

Constructing A Right To Communicate: The UN Declaration on the Rights of Indigenous Peoples

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Abstract

Since its conception forty years ago, efforts to reach a universally acceptable definition of a right to communicate have been unsuccessful, primarily because the debate has been at an abstract philosophical/legal level rather than arising out of the real experience of people struggling to achieve rights addressing their immediate communication needs. As an alternative to the problem of achieving a philosophical/legal definition of a right to communicate, this paper proposes a strategy of *constructing* a right to communicate through the interpretation of how right to communicate values are embodied in current soft and hard law texts. To illustrate how this can be done, the *United Nations Declaration on the Rights of Indigenous Peoples* (DRIP) is used as a case study. An analysis of the DRIP reveals the extent to which it embodies values associated with a right to communicate: universal human rights that recognize cultural diversity; collective and individual rights; encompassing traditional communication rights; right of participation in all aspects of communication; positive rights. The increasing experience people gain with the complex issues arising out of global, interactive communication could generate further texts embodying right to communicate values. The analysis of such texts may reveal that in time everyone does indeed possess a right to communicate.

Keywords: Right to Communicate; Indigenous People's Rights; Communication Rights Values; Declaration on The Rights of Indigenous Peoples.

Introduction

Human communication is obviously an exceedingly complex process but every human being has, among others, two fundamental communicative needs: to be informed and to inform. I contend, as have others (Canada 1971; Richstad & Anderson, 1981) that these two needs constitute a foundation for a right to communicate that everyone requires for their personal self-fulfillment. To not be able to communicate—to inform and to be informed—dehumanizes the individual. As an example, in the case of the use of language specifically, neurologist Oliver Sacks notes with regard to individuals who have lost the ability to express or understand language (aphasia):

We are a linguistic species—we turn to language to express whatever we are thinking, and it is usually there for us instantly. But those with aphasia, the inability to communicate verbally may be almost unbearably frustrating and isolating; to make matters worse, they are treated by others as idiots, almost as nonperson, because they cannot speak.

(Sacks, 2007, p. 215)

Because communication is so basic to being a fully functioning human being, everyone needs to have their right to communicate entrenched in law. However, ever since Jean d'Arcy identified the need for a right to communicate in 1969, achieving the entrenchment of such a right in national or international law has been hindered by the challenge of defining such a right (d'Arcy, 1977, p. 1). Communication rights activists, policy experts, academics, among others have advanced a variety of formulations but no precise definition has achieved wide-spread acceptance. Much of this debate over definition is at an abstract philosophical and legal level of discourse. Such discussion is valuable in exploring what could constitute a right to communicate but it has been, until recently, divorced from the experience of the vast majority of people. Consequently, it has not been linked with a broad based political or social experience that could link theory and practice. Instead of attempting to define a right to communicate, this paper explores a strategy of *constructing* a right to communicate using as a case study the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly on September 13, 2007.

From Defining to Constructing A Right to Communicate

An alternative strategy to the traditional strategy of attempting to formulate a philosophical/legal definition of a right to communicate is to interpret how the values typically associated with a right to communicate are embodied in current declarations, covenants, laws, constitutions, policies, and judicial rulings of international and national governing and legal institutions (Birdsall, McIver & Rasmussen, 2002). Philosophical/and legal discussions are important but they tend often to conclude with definitions so general that they are divorced from the real experience of people and their cultural contexts. Here, it is important to acknowledge success in the achievement of rights arise out peoples' often long struggles to correct wrongs. As legal scholar Alan Dershowitz observes: "Virtually every newly recognized right—whether it be the right to leave a country or the right to marry a person of the same sex—has been invented by human beings based on the wrongs they experienced or observed" (Dershowitz, 2004, p. 191). Furthermore, "It is ... also clear that the generic nature of a right to communicate can only attain specific meaning in the context of individuals and communities" (Rasmussen, 2004, 137).

As people strive to attain their rights in relation to a range of communicative issues, it should be possible to determine through the analysis of various texts if the values of a right to communicate are being achieved regardless of a lack of a specific definition. Indeed, it is argued in this paper that elements of a right to communicate have been identified in the foundational UN *Universal Declaration of Human Rights*, specifically Articles (12) on privacy, (19) on freedom of expression and opinion; (20) on peaceful assembly; and (27) on cultural life of the community (Harms, 2002, p. 2 & McIver, 2000). Importantly, constitutional lawyer Merrilee Rasmussen, argues that it is a mistake to apply a literalist interpretation of the words of a legal text. She asserts it is necessary to take what she characterizes as a purposive perspective; that is, "meaning is not revealed by a text . . . it is constructed from a text" (2004, p. 136). Particularly, she demonstrates how the right to communicate's values are embedded in the *Canadian Charter of Rights*

and Freedoms with regard to the Aboriginal Peoples cultural identity in Canada (Rasmussen, 2002). Furthermore, Aliaa Dakroury examines Canadian public policy issues in the context of a right to communicate (Dakroury 2005a; Dakroury 2005b). Through such a purposive perspective approach, it is possible to cumulate a coherent body of interpretation and analysis that constructs an accepted formulation of a right to communicate.

