
Book Reviews

Alexandra Xanthaki. ***Indigenous Rights and United Nations Standards, Self-Determination, Culture and Land***. New York City: Cambridge University Press, 2007. Pp. 358. \$105.00. ISBN: 9780521835749.

There are numerous books published on indigenous peoples, minorities and the right to self-determination. These topics remain, however, elusive. There is no question that the lack of clear-cut definitions concerning people, peoples, indigenous peoples, and minorities contributes to a general lack of clarity. The subject-matter of indigenous peoples acquired new currency after the adoption by the General Assembly in 2007 of the Declaration on the Rights of Indigenous Peoples.

Alexandra Xanthaki is a very well-known scholar in the field of human rights and particularly indigenous peoples' rights and is the author of many excellent publications on these subjects.¹ Notwithstanding the plethora of publications on indigenous peoples, Xanthaki's book presents a very interesting and comprehensive analysis of the legal issues concerning indigenous peoples. The book consists of two main parts: Part one is devoted to the foundations of indigenous peoples in international law; and Part two is basically centred on the indigenous peoples' claims, of which the central issue is that of the right to self-determination.

The author under review deals with deeply challenging issues such as the character of individual and collective rights, the question of a conflict between them and multiculturalism. The book presents a very solid analysis of the United Nations instruments relating to indigenous peoples. The author presents an

in-depth analysis of both the International Labour Organisation Conventions Nos. 107 and 169 and the United Nations (still in draft form at the time of completion of the book) Declaration on Indigenous Peoples.

The most challenging part of the book is Chapter 4. The title itself, 'Do Indigenous Peoples Have the Right to Self-determination?', indicates that there is no straightforward answer to this daunting question. Xanthaki rightly observes that: 'Self-determination is a thorny topic in international law with remarkable contradictions' (at 131). The reviewer agrees with the statement that there are no standard answers as to the modalities of the right and although, indeed, it 'encapsulates the richness and diversity of the ways self-determination can operate',² at the same time, the lack of reliable definitions can be frustrating and the constant quest for answers may prove to be a futile task. There are very few aspects of the right to self-determination which do not elicit completely different views. One of them is probably the issue of maintaining the territorial integrity of a state, and consequently, the prohibition of secession, outside the colonial context.

Views of states on the subject of the legal status of indigenous peoples and their right to self-determination (i.e., whether they constitute entities entitled to exercise such a right and what the scope of this right is) are far from clear and are very diversified. The differences in states' views on these controversial questions of international law were very noticeable during the whole process of the drafting and negotiating of the 2007 Indigenous Peoples Declaration. The present reviewer argues that the relationships between minorities, indigenous peoples, tribal peoples and peoples

¹ See, e.g., A. Xanthaki and N. Ghanea (eds), *Minorities, Peoples and Self-Determination* (2005).

² Xanthaki cited K. Knop, *Diversity and Self-Determination in International Law* (2002).

still constitute theoretical and practical challenges, which in part are related to definitional problems. Even if the definition of indigenous peoples 'is clear enough at its core', it is 'controversial in its boundaries'.³

Xanthaki deals admirably with many controversial issues relating to self-determination, such as, for example, recognizing indigenous peoples as victims of *carence de souveraineté*. She is correct in arguing that it involves 'a subjective judgement about the level of lack of representation of the indigenous community in the state' (at 145) and further in stating: 'even more challenging are the judgments involved in: Heraclides test of secession as a means of conflict resolution; the Musgrave test of indigenous oppression; the Espiel test for colonial domination; the Shaw test of extremely exceptional circumstances; and the Wildhaber test of consistent and flagrant violation of human rights' (at 145). However, the example of the people of Kosovo who, according to the author, do not have a recognized right to secession (at 145), clearly indicates that any generalizations or a quest for some common principles with regard to the right to self-determination is a daunting (if not impossible) task as, in this area, practice frequently challenges theory.

Xanthaki disputes the view that the right to self-determination of indigenous peoples should be analysed and assessed within the context of colonialism (at 149), which as a political process 'has more or less been completed' (at 149). Therefore, according to the author, insisting on the concept of colonization for the purposes of indigenous colonisation 'is counter-productive' (at 149). Xanthaki explains that the process of decolonization was about (re)-establishing an independent state; whilst indigenous peoples request the right to determine their political status, which, according to Xanthaki, is a much broader concept than 'a mere independence' (at 149). However, she appreciates the position of

Anghie⁴ who argues that the structure of colonialism continues to exist, although in other more informal, but still persistent, ways.

Indigenous self-determination is a 'new concept that is dynamic and involves new ideas and nuances' (at 149). She also observes that, in fact, such an argument on a practical level can be distorted and can even lead to the denial of indigenous protection. The author relies on an example of indigenous peoples in Bangladesh, which denied the existence of such peoples, as it was claimed that colonialism was restricted to the European colonies. The author herself appreciates the divergence of views regarding the right to self-determination: 'there is currently a wide range of understandings of the right to self-determination, which leads to substantially different outcomes as to the use and beneficiaries of the right' (at 154). The vagueness and the lack of commonly accepted standards are best captured in the following statement: '[t]he right of self-determination cannot be meaningfully discussed in general and abstract terms. It is necessary to examine the different contexts in which claims of self-determination is [sic] made, in order to assess its validity in each circumstance and in the light of other relevant principles and options available'.⁵

Standards of the protection of cultural rights of indigenous peoples derive from 'three different – yet overlapping – systems of human rights protection: general human rights instruments; minority instruments; and instruments specifically for the protection of indigenous rights, i.e. the ILO Conventions' (at 197). Therefore, cultural rights of indigenous peoples are also not clear cut and, as Xanthaki observes, the general instruments provide only some, but not adequate, protection to indigenous cultural human rights. She is of the view that the ILO Convention 169 is quite helpful regarding indigenous cultural

³ Eide, 'Rights of Indigenous Peoples – Achievements in International Law During The Last Quarter of a Century', 37 *Netherlands Yearbook of International Law* (2006) 186.

