the *Lavell/Bedard* cases. Both of these cases dealt with the human rights of indigenous peoples.

The court was called on in 1969 to determine whether Joseph Drybones's conviction of an alcohol related offense under the Indian Act violated his human rights, since the same offense would have resulted in a less severe punishment to any non-Aboriginal person under the laws of general application. While the case was a split decision, the debate was over whether the then still relatively new Bill of Rights, a piece of federal legislation, could be used to declare other pieces of federal legislation, like elements of the Indian Act, inoperative. There appeared to be little doubt that Drybones had been discriminated against and the majority ruled in his favour.

A few years later (1973), however, when the court was faced with virtually the same issue though in this event respecting the question of discrimination against 'Indian' women who lost their legal status as Indians through marriage to non-Indian men. Both Jeanette Lavell and Yvonne Bedard had lost their legal status as 'Indians' because they married non-Indian men. Both women took heart from the *Drybones* decision and tried to have it applied to their circumstances. Their cases were joined at the Supreme Court level. In another narrow split decision the court reversed its position, deciding that the human rights bill could not overturn sections of the Indian Act. But the 1973 decision was undoubtedly also influenced by the national debate over Aboriginal rights occasioned by the struggle to force the federal government to withdraw the 1969 white paper, and by the fact that the court had some months earlier confronted the fact of the existence of Aboriginal title in the *Calder* case.

The *Calder* case (1973) was launched by the Nisga'a First Nation of B.C., who asked the courts to recognize their unsurrendered Aboriginal title to their traditional territory. Although they lost the case on a technicality, the success of the Nisga'a in having six out of seven judges say that Aboriginal title was a doctrine that still had legal force in Canada was a major step forward for Aboriginal rights, but in some ways it also contributed to the confusion. Legal commentators at the time, for example Cumming and Mickenberg,

tended to argue that Aboriginal rights derived from Aboriginal title. Arguably, Aboriginal title could be seen as a way of securing (human) property rights of indigenous people. If everything, or in this case Aboriginal rights, derived from Aboriginal title then it would be possible to suggest that Aboriginal rights in Canada was, in a fairly esoteric but still discernable fashion, a form of human rights. The first major post constitutional case, *Guerin* (SCC 1984)—involving a dispute in which a local Indian agent had leased reserve land at a lower than market value—also lent support to this view, focusing on Aboriginal title as a basis of the federal government's fiduciary responsibility.

While the *Sparrow* and *Sioui* cases in 1990, on fishing and treaty rights respectively, did not touch on the issue, since neither dealt with Aboriginal title, both were looking at Aboriginal and treaty rights in the absence of discussion of title. It was possible, then, to start thinking along a different track. By 1994 I myself felt compelled, in my "Theses on Aboriginal Rights" which introduced *Unjust Relations* (1994), to argue that Aboriginal rights were divided into two categories, property rights and political rights; that the latter did not derive from the former; and that "Aboriginal cultures are the waters through which Aboriginal rights swim" (12-13).

By 1996, in the *Van der Peet* trilogy of decisions (which included *Gladstone* and *Smokehouse*, all concerning the right to commercially harvest fish), the Supreme Court of Canada had come to articulate the same view (needless to say without my having had any influence on the issue) and, more importantly, to clearly understand the difference between human rights and Aboriginal rights. Aboriginal rights were seen, like Aboriginal title, to derive from the doctrine of prior occupancy. But title was not the basis of rights; rather, writing for a strong majority the then Chief Justice Lamer stated "Aboriginal title is the aspect of Aboriginal rights related specifically to Aboriginal claims to land; it is the way in which the common law recognizes Aboriginal land rights" (para 33). Furthermore, and famously in the case, Aboriginal rights were effectively defined as follows: "in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right" (para 46). This established that Aboriginal rights were directly related to indigenous culture.

