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What can we do you for? – Naïve Conceptions of the Value of Indigenous Cultures and Communities

by Nigel Stobbs

The thesis of this article is that in a liberal democracy we create laws to protect things of value. The strongest legal protection is given to those things which we believe are fundamentally or intrinsically valuable. Although there is an increasing body of law aimed at protecting the rights of Indigenous peoples and communities, this body of law (in most instances) does not appear to be based on a belief that there is true intrinsic value in these entities. Furthermore, the suggestion is made that a deeper concept of intrinsic value, which does not solely depend on the attitudes or beliefs of the wider community, should play a role in the formation of credible law and policy in relation to Indigenous communities.

The preamble to the Draft United Nations Declaration on the Rights of Indigenous Peoples[1] provides that signatory nations will affirm that:

> All peoples contribute to the diversity and richness of civilisations and cultures, which constitute the common heritage of humankind.

There is no doubt that Indigenous cultures and communities do tend to make the global collection of civilisations more diverse, however this statement betrays what I submit is a shallow and potentially marginalising view of the value of Indigenous cultures. The statement typifies legislative, political and academic views of Indigeneity which predicate *value* upon the attitude and beliefs of a *valuer*. In fact, most international and Australian law and public policy which purportedly seeks to protect Indigenous Australians is based, in my view, on a belief that the value of Indigenous culture is fundamentally instrumental. In other words, we ought to respect and protect Indigenous peoples because we value them for what we perceive them as contributing (in either a political, economic or cultural sense), and not on the basis of any intrinsic value or on the basis of how such peoples value themselves and their communities.

At a deeper level, I suspect that a failure to acknowledge any fundamental intrinsic value of Indigenous cultures is at the heart of the long running dispute between Indigenous people and various states over the extent of any right to self-determination and self-government[2].

To hold that Indigenous communities have instrumental value is to assert that they are valuable because they create or lead to outcomes which are of some use or benefit to the wider community. The preamble from the Draft Declaration, for example, impliedly asserts that a diversity of world cultures is beneficial and valuable to the global community. This is undoubtedly true. A diverse global community implies a diversity of views, knowledge and experiences which can benefit a range of global concerns such as environmental protection and economic policy. Biodiversity

strategies and programs, for instance, continue to draw extensively on traditional land and resource management practices of Indigenous communities in Australia.[3]

At a popular level we can identify many benefits which derive from the content of Indigenous cultures and the phenomenon of cultural diversity. Traditional medicines, agricultural practices and the outputs of Indigenous performers and artists are all of national and international significance.

To hold that Indigenous cultures and communities have intrinsic value is to claim (ideally) that they have value, and hence a right to exist and flourish, regardless of the beliefs or attitudes of external individuals, organisations or governments. Laws and policies based on a recognition of the intrinsic value of Indigenous communities would recognise that these communities are worth protecting not as a means to some other end but as either ends in themselves or as entities which are self-valuing. Surely genuine self-determination is owed to a discrete entity which has the capacity to value itself.

To claim that Indigenous cultures have intrinsic value is not to deny their instrumental value, or to deny that their instrumental value is something we ought to recognise and promote. What we should deny is that this instrumental value ought to be what fundamentally or overwhelmingly informs our legal and policy approaches to Indigenous issues.

Legislation and policy based on a recognition of intrinsic value would need to be stimulated by a wider academic and social debate on what it means for a cultural group to have such value. There are a number of possible formulations of this concept – some of which we would want to avoid.

One possible conception of a culture which has intrinsic value is that it is one which we value for its own sake – regardless of any material or social benefit with which it provides us (the wider community). Something akin to this conception underpins the limited recognition given to Indigenous customary law in Australia by some elements of the judiciary and by institutions such as the Australian Law Reform Commission[4]. The Commission's recommendation that consideration be given to recognition of traditional marriages in order to provide better access to justice for surviving spouses and the children of such unions seems to be based on an assumption that traditional marriages[5] are the product of a legitimate and intrinsically valuable culture. There is no mention made in the Commission's report of the value of cultural diversity or instrumental benefits to the wider community in the recognition of customary law.

Tempting though it might be to adopt such a formulation of intrinsic cultural value, I would submit that this is a somewhat inadequate position since it predicates the value of the culture on the attitudes of people external to it. While there are many in the Australian community who may value Indigenous Australian cultures 'simply for what they are' and would protect them on that basis, would we want to link the continued legislative protection of these cultures to the preferences and attitudes of the non-Indigenous majority? To some extent that might be an inescapable practical reality in a liberal democracy, but more fundamental legal instruments such as

international conventions and any potential Australian Bill of Rights could be based on a deeper notion of intrinsic cultural value.