To demonstrate this interpretative approach, this paper examines how values associated with a right to communicate are embedded in the recently adopted *United Nations Declaration on the Rights of Indigenous Peoples* (DRIP) 2007, a document resulting from decades of struggle by indigenous peoples to achieve recognition of rights associated with their unique cultural identities. The specific articles upon which I draw in the analysis of right to communicate values embodied in the DRIP are Articles (1); (3); (5); (7); (8); (9); (11); (12); (13); (14); (16); (24); (31); (33); (34); (38); (39); and (42) (United Nations 2007).

The United Nations Declaration on the Rights of Indigenous Peoples (DRIP)

The population of indigenous peoples is around 350 million individuals in over seventy countries, where they represent over 5000 languages and cultures. According to the UNESCO, indigenous peoples are often pushed to the fringes of society and denied basic human rights (UNESCO, 2008). Consequently, their struggle for human rights has been long and difficult. For that, the DRIP is the culmination of over two decades of negotiations. The United Nations began its official involvement with the issue of indigenous peoples with the establishment of a Working Group on Indigenous Populations in 1982, which prepared the initial draft of the DRIP. In 1994, the UN General Assembly launched the International Decade of the World's Indigenous People, and in 2004, the General Assembly proclaimed the Second International Decade of the World's Indigenous People. After much negotiation, the Declaration was adopted September 13, 2007, by the General Assembly with a total of 144 states in favor, 4 against, and 11 abstentions.

It is important to highlight here that the DRIP is not a legally binding document, exactly like the UN Universal Declaration of Human Rights (UDHR), it is a declaration only. Declarations can, however, be a preliminary step to the establishment of legally binding texts. In time, for example, the UDHR was followed by the creation of the UN treaties, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights*. Also, just as the UDHR has served since its adoption in 1948 as a moral source for people throughout the world to draw upon in their struggle for human rights, the substantive vote in favor of the DRIP also carries considerable moral force. On its adoption, it was acknowledged that the DRIP's text did not represent either the views of all members of the UN or even of all indigenous peoples. Nonetheless, it sets international standards and a framework from which states can enhance the human rights of their indigenous peoples. For that, it should be seen as one major achievement in the advancement of human rights.

A Right to Communicate “Values”?

Since the 1970s attempts to define a right to communicate have been undertaken by different parties, among them: the UNESCO, national advisory bodies, academics, non-governmental organizations (NGOs), and communication activists among others. While debate over the meaning of a right to communicate continues, a number of values are consistently associated with such a right. One of the first attempts to articulate such a right was made by a major advisory body on telecommunications policy established in late 1969 by the Canadian government. The Telecommission asserted in its final report that “The rights to hear and be heard, to inform and to be informed, together may be regarded as the essential components of a ‘right to communicate’” (Instant World, 1971, p. 3). A decade later, Jim Richstad and Michael H. Anderson, two communication studies scholars involved in the early years of the right to communicate movement, describe a right to communicate as:

the right to inform and be informed, the right to active participation in the communication process, the right of equitable access to information resources and information, and the right of cultural and individual privacy from communication.

(Richstad & Anderson, 1981, pp. 26-27)

On the initiative of right to communicate advocates UNESCO undertook in the 1970s and early 1980s an initiative to define and promote such a right. This initiative included a series of meeting of experts to explore the implications and meaning of a right to communicate. Echoing earlier formulations, the experts concluded:

Everyone has a right to communicate. Communication is a fundamental social process which enables individuals and communities to exchange information and opinions. It is a basic human need and foundation of all social organization. The right to communicate belongs to individuals and the communities which they compose.

(as cited in Fisher 1982, 38)

More recently, L. S. Harms offered the following description:

- Everyone has the right to communicate; this fundamental human right includes but is not limited to the following specific communication rights:
- A right to assemble, a right to speech, a right to participate and relation association rights;
- A right to inform, a right to be informed, a right to inquire and relations information rights;
- A right to privacy, a right to choose, a right to culture and related global rights (Harms, 2002).

As seen, Harms also emphasized, as had others, that the recognition of the right to communicate requires that the resources be available to meet the basic communication

needs of everyone. A right to communicate, then, embodies a number of essential values, including:

1. It is a universal human right that acknowledges cultural diversity.
2. It is possessed by both individuals and collectives.
3. It encompasses traditional communication rights including intellectual freedom, privacy, intellectual property, cultural, and linguistic rights but within a broader human right framework.
4. It includes the right to participate in the development, use and governance of media of communication.
5. It is a positive right in that the state has the responsibility to provide the resources enabling individuals and groups to exercise a right to communicate, however, because of the global nature of electronic, interactive communication action can be required of international bodies as well.