More importantly for our purposes here, in *Van der Peet* the justices, citing academic commentary, argued that "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, Aboriginal rights must be viewed differently from Charter rights because they are rights held only by Aboriginal members of Canadian society. They arise from the fact that Aboriginal people are Aboriginal" (para 19). By Charter, of course, they mean the Charter of Rights and Freedoms, which in

Canada is the constitutional instrument protecting human rights. Inasmuch as this is clearly recognized by the judiciary in Canada, it amounts to the argument of this paper: Aboriginal rights are not human rights.

iii. Theoretical Histories: States and Rights

Viewed from one angle, the state itself, as a social construct, may be nothing more than an oscillation between the concentration of power and its limitation in the form of 'rights'. This form of definition would run against the grain of Giorgio Agamben's recent proposition that emphasizes the state's monopoly on violence (Agamben's notions follow from Carl Schmitt rather than Max Weber, with whom the idea is also associated) in his influential *Homo Sacer* (1998). Gathering and hunting peoples invented a form of sociality that did not depend on alien forms of condensed power (the state); communities involved intricate webs of rights and responsibilities that were embedded in cultural practices such as ceremonies, naming, gift giving, food sharing and socially extended responsibilities for child and elder care. Tithe societies (see Eric Wolf 1982) involved state forms in which the sovereign did not enjoy absolute or totalitarian power (hence the development of 'absolutism' was an aberration that needed to be named, which still included citizen rights, however uncodified). Early western tithe society, the 'ancients', codified and articulated property rights in the interest of social elites, but also developed mechanisms that defended popular rights (from elements of democracy in Greece to the institution of republican government and later the tribunate in Rome). Through the history of ancient, medieval, early modern tithe societies in the west, the state form tended towards a balance between something like near (but never wholly) absolute state power to structures that implicitly or explicitly limited state power (such as, famously, the *Magna Carta*). Certainly the most absolute, or concentrated state power forms, tended to act in the interest of social elites and that meant the protection of private property. Explicit private property rights were codified and were the subject of elite justification in philosophy.

It was popular struggle in combination with intellectual developments that lead to the development of human rights. In the late eighteenth century, events in the United States of America, in France, and in Haiti synthesized enlightenment ideals and popular political power, which came to be expressed in discursive notions of 'rights', the rights of 'man', as opposed to property rights. It is striking that slowly, the industrialization that developed in conjunction with this discourse gave the state greater tools to concentrate power, culminating in early forms of totalitarianism in the first half of the twentieth century. At the same time, the anti-slavery movement in the early nineteenth century, the women's rights (suffragette) movements in the later

nineteenth and early twentieth century, and worker's movements through the nineteenth and twentieth century all deployed the language of 'rights' as a tool to achieve their multi-variant popular objectives. Emerging from these social movements and in response to the horrors of fascist totalitarianism the movement to codify 'human rights' as they became known, lead to the famous 1948 United Nations' Universal Declaration of Human Rights.

The Universal Declaration itself was a product of its high modernist era, reflecting an expanded notion of the 'human' and a notion that state power had to be limited in a manner that expressed such 'humanity'. Of course, this schematic theorization of the history of states and rights does appalling disservice to the texture of history, and does not represent anything like a fully enunciated theory of the state (or even the few centuries old capitalist state). But it has the merit of illustrating the popular base of human rights discourse and the continuing necessity of abstract, universalizing notions of human rights in the face of the newer technologies of state power and the newest state sponsored juridical fictions that both deny basic human rights to some (labeled 'terrorists') while pretending to forcibly extend basic human rights ('freedom' and 'democracy') to others. It is also my hope that the narrative makes clear that the movement for human rights has not been a slow, liberalizing, progressive, inevitable triumphal procession. Rather, if the rights-domination oscillation characterizes political society, in effect we are witnessing new institutions, new legal structures, new discourses, that replay ancient political contests.

I have fictioned a master narrative history of the world primarily to make this point: the UN Universal Declaration of Human Rights has not and will not be the final stopping point on the path to social justice. Nor will the Canadian Charter of Rights and Freedoms. With this backdrop, I turn to the specificity of Aboriginal rights.

