UN Declaration & Modern Treaties

Brenda L Gunn, Fellow, CIGI & Associate Professor, University of Manitoba

Why a Declaration on the Rights of Indigenous Peoples?

- *Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,
- *concerned* that indigenous peoples have suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests
- *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
- *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

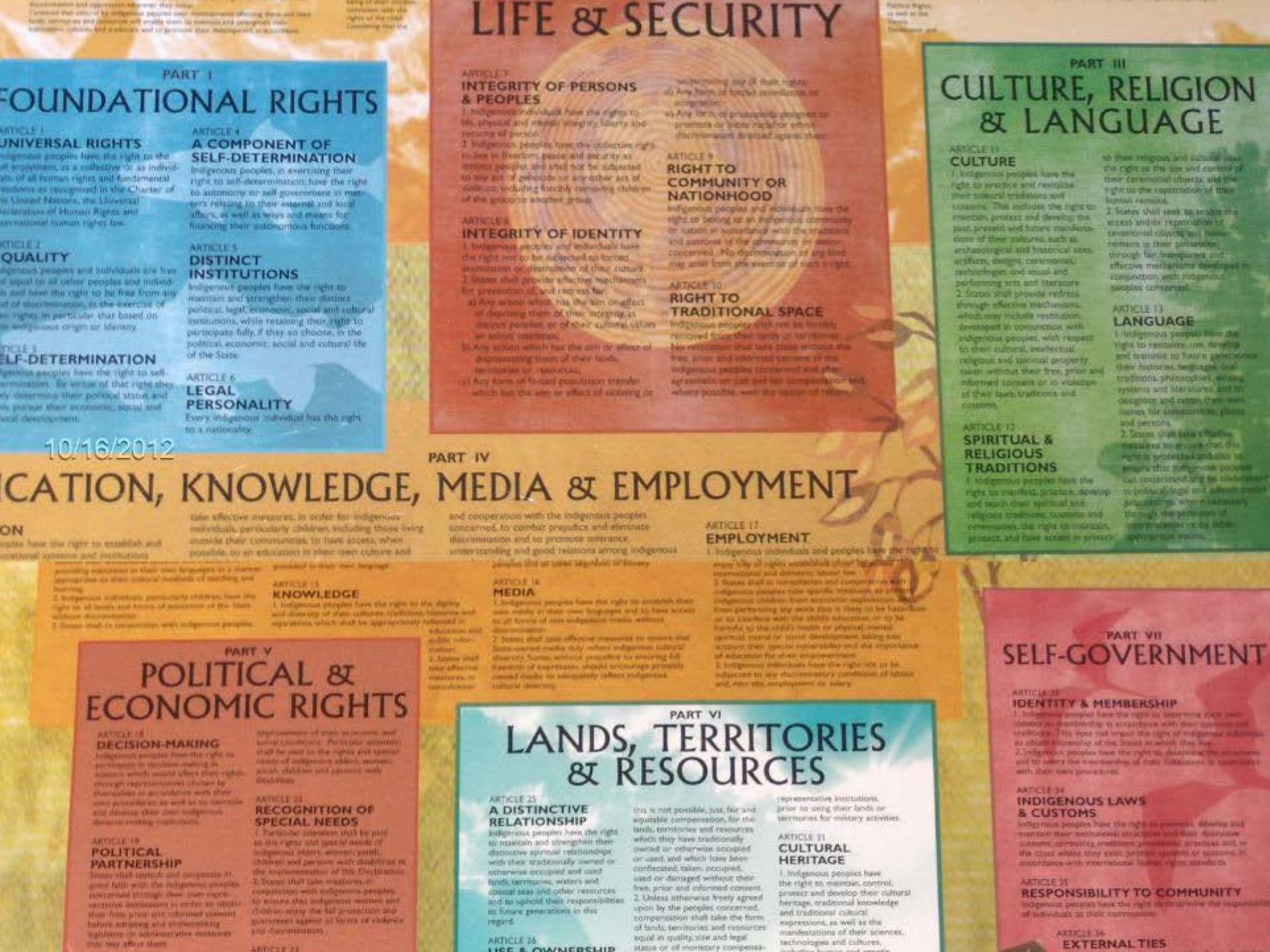
UN Dec in Context: International Instruments

International Human Rights Instruments (Treaties and Declarations)

- International Labour Organization Convention 169
- Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**)
  - General comment
- International Covenant on Civil and Political Rights (**ICCPR**)
  - General comment
- International Covenant on Economic and Social Rights (**ICESCR**)
- Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**)
- Convention on the Rights of the Child (**CRC**)
- Universal Declaration of Human Rights
- American Declaration on the Rights and Duties of Man
- American Declaration on the Rights of Indigenous Peoples

