

## BOOK REVIEW

### INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND

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The book comprises an introduction and six chapters, divided into two parts, followed by a general conclusions section. Part I looks at the international debate and laws concerning indigenous rights, while Part II provides a detailed examination of the rights of indigenous people to self-determination, to cultural autonomy and to their traditional lands.

Chapter 1 focuses on the debate concerning individual rights and collective rights. It reviews many and various philosophies regarding the relationship between the state and the individual, and considers the best way to balance those often competing interests and rights. The author analyses several schools of thought, including indigenous views, leading international law scholars and jurists, the rhetoric of several states, and several international instruments, opinions and comments, and assesses how they address the issue of collective and individual rights and obligations. The conclusion drawn is that international law very much allows for the recognition of collective indigenous rights and that - if participatory democracy is the objective - international law must do more to protect indigenous communities from violations of their rights.

Chapter 2 examines International Labour Organisation (ILO) *Convention No 107 (No 107)* and *Convention No. 169 (No 169)* in some detail. It traces their history, noting that *No. 107* was the first international convention to focus specifically on the rights of indigenous peoples, and the first to impose on states binding obligations regarding indigenous peoples. The Chapter nicely analyses how the assimilationist and paternalistic elements of *Convention No 107* have been ironed out and interpreted away by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), to ensure consistency with the spirit of *Convention No 169*. The author analyses the *Conventions* clause by clause to determine whether they are adequate and effective at protecting the rights of indigenous peoples, with specific reference to rights against discrimination, and rights to lands and culture. Her criticism of *Convention No 107* is that although it contains some strong principles and guidelines regarding indigenous rights, those rights are compromised by a number of exceptions in the interest of the state.

Increasing criticism of *Convention No 107* and an awareness of the need to move away from assimilation and integration resulted in *Convention No 169*, and a shift toward the right to maintain indigenous cultures and institutions, self-sufficiency and indigenous development. *No 169* was the first international instrument to refer to indigenous populations as “peoples”, thus bringing the issue of their self-determination into sharp debate. The author opines that, as compared to *No 107*, *Convention No 169* strikes a better balance between individual and collective rights; she cites the collective nature and language of the rights espoused in *No 169* as a

major success. Following *No 107*, *No 169* provides for special measures to protect indigenous rights to land, but as the author correctly explains, the significant strides made by *Convention No 169* are in relation to the protection of indigenous cultural rights, the right of self-identification as indigenous, and the right of indigenous peoples to be integrally involved in any decision that affects them.

Part I would not have been complete without an analysis of the *United Nations Draft Declaration on the Rights of Indigenous Peoples*. In Chapter 3, the author looks at the drafting process and status of the draft *Declaration*, before addressing in some detail its contents relating to individual and collective rights, self-determination, protection of indigenous people (especially women and children), cultural and linguistic identity, and land and resources. While this chapter is to a certain extent moot, given that the draft *Declaration* was adopted in September 2007, it does provide insight into the negotiating process, including the political manoeuvrings and comments by states involved.

The author comments that although the participation of indigenous peoples in the drafting of the *Declaration* was considered essential for legitimising the process and outcome, it was difficult for them to participate effectively. It was a requirement that NGOs be accredited, and even when accredited they were not permitted to submit formal proposals at drafting sessions; prior consultation with the relevant national state was also necessary for approval of the participation of any indigenous group. It was due to the perseverance, and often confrontational interventions, by indigenous representatives that, in the end, over 100 indigenous organisations were allowed to participate in the Drafting Working Group.

Chapter 4, in Part II, focuses on the right of indigenous peoples to self-determination. As rightly noted by the author in the introductory section of the chapter, self-determination has been a very controversial topic in international law. The history of the concept is traced back to the *1960 Declaration on the Granting of Independence to Colonial Countries and Peoples*, which the author hails as the first *Declaration* to recognise the right of all peoples to self-determination. As characterised in that *Declaration*, the right benefits peoples under “alien subjugation, domination and exploitation” and includes the right to “freely determine their political status and freely pursue their economic, social and cultural development”. The original language of the right reflects that it was borne out of times in which decolonisation was the order of the day.

The author also discusses the necessity of geographical separateness as a condition of eligibility for self-determination, in order to avoid contravening the fundamental principle of international law regarding the territorial integrity of states. The expansion of the right is traced to the *1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, which expanded the beneficiaries of the right to include peoples under racist regimes or other forms of alien domination. Then, in 1975, the *Helsinki Declaration* confirmed the extension of the right to include peoples living in independent states. Tension between the right to self-determination and the concept of territorial integrity of the state nevertheless still remains.

More recently, however, the right to secession has been recognised as a remedy for people who are not, or are not adequately, represented in the government of a state. This right arises therefore in the absence of a requirement for geographic separateness or any irresolvable conflict with the territorial integrity of the state. The chapter goes

on to analyse the minimalist as well as the maximalist approach to self-determination. The minimalist approach is self-determination akin to colonisation, in a colonial context. The maximalist approach is self-determination in all its varied but related facets: political independence, sovereignty, religious, cultural and economic independence. The author believes that whether indigenous peoples will be able to claim remedial secession will be decided on an *ad hoc* basis, according to the circumstances of the situation and the nature of the people claiming that right. She expresses the opinion that insisting on colonisation for the purposes of indigenous self-determination is counter-productive because decolonisation is more or less complete. However, she also criticises the maximalist approach as “a poor legislative method that runs the risk of distorting its meaning and scope.”