iv. Theoretical Histories: Customary and Aboriginal Rights

It is of more than passing interest that among Karl Marx's earliest writings is a strong political and legal defense of the rights of peasants to gather and use deadwood, in which he deploys the phrase 'from time immemorial' (see 1975). Marx was not entering a marginal political sideshow in making these arguments (which he himself later saw as a major turning point in his intellectual development) but rather joining in at the tail end of a critical eighteenth and nineteenth century popular struggle for what was called 'customary' rights. In the English language, the historian of customary rights is E. P. Thompson, whose *Customs in Common* (1993) may ultimately eclipse his other great study and certainly should be read by any serious students of indigenous rights. Thompson emphasizes that "the origin of common

rights in royal or feudal grants is a fiction" (133). Rather, common rights derive from the actual practices of people, whether in walking a particular circuit to demonstrate their right of passage or to traverse the passage itself, or in engaging in centuries-old subsistence activities: "perhaps in the first six decades of the eighteenth century disputes about deer and other game, about fishing rights, about timber, about the exploitation of quarries, sand pits and peat, became more frequent and more angry" (106).

What created these disputes was the totalizing spread of a quite different regime of property: "the concept of exclusive property in land, as a norm to which other practices must be adjusted, was now extending across the whole globe, like a coinage reducing all things to a common measure" (164). In the area of customary rights (and Aboriginal rights), it is the state as an agent of totalisation that matters. By this I refer to the whole painstaking historical process of reconfiguring notions of space, time, and subjectivity in the modern period to accord with the new modalities for producing wealth: totalisation: forms of practice, law and the power to compel observance of these that spread across the globe over a period of a mere few centuries, and continue to spread both geographically and culturally. That spread is resisted, in the past and present, and the doctrines of customary and Aboriginal rights are one of the baselines of such resistance. To a certain degree, the universal doctrine of human rights is complicit with this spread and in part explains some of the resistance to it. The British recognition of customary rights, through common law, is surely one of the grounds upon which, with the spread of British hegemony worldwide, the doctrine of Aboriginal rights develops.

Two small contrasting features of human rights and Aboriginal rights may be worthy of notice, here. On the one hand, human rights seem to develop, thrive, and be a site of struggle in the emerging urban contexts associated with cosmopolitanism and the liberal enlightenment. On the other hand, Aboriginal rights like customary rights seem to be situated most often or tendentially in rural contexts, where ownership of the means of production for subsistence purposes remains viable. Secondly, respect for human rights oscillates with a state power that at its extremity can be characterized as 'totalitarian' (see Arendt 1973), by which is meant a nearly all pervasive exercise of state power. Customary and Aboriginal rights confront a state that serves the interest of totalisation, by which is meant a state that works assiduously and relentlessly to establish cultural preconditions for capital accumulation. These two state forms have historically not frequently been co-existent, but when they are a whole new 'state of exception' may emerge, threatening all forms of rights even as such state forms may deploy in Orwellian manner the language of rights.

In this view, Aboriginal rights are the customary rights of indigenous peoples. There is a performative element to Aboriginal rights, inasmuch as

they are grounded in the 'embodied practices' (see Taylor 2003) of indigenous peoples. This is one of the features foregrounded in the *Van der Peet* decision, discussed above.

Historically, Aboriginal rights in Canada emerge from the struggle of indigenous peoples. The Royal Proclamation of 1763 itself was a response to Pontiac's famous resistance a few years earlier (see Hall 2003). While in the nineteenth century 'Indian rights' as they were then called were clearly a part of the British North American, and later Canadian, legal landscape, after the Williams treaty in 1923 Aboriginal rights were more often noted in the breach rather than through respect. This culminated in the "Statement of the Government of Canada on Indian Policy, 1969" or now infamous 'white paper', which in the name of equality (a human right) sought to remove all legal distinctions between 'Indians' and other Canadians. In the intensive struggle to prevent implementation of the white paper the term 'citizen's plus' (used in the early sixties by government officials and with a bit more prominence by H. B. Hawthorn in his mid-sixties report *A Survey of the Contemporary Indians of Canada*) was deployed to emphasize that indigenous peoples in Canada were Canadian citizens, had the human and citizenship rights of Canadian citizens, but were also the bearers of something else, an un-named 'plus', that had to be acknowledged. The 'plus' would come to be known as Aboriginal rights. It was in this period of confusion and conflict that the *Drybones* and *Lavell/Bedard* decisions were rendered; so too, the decision in *Calder*, which marks a significant tipping point towards recognition of Aboriginal rights, even if based primarily on title. The main point is that in Canada, a deliberate attempt to—ruthlessly—extend human rights in the form of equality was placed in direct contradiction to the affirmative, differential rights doctrine embodied in Aboriginal rights. It is ironic, years later, to see the United Nations Declaration on the Rights of Indigenous Peoples characterized as an extension of the principle of human rights, an issue to be discussed below.