Another, related, conception of intrinsic cultural value could be that it consists of value which we ascribe to a culture based on some property which is intrinsic or inherent to it. This is the sort of intrinsic value which often informs environmental protection law. Many plants, animals and ecosystems are valued, and thereby afforded formal legal protection, as a result of their rarity. Endangered species are very strictly monitored and interaction with them is highly regulated in many jurisdictions – and often the species protected has no obvious instrumental value and is protected for no other reason than its rarity.[6] Could we then argue by analogy that we have an obligation to protect Indigenous cultures on the basis of their rarity and vulnerability – and that this conception of intrinsic value ought to inform our law and policy making? To some extent it could be argued that such a naïve Social Darwinist approach to legislating and policy making for Indigenous affairs in Australia has been characterised by some analogous concern for rarity.

Apart from the obvious criticism that we would not want to take some sort of cold, mechanistic, flora and fauna view of Indigenous cultures, predicating value on rarity is still to predicate the worth of a culture on external conditions.[7] The rarity of a thing is a measure of the non-existence of related or similar things. So too is diversity. So although it is possible to value something based on rarity, and to discount or ignore any instrumental benefits received from it, rarity is not truly intrinsic. Recognition of the vulnerability and fragmentation of Indigenous cultures and communities as a result of colonial and social oppression is clearly warranted and has a place in the theoretical and political context which informs good law, but it is not enough.

The key deficiency with all the conceptions of value with which we have so far approached the task of making laws and policies for the benefit of Indigenous cultures is that they are all contingent upon the existence of particular values, preferences or attitudes of people external to the culture in question. Preferences, values and attitudes are often fickle things and subject to change in response to political, economic and social circumstances.

Furthermore, I suggested earlier that the reluctance of governments in many nations to accord real rights of self-determination to Indigenous peoples is a reflection of the belief (perhaps subliminal) that any intrinsic value which a culture possesses is based on the existence and assessment of some external valuer. Deliberations involving Indigenous delegations and representatives of states over the content of the Draft Declaration have often become bogged down over whether the right to self-determination is limited to an internally (within the Indigenous community) exercised right or whether it could include a right to secession or separate sovereignty. Although Indigenous peoples themselves overwhelmingly rejected the assertion that secession would be sought by their communities, they claimed it was an important matter of principle that they not be dictated to ahead of time as to how they would exercise their autonomy under the declaration.[8] If, however, the value of an Indigenous community was ultimately to be grounded in how it viewed and valued itself (as being at least viable and contiguous), and it was that conception of intrinsic value which informed our law and policy making, then this would not only be a

theoretically coherent jurisprudential position but a significant tool for empowering these communities.

How else can Indigenous peoples and communities freely determine their political, economic and social futures unless the wider population (and the legislature) allows that the value of those cultures is ultimately generated by a process of self-valuation?

To return to the central thesis of this discussion – the law ought to protect that which is valuable. A fundamental flaw in current law and policy making is that the presumed value of Indigenous peoples is continually categorised as being their value to someone or something external to their own communities or cultures. Laws which seek to protect the rights of Indigenous peoples based on benefits to the wider community, or on what the wider community believes is valuable may be well intentioned, but are inescapably paternalistic and lacking in credibility.

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[1] UN Doc E/CN.4/Sub.2/1994/2/Add.1(1994).

[2] Article 31 of the Draft Declaration on the Rights of Indigenous Peoples currently limits any right to autonomy and self-government of Indigenous Peoples to 'their internal and local affairs'.

[3] According to the Australian Science, Technology and Engineering Council, a critical component of the National Strategy for the Conservation of Australia's Biological Diversity (1995) is 'the role indigenous peoples have played in managing the environment, especially their traditional knowledge and practices in the use and management of protected areas.'

[4] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986). Although some commentators argue that the incorporation of customary law into the mainstream justice system perpetuates a power imbalance and creates a contrived hybrid of laws which displaces Indigenous values and culture – see B W Morse, 'Indigenous Law and State Legal Systems: Conflict and Compatibility' in B W Morse and G R Woodman (eds), *Indigenous Law and the State* (1988) 105.

[5] Ibid 235.

[6] For a very detailed analysis of the relationship between different conceptions of intrinsic value and environmental ethics, see John O'Neil, 'The Varieties of Intrinsic Value' (1992) 75 *The Monist* 119.

[7] Gareth Evans in fact strongly criticised John Howard's draft preamble to the Australian Constitution for its 'flora and fauna' references to Indigenous Australian cultures – implying that a serious approach at reconciliation ought to acknowledge cultural value based on much more than just its longevity.

[8] Catherine Iorns, 'The Draft Declaration of the Rights of Indigenous Peoples' (1993) 1(1) *E-Law – Murdoch University Electronic Journal of Law* [3] <http://www.murdoch.edu.au/elaw/issues/v1n1/iorns112.html> at 1 April 2005.