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Conceptualizing Global Indigenous Rights

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Title: Conceptualizing Global Indigenous Rights

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Synonyms: aboriginal rights, native rights, first nations rights, international human rights law, indigenous rights, indigenous peoples, international indigenous movement

Definition:

Global Indigenous rights is the legal theory within international human rights law that Indigenous people are in a unique position due to their being the first peoples of the nations that have occupied their ancestral territories that are separate from those listed in the United Nations Universal Declaration of Human Rights. Over the last six decades, international human rights organizations have issued conventions, declarations, established agencies and forums to further the global Indigenous rights movement. However, these actions while raising awareness and promoting the establishment of an international system to protect Indigenous rights lack the mechanisms to be legally enforced. Global Indigenous rights have been rendered as more of a suggestion on how nations should work with and protect the rights of their indigenous populations, rather than conformance to international law.

Description:

Who are Indigenous Peoples?

Indigenous refers to the descendants of pre-colonization inhabitants of territories that are claimed and governed by others (Anaya 2004). Indigenous peoples, communities, and nations are culturally distinct groups within settler-colonial societies that were established using violence and conquest (Anaya 2004). These people and communities “are indigenous because their ancestral roots are embedded in the lands” that they live in giving them a deeper connection to the land than the settler-colonial societies that surround them (Anaya 2004). They are peoples because they are distinct communities that have continually existed with a shared “identity that links them to the communities, tribes, or nations of their ancestral past (Anaya 2004).”

The definition of Indigenous peoples was promulgated by Jose Martínez Cobo, the United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his *Study on the Problem of Discrimination against Indigenous populations* which defined “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.” The study goes on to state that “They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system (1981).” This definition was summarized by the United Nations Department of Economic and Social Affairs to identify Indigenous peoples as those that are the “inheritors and practitioners of unique cultures and ways of relating to people and the environment (Department of Economic and Social Affairs).” Moreover, “have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live” to guide the work of the United Nations around Indigenous peoples (Department of Economic and Social Affairs).

Historical Context

European exploration gave rise to the question of how the relationship between Europeans and indigenous people would be framed (Anaya 2004). Contact with indigenous peoples expanded the understanding of law and culture of Europeans, as the nations of Europe attempted to fit indigenous people into the framework of intellectualism, theology and political philosophy that had shaped their understanding of international law (Deloria 2011). Indigenous communities and nations did not have written codified laws in the same manner as European societies, which caused Europeans to dismiss the legal structures of indigenous peoples as primitive and subscribing to natural law - not subject to or recognizing the authority of others (Deloria 2011). Francisco de Vitoria, professor of theology at the University of Salamanca, framed the legal relationship between European nations and the indigenous communities in his published lecture *On the Indians Lately Discovered* (1532). Vitoria states that they “are unfit to found or administer a lawful State up to the standard required by human and civil claims,” and

argued that it would be in the best interest of indigenous people for the nations of Europe to administer the indigenous territory for the benefit of indigenous people (Anaya 2004).

European legal theory at the time of exploration held that upon discovery of lands inhabited by non-Christians, the European nation that sponsored the exploration would acquire “ownership of land simply by exchanging other commodities and by doing physical labor on the land,” thereby transferring title to the land from the indigenous peoples under the doctrine of discovery (Deloria 2011). As European nation’s claims to territory in North America came into conflict with each other, it becomes necessary to establish alliances with indigenous nations, to strengthen and protect territorial claims, through treaties that recognized indigenous nations as equal to European nations (Deloria 2011). In other parts of the world, indigenous people came under the jurisdiction and administration of European nations without their consent, as evident by the annexation of the Torres Strait Islands by the Governor Queensland which placed the Meriam people in state guardianship under the colonial government (Mabo 1992).

European colonizing nations and those nations formed from their previous colonies extended control over indigenous lands and developed systems that placed indigenous people in a state of trusteeship (Anaya 2004). The aim of trusteeship was the assimilation of indigenous people into colonial society by having them abandon their cultural norms, languages, religions, and their connection to land in favor of a civilized European lifestyle (Anaya 2004). Trusteeship was internationalized through conferences geared toward dividing up of the continent of Africa and the islands in the Pacific (Anaya 2004). Indigenous peoples rights became subjected to the laws and paternalism of European nations which placed them in state of pupilage unable to manage their internal affairs or determine their future.