Over the next decade legal and political attention in Canada slowly turned to questions around Aboriginal rights, prompted in part by their use by Dene in the Mackenzie Valley pipeline conflict and by Cree and Inuit in the James Bay and northern Québec conflicts over hydro electric production (and the Cree in northern Manitoba dealing with similar issues; on the Dene see Watkins 1978, on Cree in Quebec see Richardson 1975, and Cree in Manitoba see Chodkeiwitz and Brown 1999). The original draft of the constitution that then prime minister Trudeau wanted to repatriate contained no recognition of Aboriginal rights, but after another intensive struggle, including a First Nations lobbying effort in Westminster, section 35, which in the act follows after the Charter of Rights and Freedoms, recognizing and affirming Aboriginal and treaty rights, as well as section 25 which limits the exercise

of the Charter over Aboriginal rights, were included. Aboriginal rights were again a recognized, codified part of the political and legal landscape, though to what effect remains uncertain.

v. The Confusion, Again

Even as careful, helpful and astute an observer as the secretary general of Amnesty International Canada, Alex Neve, in a 2009 speech at the University of Regina making a very strong argument in favour of the Declaration, tends to confuse the issue of the relation between indigenous rights and human rights. His analysis is historically and politically compelling and valuable, while at the same time it is conceptually weak. I want to engage a close reading of his paper to demonstrate this issue, of critical importance. It should be noted, though, that Amnesty International is a human rights based organization with very little 'track record' respecting Aboriginal rights issues; if I am critical of Neve it is as one of many, many examples I could draw upon of those that confuse human and Aboriginal rights.

Neve begins an extensive and very useful discussion of the twenty-year history of the drafting of the Declaration, itself prefaced by a discussion of the Universal Declaration of Human Rights and other human rights declarations, by mentioning in three places reasons why a declaration on the rights of indigenous peoples is needed. These are, in the first instance, "governments also recognized that some rights need extra attention, different attention or more detailed attention. That may be because of the heightened vulnerability of a particular group to serious human rights violations, such as women or children. Or it may be because of the gravity or the insidious nature of a particular kind of human rights violations, such as racism or torture". This all deals with human rights violations that may happen to indigenous people as well as others. Secondly, again using the phrase 'governments recognized' which leans towards the notion that rights emerge from liberal benevolence, Neve states: "governments recognized that it was necessary to go further than the overarching human rights protections of the UN Charter, the Universal Declaration and the two Covenants. They realized that the extent, longevity and entrenched nature of certain types of human rights violations is such that very specific and direct attention is inescapable." Here, again, 'human rights violations' is at issue, in this case the 'extent, longevity and entrenched nature' of those being the specific issue. Critically, Neve situates the rights of indigenous peoples in subsidiary relation to 'overarching' human rights. Thirdly and finally, Neve states:

> And universally they are among the most marginalized and repressed members of the societies in which they live—subject to extreme levels

> of violence, violence that has possibly reached the level of genocide in some countries over the decades and centuries; living in extreme poverty; coping with relentless encroachment upon and theft of their traditional lands; and facing a range of sometimes brutal, often insidious laws, policies and practices aimed at suppressing and eradicating Indigenous culture, language and way of life.

Again, most of this specifically details human rights abuses; at the very end he tacks on the notion of "often insidious laws, policies and practices aimed at suppressing and eradicating Indigenous culture, language and way of life." Culture, the basis of what makes indigenous peoples distinct, belatedly makes it into the picture.