The author apparently intends to propose a re-evaluation of the concept of self-determination, but only analyses the well-known categories of the internal and external aspects of self-determination, while positing that self-determination must remain open to adaptation. Her conclusion seems to be that if the provisions in the draft *Declaration* on the rights of indigenous peoples had not received support in the General Assembly (which they eventually did in the 2007 *Declaration*), the only other realistic option would have been for the *Declaration* to include the right to self-determination, but with a proviso that it would not lead to secession.

Chapter 5 looks closely at indigenous cultural rights. It commences by summarising the cultural violence done to indigenous peoples by the commercialisation of indigenous objects, art and sciences that has been driven by tourism and the demand for new medicines. Following on from the previous chapter, the author explains why she is of the opinion that cultural claims should be constructed not on the basis of self-determination, but on the basis of cultural rights. She explains that there exist several international instruments in which cultural rights are clearly established, thus obviating the need to resort to the more controversial right to self-determination. The author examines several minority rights provisions but rightly distinguishes those international provisions that protect cultural rights of individuals from those that protect cultural rights of communities.

One of the questions tackled in this chapter is whether the relevant international provisions impose obligations on states to take positive action to protect indigenous cultures. The author concludes that several of the international conventions and declarations do define positive state obligations, but that international law is not well-equipped to protect cultural rights of indigenous peoples. She asserts three main reasons for this inadequacy: (1) indigenous and non-indigenous perceptions of culture differ: from a non-indigenous view culture refers to creativity - some may say intellectual property and capital - whereas the indigenous conception of culture is broader and includes a way of life; (2) the prevalence of the concept and meaning of cultural property and ownership in international law; and (3) the focus of international law on states, rather than groups, as beneficiaries of protection.

Chapter 5 examines the leading instruments of international law concerning culture, and concludes that indigenous cultural claims are not currently fully accommodated in them. She proffers the optimistic view that increasingly states are recognising cultural pluralism and the right of indigenous peoples, rather than the state, to control indigenous cultures. Such a conclusion, which - given her reasoning - is an accurate one, belies the weakness in her earlier conclusion that a resort to the right to self-determination is an inept way to protect indigenous cultural rights. On the contrary, it

is arguable that the absence of adequate protection in international law, coupled with different understandings of culture by indigenous and non-indigenous people, may support the inclusion of a right to cultural integrity and to control over indigenous culture in a *sui generis* indigenous right to self-determination, such as is now contained in the *2007 Declaration on the Rights of Indigenous Peoples*. Chapter 5 demonstrates a further lack of perspective by omitting any analysis of the extensive work of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, and contains only a very slight reference to biodiversity and the issues of indigenous culture, national policies and laws that are affected by bioprospecting.

The final chapter focuses on indigenous land rights, a very interesting and compelling subject for discussion in the context of historical and contemporary international law. The author describes the special relationship of indigenous peoples to their lands and agrees that sovereignty over land is of paramount importance to those exercising their right to self-determination. Although the right to land is seen as necessarily tied to that of economic self-determination, the author discusses whether this should be so, or whether it should instead be seen as part of the right to development. She explains that the *1986 Declaration on the Right to Development* first enunciated the right to development as a right to “participate in, contribute to, and enjoy economic, social, cultural and political development” - and that it does not distinguish between development and self-determination. The author would differentiate between the two, suggesting that the right to self-determination be restricted to political power, and the right to development to economic claims. She argues that the right to development is pursued through the right to self-determination, that is, by political independence. She insists that although they are related rights, and similar in that each has been defined by both a minimalist and a maximalist approach, the scope of the two rights is different.

According to the author, land rights have not been the focus of international human rights, although she does recognise the usefulness of *ILO Convention No. 107* and *Convention No. 169*, as well as the *ICCPR* and the *ICESCR* and the *UN Declaration on Minorities*. The chapter briefly looks at the doctrine of *terra nullius* as espoused in a few cases. She also examines the native title system in Australia and some of the problems posed when a torrens system of land tenure is confronted by indigenous ownership. As a result of such problems, demarcation of indigenous lands is encouraged by international law. As an alternative to rights of ownership, the author examines rights of use, management and resources - a compromise often used to enable indigenous people to maintain access and benefits from their traditional lands without retaining ownership. The chapter also analyses the right of consultation and participation in decisions affecting indigenous rights to land and the development of this right in international law. Finally, the chapter discusses the limited right against removal from traditional lands, including the right of relocation to alternative suitable lands, as well as the right to restitution and compensation. Although it restates the existing norms and trends, which is helpful, the chapter does not take the analysis of the several national examples far enough. It could have proposed an international legal position that would adequately protect an indigenous right to land, and secure to indigenous peoples the justice owed them by international law, the vehicle by which many such peoples were deprived of their lands, identities and cultures in the first place.

Overall, Part I provides a detailed analysis of the several United Nations standards that relate to indigenous peoples, and summarises them well. Save for the very good discussion on the right to self-determination, Part II lacks analysis in critical areas which would make the treatment of the subject much more compelling. Nevertheless, the book is an appreciable and welcome contribution to an area of law that is evolving rapidly, and which suffers from lack of elucidation and scholarly research.

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