Global Indigenous Rights Movement

The movement for recognition of Indigenous rights on the international stage has its origins in the attempt of Deskaheh, a Cayuga Chief, to address the Council of the League of Nations in Geneva in 1923. On behalf of the Haudenosaunee, Deskaheh attempts were “an effort to obtain recognition of his tribe as an independent state,” to defend their rights to be governed by their own laws, practice their faith and live on their ancestral territory without interference from the United States. He was not permitted to address the Council (New York Times 1923). Following the example of Deskaheh, Tahupotiki Wiremu Ratana, a Maori religious leader who

attempted to seek redress for the abrogation of the Treaty of Waitangi by New Zealand, which had secured the Maori ownership rights to their land before the Council (Department of Economic and Social Affairs). He too was not permitted to address the Council and returned to New Zealand (Department of Economic and Social Affairs).

In 1957 the International Labour Organization adopted the Indigenous and Tribal Populations Convention (No. 107) for “the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries.” The Convention charged governments with responsibility for putting into place systems that would protect and assist with the integration of indigenous populations into their respective countries. The objective was to protect indigenous populations, institutions, property, and labor as long they were prevented from benefiting from the laws of their countries (International Labor Organization 1957). The 1957 Convention was revised in 1989 by the adoption of the Indigenous and Tribal Peoples Convention (No. 169). The revisions changed the objectives from the 1957 Convention away from integration into national society to one of self-determination in which Indigenous peoples would “exercise control over the own institutions, ways of live and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live (International Labor Organization 1989).” Countries were called upon to develop systems with the participation of Indigenous peoples to protect their rights and for the protection of their “human rights and fundamental freedoms” (International Labor Organization 1989).

The United Nations General Assembly declared 1993 to be the International Year of the Worlds Indigenous People to strengthen “international cooperation for the solution of problems faced by indigenous communities in areas such as human rights, the environment, development, education, and health (United Nations 1992). The declaration was a response to requests from international Indigenous organizations that were attempting to secure rights and cultural integrity (United Nations Department of Economic and Social Affairs). In 1994, the General Assembly declared the International Decade of the World’s Indigenous Peoples (1995-2005) to further the commitment of the United Nations to protecting and promoting the rights of Indigenous peoples (United Nations Department of Economic and Social Affairs).

In 2000 the United Nations established the Permanent Forum on Indigenous Issues which serves as an advisory body to the Economic and Social Council (United Nations

Indigenous Peoples). The Forum's first meeting was in May 2002 and meets annually for ten days (United Nations Indigenous Peoples). The Forum was charged to "deal with indigenous issues related to economic and social development, culture, the environment, education, health and human rights (United Nations Indigenous Peoples)." The Forum provides recommendations and expert advice to the Economic and Social Council, raises awareness about indigenous issues and promotes the coordination of activities to address those issues, disseminates information on indigenous issues that it has prepared, and "promotes respect for and full application of the provisions of the UN Declaration on the Rights of Indigenous Peoples (United Nations Indigenous Peoples)."

Following the establishment of the Permanent Forum on Indigenous Issues, the United Nations Commission on Human Rights appointed a Special Rapporteur on the Rights of Indigenous Peoples in 2001 and renewed the Special Rapporteur's mandate in 2004, and 2007 (United Nations Special Rapporteur on the Rights of Indigenous Peoples). The mandate of the Special Rapporteur is to report on the human rights situation of indigenous people, communicate to governments address specific alleged violations of the rights of indigenous peoples, and conduct thematic studies on topics regarding the promotion and protection of the rights of indigenous peoples (United Nations Special Rapporteur on the Rights of Indigenous Peoples).

United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)

In 1994, the United Nations Working Group on Indigenous People and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved the Declaration of on the Rights of Indigenous Peoples (White Face 2013). In response to objections raised by the United States and other countries, the text of Declaration was assigned to the Working Group on the Draft Declaration which held an open-ended session starting in and lasted until 2006 (White Face 2013). On June 29, 2006, the Declaration was adopted by the United Nations Human Rights Council in Geneva, Switzerland and forwarded to the United Nations General Assembly, which adopted the Declaration on September 13, 2007 (White Face 2013). Australia, Canada, New Zealand, and the United States voted against the Declaration, with Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine abstaining (United Nations Office of the High Commission for Human Rights).