This conceptual confusion, and emphasis on the human rights of indigenous people with a small appreciation for the notion of cultural distinctiveness as an underlying element of Aboriginal rights, leads Neve down a path that ultimately vitiates much of his concern for indigenous peoples. Hence, for example, "that there was early recognition that the rights of Indigenous peoples merited special attention *within* the UN human rights system: that the nature, scale and severity of the violations were such that it was not enough to rely only on the universal guarantees of equality and justice contained in the Charter, Declaration and the two Covenants (emphasis added)." Without a notion of the particularity of Aboriginal rights, Neve never notices that universal human rights may often provide the explicit justification for trumping Aboriginal rights, as happened in the struggle over the white paper in Canada. By situating Aboriginal rights 'within' the United Nations human rights system, the UN effectively ensures that Aboriginal rights take second place: that universality will always hold the deciding cards over cultural difference. This is a problem with the Declaration itself, and one that Neve never addresses, but a problem to which we will shortly turn our attention. Neve is clearly not the only one to turn a blind eye to the issue: Neve notes approvingly that "Australia's Minister of Indigenous Affairs, Jenny Macklin, called the Declaration a 'landmark document that reflects and pays homage to the unique place of Indigenous people and their entitlement to all human rights as recognized in international law.'" The entitlement of indigenous people to 'all human rights' is not the question of Aboriginal rights.

Interestingly, Neve refers in three places in his article to the 'aspirational' nature of the Declaration, for example emphasizing at one point "the aspiration[al], non-binding nature of the Declaration." In fact, the Declaration on the Rights of Indigenous People never uses the term 'aspirational'. It does 'proclaim' the Declaration as a "standard of achievement to be pursued in a spirit of partnership and mutual respect" (p 16). Whether a 'standard

of achievement to be pursued' is the same as an 'aspirational, non-binding' statement is open to interpretation. He notes that in most instances declarations get turned into more binding documents called 'covenants'. However, it is striking that months after his speech, when Canada finally responded to the pressure he and many others brought to bear on it for not adopting the Declaration, it did so as an 'aspirational' document rather than as a 'standard of achievement to be pursued'. Neve in effect let the Canadian government off the hook even before it was hooked!

vi. The United Nations Declaration on the Rights of Indigenous Peoples

It is striking that the document is itself called the United Nations Declaration on the Rights of Indigenous Peoples. Syntactically, this leaves open the question of whether it is affirming indigenous (Aboriginal) rights, or the human rights of indigenous peoples. "The rights of indigenous peoples" as a phrase may be used to characterize either or both of these forms of rights. In this instance, as articulated through the Declaration itself, it means both.

The United Nations Declaration on the Rights of Indigenous Peoples, as it is introduced in the English-language text, states that indigenous people are "among the most impoverished, marginalized and frequently victimized people in the world. This universal human rights instrument is celebrated globally as a symbol of triumph and hope." Throughout the introductory material and the document itself, it is positioned as an extension of the doctrine of universal human rights, rather than a document of equal or counterbalancing weight. For example, the statement of Victoria Tauli-Corpuz, the Chair of the UN Permanent Forum on Indigenous Issues, on the occasion of the adoption of the Declaration, declares that the moment "marks a historical milestone in its long history of developing and establishing international human rights standards." This confusion is also reflected in many of the 'supportive statements' appended to the Declaration.

Perhaps another way I can make the issue clear is with reference to the Aboriginal rights legal structure, let's call it a topography, embedded in the constitution of Canada. There, it is recognized that the Charter of Rights and Freedoms could be interpreted in a manner that would diminish Aboriginal rights. Section 25 of the Charter therefore states that "the guarantee of this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada." Philosophically, this is a substantial step ahead of the Declaration, because it reflects the notion that universalist equality rights can be deployed in a way that would diminish the force of Aboriginal rights. In fact, in the *Corbiere* (1999) case, involving whether off reserve Indians could run for office and vote in on-reserve elections,

which has been the only Supreme Court of Canada case to pay significant attention to section 25, a significant minority of the court suggest that the canons of interpretation of section 25 are such as to give it even more scope for application than the actual Aboriginal rights recognition clause that is more frequently invoked, section 35. There is no such a legal topography at work in the UN Declaration. The Universal Declaration includes no clauses limiting its application over culturally distinct indigenous peoples.