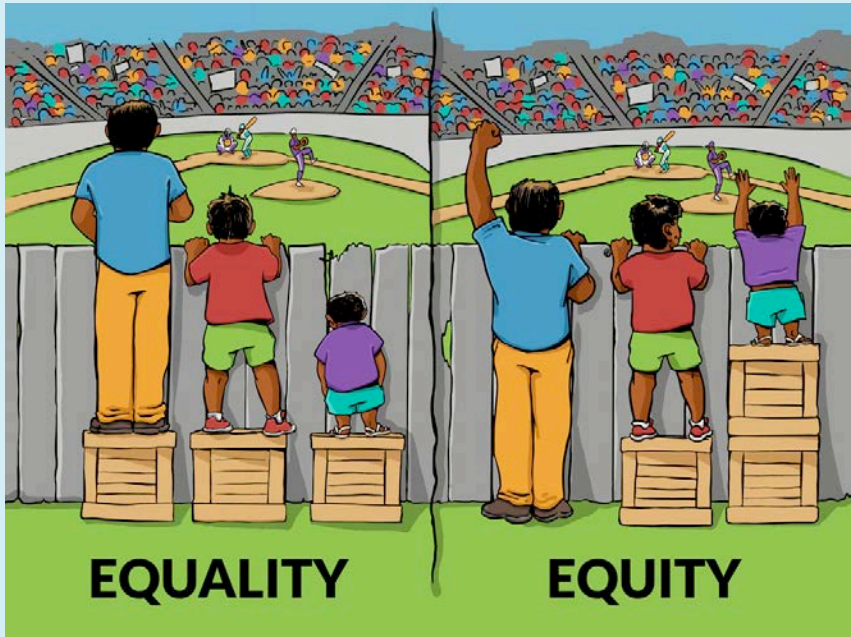
Implementation in Canada

- Applies to all Indigenous peoples in Canada: First Nations, Inuit & Métis
- Indigenous peoples are Canada's partners in confederation – this is a benefit not a burden
- Bringing together Canadian, international and Indigenous law
- National action plan that ensures different Indigenous peoples are able to pursue their rights as they understand them – no pan-Indian approach
- Relevant to every Canadian government actor, and every policy, program
- Need to reconsider the scope of section 35 rights – *Van der Peet* is no longer relevant
- Move beyond consultation and accommodation – to participation in decision making


PART I
FOUNDATIONAL RIGHTS
ARTICLE 1
UNIVERSAL RIGHTS
ARTICLE 2
QUALITY
ARTICLE 3
ELF-DETERMINATION
ARTICLE 4
A COMPONENT OF SELF-DETERMINATION
ARTICLE 5
DISTINCT INSTITUTIONS
ARTICLE 6
LEGAL PERSONALITY
10/16/2012
LIFE & SECURITY
ARTICLE 7
INTEGRITY OF PERSONS & PEOPLES
ARTICLE 8
INTEGRITY OF IDENTITY
ARTICLE 9
RIGHT TO COMMUNITY OR NATIONHOOD
ARTICLE 10
RIGHT TO TRADITIONAL SPACE
PART III
CULTURE, RELIGION & LANGUAGE
ARTICLE 11
CULTURE
ARTICLE 12
SPIRITUAL & RELIGIOUS TRADITIONS
ARTICLE 13
LANGUAGE
PART IV
ICATION, KNOWLEDGE, MEDIA & EMPLOYMENT
ARTICLE 14
ARTICLE 15
KNOWLEDGE
ARTICLE 16
MEDIA
ARTICLE 17
EMPLOYMENT
PART V
POLITICAL & ECONOMIC RIGHTS
ARTICLE 18
DECISION-MAKING
ARTICLE 19
POLITICAL PARTNERSHIP
ARTICLE 21
RECOGNITION OF SPECIAL NEEDS
PART VI
LANDS, TERRITORIES & RESOURCES
ARTICLE 25
A DISTINCTIVE RELATIONSHIP
ARTICLE 26
ARTICLE 31
CULTURAL HERITAGE
PART VII
SELF-GOVERNMENT
ARTICLE 33
IDENTITY & MEMBERSHIP
ARTICLE 34
INDIGENOUS LAWS & CUSTOMS
ARTICLE 35
RESPONSIBILITY TO COMMUNITY
ARTICLE 36
EXTERNAL TIES

Equality & Non Discrimination

- Indigenous peoples are entitled to the **same human rights and fundamental freedoms as all people**
- This includes the right **to be free from discrimination**
- recognize the right of Indigenous peoples to be different, to consider themselves different, and to be respected as different



History of Indigenous peoples standing in international law

- 1500s Vitoria: American Indians had rights based on natural law – but could lose their rights through a conquest following a just war
- 1600s Grotius: Indians could enter into treaty, as grounded in natural law
- 1800s Vattel: Concerned about the domestication process of Treaties
- Westlake distinguished between civilized (sedentary lifestyle with Euro govt system) and uncivilized. International society limited to civilized
- Oppenheim: through recognition a State becomes an international person and a subject of international law

Further international law developments

- McNair: “an agreement made between a State and a native chief or tribe cannot be regarded as treaty in the intl sense of the term, nor can it be said that such an agreement produces the international legal effects commonly produced by a treaty.”
- *Island of Palmas* arbitration: “as regards *contracts between a State* or Company such as the Dutch East India Company *and native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties.”
- McNair: this represents “modern doctrine”, but agreements have been recognized as treaties by domestic courts, including US & NZ