For the purpose of this paper, each of these values will be examined with specific reference to the DRIP.

1. A Universal Human Right That Acknowledges Cultural Diversity

It was not until the adoption of the United Nations *Universal Declaration of Human Rights* in 1948 that the concept of *universal* human rights was accepted at the international level in a formally endorsed text. As new rights are advanced, debate continues over the universality of rights, in particular with regard to their intercultural implications (Flynn, 2005). While the concept of “cultural relativism” of human rights has been rejected by the majority of states, there is recognition that the achievement of human rights must be in the context of cultural diversity. This is particularly the case with a right to communicate due to the inextricable relationship between communication and culture.

The DRIP affirms the concept of universal human rights in the context of cultural diversity. Article (I) states emphatically that, “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the UDHR and international human rights law.” However, it also recognizes the cultural diversity of and among indigenous peoples: “*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”

Consequently, seen in this manner, indigenous peoples have the right to self-determination which allows them to determine their political status, Article (3), to maintain and strengthen their distinct political, legal, economic, social and cultural development, Article (5). Diversity is further elaborated upon with regard to rights related

to collective security as a distinct people, Article (7.2); protection from forced assimilation and destruction of their culture, Article (8); belonging to indigenous communities according to their distinct customs and traditions, Article (9), including their spiritual and religious traditions, customs and ceremonies, Article (12); and controlling their own educational systems, Article (14).

As if to drive home the acknowledgement of cultural diversity Article (33) states: “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.” Furthermore, to protect their cultural identity they have the right, according to Article (34), to develop the necessary institutional and judicial structures to promote and protect their distinctive custom, traditions, and practices. It is clear the DRIP does not conceive of a conflict between recognized universal rights and rights arising out of cultural diversity.

2. Recognition of both Collective and Individual Rights

Some contend that rights are possessed solely by individuals, not collectives or communities. The debate over individual versus collective rights continues to be a consistent part of the philosophical discourse on the nature and validity of human rights. In the meantime, there is solid recognition in formally adopted international and national human rights texts, beginning with the UDHR, that groups or collectives can possess human rights. Collective rights are entrenched in international law with the UN International Covenant on Social, Economic, and Cultural Rights (1967) as well as texts directed at specific groups such as the UN Convention on Elimination of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989). Collective rights are also found in such national documents as the Canadian Charter of Rights of Freedoms (1982) with regard to Francophone linguistic and Aboriginal people’s rights.

Since communication is inherent to being human but also central to social organization and cultural development, advocates of a right to communicate have always seen it as both an individual and a collective right. However, because freedom of speech and the press are among the earliest of political and civil rights individual rights, some within the mass media sector see a collective right to communicate as a threat to these earlier rights. As we will see in the next section, supporters of a right to communicate argue that such a right encompasses, rather than denies, these individual rights. Because the debate continues over individual and collective rights, it is significant whenever recently adopted human rights texts, such as the DRIP, reinforce both individual and collective rights.

The DRIP clearly recognizes the application of rights to both individuals and collectives. Article (1) states specifically that “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms....” Article (7) states that “Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples” Article (8) states that “both Indigenous peoples and individuals” have a right not to be subject to forced assimilation or destruction of their culture while Article (9) indicates both have a right to be a member

of an indigenous collective in accordance to the traditions of that collective. Many other articles also refer to indigenous peoples having various rights relating to language such as Article (13), their own media in Article (16), intellectual property in Article (31), and their identity in Article (33).

3. Encompasses Traditional Communication Rights Including Intellectual Freedom, Privacy, Intellectual Property, Cultural, And Linguistic Rights

The DRIP addresses a number of communication issues that have been entrenched in traditional liberal freedoms, such as access to information, intellectual property, control of the media, and cultural development. However, because of the nature of indigenous knowledge systems, which differ substantially from the prevailing scientific based knowledge system (Birdsall & Shearer 2007, pp. 44-45), the DRIP challenges current interpretations of such rights and is therefore seen by some as a threat to traditional communication freedoms.

Advocates of a right to communicate never envisaged it would be a substitute for well established communication rights. Rather, they believe these rights are strengthened by being placed within a broader framework of an ascending progression of freedoms and rights whose capstone is a right to communicate (see d'Arcy, 1983; and Fisher, 1982 for example). In contrast to statements of traditional liberal communication freedoms, this framework places them in the context of cultural diversity and collective rights. By addressing such issues the DRIP reinforces the cultural and community values associated with a right to communicate.