One of the key provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the protection of culture, many of the provisions of the Declaration are directly or indirectly linked to culture. In the larger body of international law, culture is recognized in “international treaties, jurisprudence, and practice as an integral part of human rights (Echo-Hawk 2013).” Under UNDRIP, the right to culture is guaranteed to indigenous peoples in the same manner and with the same protections that are enjoyed by all other cultures in the world (Echo-Hawk 2013).” The protections that are embedded in UNDRIP are not found in all jurisdictions of the world, and the absence of those protections has contributed to assaults that have resulted in the disappearance of many cultures in the twentieth century (Echo-Hawk 2013). Walter Echo-Hawk describes UNDRIP as the “Magna Carta” for the protection of indigenous cultural rights and the actualization of self-determination (Echo-Hawk 2013). His attribution of this description is based on the articles within the Declaration that extend protections to culture rights in the area of international law and policy. Articles 7 and 9 prohibit the destruction of indigenous cultures and those protections are extended in Articles 11 and 13 by the safeguarding of “the physical manifestation of culture” – “the archeological and historical sites, artifacts, designs, ceremonies, literature and arts” - with mandates that indigenous people have access to redress for the appropriation of their “cultural, intellectual, spiritual and religious property (Echo-Hawk 2013).”

Religious liberty for indigenous people is guaranteed by Article 12 of the Declaration. It accords rights for the freedom to exercise spiritual and religious customs, use and control of ceremonial objects, private access to religious and cultural sites, and the repatriation of the human remains that have been held by museums, universities and research institutions in direct opposition to the religious beliefs of indigenous people (Echo-Hawk 2013).” The protection of the right to traditional medicines, knowledge, and all forms of indigenous intellectual property are found in Articles 24 and 31, which requires states to provide the necessary assistance to indigenous people to realize these rights (Echo-Hawk 2013).

Self-determination has been at the center of the global indigenous rights movement (Anaya 2004). Article 3 of the Declaration provides that “Indigenous peoples have the right to self-determination. By that right, they freely determine their political status and freely pursue their economic, social and cultural development (United Nations Declaration on the Rights of Indigenous Peoples 2007).” The freedom for indigenous peoples to determine how they will

structure their future according to their own goals removes the barrier of trusteeship that has hampered their ability to engage to be self-reliant. Exercising self-determination provides legitimacy for the institutions and systems that indigenous communities and nations establish to further economic growth, provide for their social welfare and secure their cultural identity and development (Anaya 2004).

Article 18 of the Declaration provides that “Indigenous peoples have the right to participate in decision making in matters that will affect their rights, through representatives chosen by themselves in accordance with their procedures, as well as to maintain and develop their indigenous decision-making institutions (United Nations Declaration on the Rights of Indigenous Peoples 2007).” The ideals of self-determination are explicitly and implicitly stated throughout the Declaration demonstrating its importance in the larger body of international human right law. Self-determination is an essential component of ensuring the ability of indigenous people to enjoy all the rights that have been secured in international and domestic law (United Nations Declaration on the Rights of Indigenous Peoples 2007).

The Declaration is absent a mechanism of enforcement, it serves primarily as a statement of actions that signatory nations should take rather than statute of international human rights law.

Repudiation of Trusteeship by Discovery

In *Mabo and Others v. Queensland*, the Australian High Court was asked to reconsider the concept of *terra nullius*, vacant land, which had been used by the Colony of Queensland to declare that Torres Strait Islands as part of jurisdiction because they were uninhabited by a Christian population (Mabo 1992). The Meriam people have inhabited the Murray Islands, which are part of the Strait, continuously before and after European contact (Mabo 1992). The Torres Strait Islands were annexed by the Colony of Queensland in 1879, out of concern for the maintenance of order in, and the protection of the inhabitants of, those Islands and other islands in the Western Pacific” and placed the Meriam people under the trusteeship of the colony (Mabo 1992).

In its decision the High Court held that the while *terra nullius* was a legal precedent, the Court could modify that precedent “to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed” as “law is a prisoner of its history (Mabo 1992).” The High Court held that when legal precedents “depended on a discriminatory

denigration of indigenous inhabitants, their social organization and custom,” which are “false in fact and unacceptable in our society,” the courts can overrule them (Mabo 1992).” The High Court ruled that the Murray Islands were not subject to the jurisdiction of Queensland and the title to the islands belonged to the Meriam people (Mabo 1992).

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