Instead, the UN insists that 'the rights of indigenous peoples' are an extension of universal human rights, and is explicit that the newly gained rights must be brought within the scope of the older doctrine. The three sections of article 46 in the Declaration make this clear. Section 1 establishes 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 contrary to the Charter of the United Nations" (39); section 2 of that article states that "in the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected" (39); and section 3 makes it clear that "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" (40). The notion that 'the rights of indigenous peoples', inasmuch as they are Aboriginal rights, might be seen as forms of positive discrimination, is therefore entirely absent from the overall topography of the Declaration. Also absent is the notion that human rights, especially equality rights, may sometimes be deployed to limit or render meaningless human rights, or any notion that Aboriginal rights might be viewed specifically as a counterforce to human rights.

This is not to say that the Declaration is not a worthy achievement; nor to imply that it should not be adopted and implemented; nor to assume it will not be of any value in the struggle of indigenous peoples. Indigenous peoples do need to have their human rights respected. But, as indigenous peoples, for their Aboriginal rights to have any value in the struggle to help them retain their distinctive cultures, they need a version of Aboriginal rights that cannot be 'trumped' by universalisms. The Declaration is a flawed tool for respecting and affirming global Aboriginal rights.

vii. Reading The United Nations Declaration On The Rights Of Indigenous Peoples

In my reading of the document, the human rights of indigenous peoples are the clear subject of ten articles (1, 2, 6, 17, 21, 22, 23, 43, 44 and 46). Articles that in some way or other deal with culture, tradition, language or indigenous institutions and laws, and may therefore be interpreted as relating to

Aboriginal rights as I have characterized them following the logic of Canadian jurisprudence, are the sole subject of twenty articles (3, 4, 5, 8, 9, 11, 12, 13, 14, 16, 19, 20, 24, 25, 31, 33, 35, 36, 37 and 40). An additional nine articles pertain to both human rights of indigenous peoples and Aboriginal rights (7, 15, 18, 34, 38, 39, 41, 42 and 45). Finally, a full seven articles deal with land rights and Aboriginal title, which again could be seen as belonging to either form of right, or even to property rights (10, 26, 27, 28, 29, 30 and 32). Note the way in which these issues are mixed; the authors of the Declaration had no sense of the ways in which some of the first set of rights might be deployed to limit the second set. There is no coherent notion that these forms of rights should be grouped as sets.

An example is needed to make this issue clear. Article 21, which I have situated in the category of human rights, deals broadly with the economic well being of indigenous peoples. It makes provision that:

> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

The Eurocentric nature of the language being deployed here demands some attention: the United Nations document does not invoke any greeting or thanksgiving in any indigenous language. It does use '*inter alia*' (among other things), thus giving additional attention to Latin, a dead but hardly uninfluential language (I note that I myself on rare but significant occasions have been known to resort to Latin numerals). It does not develop or rely on a single concept from within a single indigenous worldview. Since it cannot decide which one to use, it uses none; this is a travesty.

Of particular concern is the way this list in Article 21 (vocational training!) and the standards it implies could patently justify, in the name of the rights of indigenous peoples, state interventions: building a hydro electric dam can be justified for the jobs it creates; removing children can be justified to improve their educational attainment or social circumstances within the mainstream of society. While there are other clauses that mitigate against these effects, by placing the document as a whole within and underneath the logic of

overarching, universal human rights, where there is a conflict it appears clear that indigenous human rights will over ride Aboriginal rights, to the likely detriment of indigenous people. This latter is likely since it is 'states' that will tend to implement the human rights.

State involvement is not a question of no importance here. The Declaration contains a number of clauses that deal with self determination, including four in a row at one point. These are:

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5: 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.

Article 6: Every indigenous individual has the right to a nationality.

What is important is what is missing from this list. Indigenous people do not have a right to sovereignty. Further, they only have the "right to autonomy or self government in matters relating to their internal and local affairs." Interestingly, articles 11 to 17 begin with a first clause, "indigenous people have the right," and add a second clause, "states shall" (articles 21, 22, 26, 29, 30, 32 and 36 use the same formal structure; article 18 and 19 use the form in separate articles). The Declaration posits a bifurcated world, with indigenous people on one side as rights holders and the state on the other as duty bound. It is clear that forms of self government are to exist within the existing state system. Although the Declaration places clear demands on states vis a vis their practices respecting indigenous peoples, it also enforces the notion that indigenous people are ultimately under the aegis or authority of existing national states, and there they must stay. Even aspirationally.