The issue of intellectual freedom is addressed in Article (13) which states that “indigenous peoples possess right to transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures”. Indigenous peoples have the right to develop manifestations of their culture including ceremonies, visual and performing arts, and literature. Article 16 gives indigenous peoples the right to establish their own media along with access to all modes of non-indigenous media. It also calls upon states, “without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.”

Traditional liberal rights place great emphasis on access to information. However, as noted, a right to communicate recognizes the right of individuals and groups *not* to communicate. For some indigenous peoples their way of knowing and all or part of their body of knowledge are sacred, consequently access is limited to the members community or specific individuals within it, such as the elders. Article (12) protects this ethos including “the right to maintain, protect, and have access in privacy to their religious and cultural sites” and “the right to the use and control of their ceremonial objects....”

The protection of the intellectual property rights of Indigenous communities is a high profile issue (Britz & Lipinski, 2001, p. 235). Intellectual property is addressed in Article (24) which makes reference to the wide range of aspects of any knowledge system including the cultural expression, sciences, technology, medicines, flora and fauna, oral

traditions, and so forth. Indigenous peoples are given the specific right “to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.”

The right to protect their culture and language is manifest throughout the UNDRIP in many ways, some of which have already been touched upon. These include references to the right to strengthen their cultural institutions, to develop their own media, to collective intellectual property rights, to preserve and use their own language in their educational system, to preserve and develop their archaeological and historical sites, artifacts, designs, and other manifestations of their culture, and so forth. Indeed, the essence and objective of the DRIP as a whole is the preservation of the cultural distinctiveness, in all its manifestations, of indigenous peoples.

4. Participate in the Development, Use and Governance of Media of Communication

The promotion of a right to communicate in the 1970s and 80s was part of a larger media reform movement which included a call for a media democratization including the greater participation of consumers of information media development and dissemination (Napoli, 2007). Early advocates of a right to communicate recognized that telecommunication and computing technological developments had a tremendous potential to make accessible to everyone interactive communication over satellite based global networks. They embraced the idea that this direct involvement in global communication required the full participation of users in the development, use, and governance of communication media.

Their foresight was affirmed with the convergence of the Internet, the World Wide Web, and the personal computer in the 1990s. These developments revived a call for media reform as well as generated an awareness users must be involved in Web 2.0 and other media development (Birdsall, 2007). The DRIP makes specific reference to the right of indigenous peoples to participate in the development of their own media as well as access to non-Indigenous media. Article (16) states:

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

5. Positive Rights at the National and International Level

From the beginning advocates and students of a right to communicate have seen it as a positive right, that is, the state has the responsibility to insure citizens have the resources available to exercise their right. However, a right to communicate is like other more recent rights in that they require not only national but international action because of the

global nature of the issue, whether it is global communication, the environment, common heritage, and so forth.

Action at both the national and international level is called for in the DRIP. Article after article stipulates with regard to a wide range of rights that “States shall provide effective mechanisms”. “States shall provide redress...,” “States shall seek to enable....,” “States shall take effective measures...,” “States shall legal recognition and protection...,” and “States shall establish and implement.....” Article 38 specifically asserts that “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.” Article (39) speaks to the need for resources so indigenous peoples can exercise their rights: “Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.”

As can be seen, Article (39) also encompasses the need for “international cooperation.” The need for international action is also addressed in Article (42) which states: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

A Final Comment

Using the DRIP as a case study, this paper demonstrates a strategy of constructing a right to communicate through the examination of a diversity of legal texts, judgments, and opinions to delineate the extent to which they embody elements of a right to communicate. Other UN texts might have been selected for such an analysis. For example, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions that stipulates in Article (6, 2*h*) which parties to the Convention have the right and obligation to take “measures aimed at enhancing diversity of the media, including through public service broadcasting” (UNESCO, 2005). The Convention also addresses issues such as civil society participation, access to and preservation of modes of cultural expression, and international cooperation, to mention only a few examples.

Debate over the values embodied in the DRIP and in a right to communicate will continue. Let us remember four countries with large indigenous populations voted against it: Australia, Canada, New Zealand, and the United States. During the drafting negotiations, these and other nations raised a wide range of concerns about the Declaration including intellectual property rights, education, the rights of others, and self-determination, self-government, and indigenous institutions (Davide, 2007). These are all issues relevant to a right to communicate. Thus, we can anticipate the achievement of a right to communicate will take time and that such a right will always be an open work continually under construction (Birdsall, 2006). However, the growing personal experience of people around the world with the complex issues arising out of global,

interactive communication and converging media could generate further human rights movements similar to that of indigenous peoples, movements resulting in further texts embodying the values of a right to communicate. In time, we may discover through continual analysis of such texts that everyone can, indeed, exercise their right to communicate.

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