1999 Alfonso Martinez UN Report on Treaties

- Concerned about the domestication process of Treaties
- In concluding treaties with Indigenous peoples, Europeans were clearly aware that they were negotiating and entering into relations with sovereign nations, with all intl legal implications of that term during the period under consideration.
- no sound legal argument to sustain the position that [Indigenous peoples] have lost their international juridical status as nations
- Must avoid a narrow definition of treaty or treaty making
- "other constructive arrangements" added to study at request of Canadian Government to cover what are now called "modern treaties" in Canada

UN Declaration: Treaties, Agreements & Other Constructive Arrangements

- The UN *Declaration* provides protection of
  - **Treaties**: peace and friendship, historic and modern
  - **Agreements**: impact benefit agreements, land use agreements, etc
  - **Other constructive arrangements**: any legal text or other documents that are evidence of consensual participation by all parties to a legal or quasi-legal relationship
- States are obligated to respect and honour treaty obligations
- Recognizes that Treaties provide a way forward in strengthening and developing relationship between Indigenous peoples and Canadian governments
- Treaties are recognized as being an international responsibility and as having an international character

American Declarations on the Rights of Indigenous Peoples

- 1. Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors, in accordance with their true spirit and intent in good faith and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the indigenous peoples as regards to treaties, agreements and other constructive arrangements.
- 2. When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to **competent bodies**, including regional and international bodies, by the States or indigenous peoples concerned.
- 3. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Implications

- *Pacta sunt servanda*: the legal duty of parties to perform the treaty in good faith necessarily includes the good faith interpretation of the respective treaty obligations
- Reiterates a nation-to-nation relationship
- No unilateral modification of treaties
- Not just Canadian law that applies to interpret treaties
- Role for international oversight (beyond domestic courts)

Lands, Territories & Natural Resources

- right to their lands, territories, and natural resources including to:
  - Own
  - Use
  - Develop
  - Control
  - Strengthen the relationship with the lands
- applies to the lands they currently live on and use, as well as their traditional territories
- applies to lands Indigenous peoples have acquired in other ways like treaty land entitlements, modern treaties or purchase
- Canada is required to work with Indigenous people to set up a process that identifies and protects these lands under Canadian law
- Governments must consult with Indigenous people before allowing any activities on Indigenous people's lands, territories and resources

Right to Participate in Decision-Making

- determine the outcome of decisions that impact their rights, not just be involved in such processes
- participate in public affairs including elections, but is not limited to formal public institutions but also participation in civil, cultural and social activities
- effectively participate in the decisions of all Canadian government bodies and agencies when Indigenous peoples' rights are specifically and especially impacted
- make independent decisions over their internal and local affairs without external influence
- Must occur in a climate of mutual trust and transparency
- not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights

International Instruments and Participation

- UN Declaration: articles 3–5, 10–12, 14, 15, 17–19, 22, 23, 26–28, 30–32, 36, 38, 40 and 41 (and World Conference outcome doc)
- ILO 169: articles 6, 7, 15
- CRC article 12
- ICCPR Art 27 /HRC General Comment 23
- CERD Recommendation XXIII General Comment: no decisions directly relating to their [Indigenous Peoples] rights and interests are taken without their informed consent
- CESCR: General Comment 21
- American Convention of Human Rights/Am Dec Rights and Duties of Man / Am Dec Rights of Indigenous Peoples
  - *Saramaka* decisions: must engage in free, prior informed consultation, a sharing of benefits from the project and that there are prior environmental and social impact assessments
- EMRIP study on right to participate in decision making

Types of participation

- {{**Information sharing**: After getting permission to consult, this activity will commence immediately and will mostly be a 1-way flow of info.
- **Consultation**: 2-way flow of info & exchange of views.}}
- **Collaboration**: begin with each party clearly outlining how its decision-making processes function. This includes, at a minimum, an identification of all individuals and entities that need to take part in the process for each party
- **Joint decision making**: Shared decision-making is useful when the external actor's knowledge, capacity, and experience are critical for achieving policy objectives.
- **Consent**: a freely given decision from the rights-holders based on full, prior and objective information; a decision made by the people or community in question, through their designated representatives and in accordance with their traditions, customs and norms
- **Empowerment**: Transfers control over decision making, resources, and activities from the initiator to others, including stakeholders and rights-holders

UN Declaration and the Constitution

- Division of powers: implementation will likely require the participation and involvement of both levels of government (especially post *Keewatin*: with power comes responsibility)
- Section 35: at a minimum, section 35 must contain all the rights set out in the UN Declaration

Implementation challenges

- Understanding UN Declaration in context of broader international human rights law
- Understanding of UN GA resolutions – international legal character
- Moving beyond rhetoric – of supporting principles to changing how government operates
  - Will Canadian governments take necessary steps to ensure that Indigenous peoples are involved in decision making where their rights are specifically & especially impacted?
  - Decolonization….
- Many lawyers and judges do not understand the relevance of international law domestically in Canada