This is, again, not to say that the Declaration is of no positive political and legal value, even in the Canadian context. There are twenty clauses that specify Aboriginal rights, and these are not a part of the Canadian, or many other, legal/political contexts. For example, as well as Article 44 guaranteeing

that the rights of indigenous peoples are available equally to indigenous male and female persons, a clause in Article 22 mandates that "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." Another article, 33, specifies rights to control citizenship among indigenous peoples as follows:

> 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
>
> 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Both of these, and many others of the twenty articles that deal with Aboriginal rights, could be important tools in litigations or in social justice struggles in Canada, where the state through the Indian Act still ultimately controls the legal status of first nations citizens, and where gendered violence against Aboriginal women remains a pathological and deeply repulsive feature of society.

viii. A Conceptual Structure

With this as background, it should be clear that some conceptual clarity is demanded on issues pertaining to Aboriginal rights, particularly in order to understand how they can come into conflict with human rights. Human rights, citizen rights and property rights operate on one plateau of rights discourse. Aboriginal rights, customary rights, and treaty rights operate on another. Indigenous human rights can be specified with reference to both, though they belong in my view with the first set, as an application.

On one plateau, then, are the set of rights that may be enjoyed by individuals by virtue of their citizenship, their humanity and their wealth. Citizenship rights are the national rights enjoyed by people and individuals through being entitled members of a nation. These may include rights to participate in that nation's political system and rights to be protected, internationally, by representatives of their nation. These rights vary dramatically, as different nations clearly have different abilities to protect their citizens and have different status in the global hierarchy of national polities. These were the forms of rights that Edmund Burke famously preferred to 'the rights of man' being proclaimed by the revolutionaries in eighteenth century France.

Human rights are rights and freedoms that belong to all peoples inasmuch as they are human. Human rights involve equality rights, individual freedoms, and rights to belong to cultural and national collectivities. National collectivities may, and often do, enshrine human rights as an aspect of the rights of its citizens, as the Canadian Charter of Rights and Freedoms example suggests. Property rights may be a form of human rights and/or a form of citizenship rights, and speak to security of ownership of property. The doctrine of property rights has tended to protect the wealthy of the world as individuals, but it can pertain to collectives in the forms of intellectual property, cultural property, and Aboriginal title.

Aboriginal rights are rights that pertain to a specific group of people, frequently the prior occupants of a territory in pre-colonial times, and therefore are established on a whole distinct plateau of rights: they do not belong to everyone. Aboriginal rights exist in order to acknowledge the cultural distinctiveness of prior occupants or other indigenous peoples. They therefore tend to be collective, and particular. They may be seen as a variety of customary rights, tied as they are to the collective cultural traditions and practices of specific indigenous peoples. Any peoples who have engaged in a practice for such a lengthy period that they have earned a right to continue the practice may enjoy customary rights. Treaty rights are any rights that may be conferred through negotiations between a specific indigenous peoples and a specific nation state.

The human rights of indigenous peoples involve the application of human rights to indigenous individuals. They belong on the territory of human rights, but involve the people associated with Aboriginal rights. Obviously, indigenous peoples can have their rights as human beings violated. Although in effect the Universal Declaration of Human Rights should be sufficient to protect indigenous peoples, the reasons Alex Neve sets out for the Declaration amount largely to a justification of elaborating and extending human rights specifically to indigenous peoples. But it must be clear by now that this is a different ethical, legal and political issue than the issue of Aboriginal rights.

Aboriginal rights exist for the protection of the cultural distinctiveness of indigenous peoples, in the recognition that such distinctiveness may be of value in a rapidly changing world. They therefore pull in a different direction than human rights. Human rights move towards what is common in humanity and are an expression of some basic ideas thought to be of universal value. Aboriginal rights move in the direction of what characterizes specific groups of people and of what defines them as distinct. The actual actions protected by Aboriginal rights are particular and vary from group to group, perhaps from time to time. Human rights work to abstract from particular actions and protect a broader principle embedded in the action (for example, freedom of speech).

The problem that emerges is that human rights may be used to over ride Aboriginal rights. A young man is taken from his home to an island, where he is left isolated for several days as a first stage of initiation into a dance society. His human rights were clearly violated, in the interests of the Aboriginal rights of his nation. The two, Aboriginal and human rights, do not sit comfortably side by side. The United Nations structure establishes a hierarchy, with human rights on the ascendance. The rights of indigenous peoples are positioned as an extension of human rights. They are not.

The particular cultures of gathering and hunting peoples, one specific form of indigenous peoples, often show great respect for the 'autonomy of the individual'. In fact, since property rights are less paramount, oftentimes gatherers and hunters enacted cultural mechanisms that showed greater respect for equality and freedom than the most 'advanced' liberal democracies of our own time. Yet, still bound by the notion that 'we', the 'advanced', 'progressive', 'developed' 'west' know more than 'they', 'we' insist on imposing our hierarchies in the name of equality and freedom. To repeat: we insist on imposing our hierarchies in the name of equality and freedom: this, in part, is what the United Nations Declaration on the Rights of Indigenous Peoples amounts to: our notion of human becomes the notion of human, our notion of freedom and equality becomes the notion of freedom and equality, our notion of rights is the only notion possible.

ix. From The Ground Up

Just as human rights exist more in the breach than in the enforcement, many years after the Universal Declaration of Human Rights was promulgated and even after the covenants meant to give it force were passed, so too Aboriginal rights continue to be violated on a daily basis. They are violated here in Canada, part of the 'advanced', 'developed', 'progressive' social world as much as they are in many other parts of the world. When the United States, at the pinnacle of the world hierarchy, feels free to entirely violate basic human rights in the interest of its war on terror, it is difficult to feel optimistic about global compliance in human rights instruments. It is even more difficult to be optimistic about the Aboriginal rights provisions in a document as compromised as the United Nations Declaration on the Rights of Indigenous Peoples.

Last August, 2010, I was in the Mackenzie Mountains with Shutagot'ine, mountain Dene from the village of Tulita. My students and I discussed and argued about the status and role of Dene women in the hunting camp. We negotiated our own role and status among the generations of hunters present with us. We went on crazy rides on all terrain vehicles across rivers and up riverbeds into the foothills and past the trees high onto mountains, in search of caribou. We traded stories and images, and borrowed rifles and lent fishing

rods and helped each other in the daily routines of a work that is somehow more like leisure and a leisure that is somehow more like work than we imagined. We drank water taken straight from the lake and ate fish from the nets or caribou from our hunts. We kept watch for moose and went on dusk and dawn excursions to see if we could find them out in the open. We learned a little bit about what it is to be Dene. And, perhaps, it's true, in learning that we learned a little bit more about what it is to be human.

Aboriginal rights get asserted this way, in the practice of indigenous culture. They will, in the end, not be handed down from on high as a gift from the king or the United Nations (one of E.P. Thompson's points about customary rights). They are won in blockades, in occupations, in marches and walks, through patience and practices, through petitions, through determination and the strength of indigenous nations and their allies. Critically, Aboriginal rights are achieved through the enactment of cultural practices, the repetition of activities that were engaged in albeit with different technologies, economies and social contexts, many many years ago. These practices, paradoxically, may also have something to teach about such cherished human rights as equality and freedom. But when we arrogantly impose our universality we blind ourselves to the possibility of learning, even learning what it is to be human.

The Declaration presumes indigenous peoples as victims and as weak. In the various rationales and justifications, it always positions indigenous peoples as in need of benevolent support. Nowhere does it recognize the strong contribution that indigenous peoples as indigenous peoples have to make to the world, coming closest but adopting instead in its preamble the phrase: "all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind." All peoples, including indigenous peoples, have a contribution to make: there is nothing especially valuable about indigenous knowledges and cultures. The preamble deploys this, too, as a critical fiction. That 'we' in the 'advanced', 'developed', 'progressive' world might actually have something to learn from indigenous peoples, might have something to gain by living side by side in peace with thriving indigenous cultures, appears unthinkable among the too many too smart, jurists of universalism. Nowhere does the United Nations appear to imagine *pimatisiwin*, the good life, which may be found in Andean and Mackenzie mountain ranges. Until they can, their declarations will float lightly on currents of rising air, never finding the ground beneath their feet.

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