⁴ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

⁵ Eide, 'The National Society, Peoples and Ethnations: Semantic Confusions and Legal Consequences', 64 *Nordic Journal of International Law* (1995), at 356-357.

claims. However, this instrument also suffers from shortcomings as the references to cultural rights are not specific enough and they do not cover cultural objects nor intellectual and cultural property rights. Xanthaki provides an exhaustive analysis of Article 27 of the ICCPR, especially whether it imposes a positive obligation on a state to take measures to protect indigenous cultures.

The author correctly stresses that in the indigenous context, culture is a way of life, embracing all aspects of life, and that this holistic approach was largely neglected in legal instruments. The ILO Convention No. 169 represents a positive approach to indigenous culture, but unfortunately – due to the limited number of ratifications – its effectiveness is restricted. However, as Xanthaki observes, the strong indigenous movement has brought a certain degree of recognition for multiculturalism within states.

The author of the book deals with another difficult and controversial issue regarding indigenous rights: indigenous land rights. These types of rights are perceived as constitutive of economic self-determination. In this context, Xanthaki analyses the controversial right to development, and the 1986 Declaration on the Right to Development, which is not clear regarding the distinction between the right to development and the right to self-determination. The author postulates that: 'a clear distinction between the right to self-determination, restricted to political power, and the right to development, encompassing economic claims, could prove helpful' (at 241). The present reviewer argues that although such a clarification should be desirable, there is a very slim probability of this problem ever being resolved, due to continuously contentious discussions regarding its character, which do not show any signs of abating. Xanthaki explains that the United Nations bodies sidestepped the difficulties posed by the relationship between self-determination and development and have covered the legal gap in the protection of land rights by applying general human rights (in particular the provisions on prohibition of self-determination, minorities' right to their culture and the right to property, at 243).

The United Nations Human Rights Committee (and other human rights monitoring bodies) frequently referred to Article 27 of the ICCPR to address the violations of indigenous land rights,⁶ which has a collective character.

Xanthaki notes certain issues, inherent to indigenous land rights, such as a high problem of proof, which is one of the most difficult in the context of indigenous land rights. Article 14(1) of the ILO Convention No. 169 adopted the same approach as the Human Rights Committee regarding the use and management of resources. It urges states to take measures to safeguard indigenous peoples' rights to use lands not exclusively occupied by them, but to which they traditionally have access. International practice in this respect is very varied and international standards are neglected. However, as observed above, those adopted in the ILO Convention No. 169 are of limited effectiveness due to a very small number of states being bound by it. The rights to natural resources on the lands they live in are also, according to Xanthaki, 'not a resolved issue' (at 258).

Similarly, the issue of restitution raised by Article 16 in conjunction with Article 14(3) of the ILO Convention No. 169 is, without doubt, one of the most debated questions. The author observes correctly: '[t]he right to restitution is not well established in international law, even though compensation is' (at 264).

The interpretation of Article 14(3) is the subject of debate. One broader view presented by Anaya suggests that restitution relates to dispossession.⁷ The other view represented by Xanthaki is more limited and refers to restitution only for relocation. She argues that 'the Convention does not go so far as giving indigenous peoples who lost their lands the right to restitution' (at 265). This author

⁶ E.g., *Lovelace v. Canada*, Communication No. 24/1977, Views in A/36.40 (1981); *Kitok v. Sweden*, Communication No. 197/1985, views in A/43/40 (1988); *Länsman v Finland*, Communication No. 511/1992. UN Doc. CCPR/C/52/0/51/1992 (1993).

⁷ J. S. Anaya, *Indigenous Peoples in International Law* (1996), at 106-107.

concludes that although international human rights instruments do not foresee a strong protection of indigenous peoples' rights, the interpretation of these instruments by their monitoring bodies has expanded their scope in order to accommodate indigenous peoples' claims. The present reviewer submits that indigenous peoples' rights are still one of the areas of international law that is developing and that, as it stands at present, insufficient protection is granted to indigenous peoples.

The rights of indigenous peoples gained a renewed international interest after the adoption by the United Nations General Assembly of the 2007 Declaration on the Rights of Indigenous Peoples.⁸ It is perceived as a rather disappointing document and Xanthaki observes that, although it offers a wide range of rights, it does not sufficiently cover many issues (e.g., the issue of land rights, to the extent that ILO Convention No. 169 does).⁹ There are more questions and contentious issues than answers, the most complicated being the scope of indigenous peoples' right to self-determination (and related issues of the right to land and natural resources). The discussion on these issues has been an ongoing theme of scholarly and practical debate for a long period of time.

Xanthaki presents in her book an in-depth analysis of these issues. The author relies on an impressive number of publications written on this subject. Xanthaki analyses the legal position of indigenous peoples within a broader context of human rights law and general international law, which enhances the value of the monograph. This is a very erudite book, giving

evidence of the author's sound knowledge of international law. The author does not avoid a discussion of thorny issues and confidently presents and defends her views. She deals successfully with some of the most contentious areas of contemporary international law. In conclusion, this is one of the most informative, well researched and extremely well-argued books that has been published on the subject of indigenous peoples.

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⁸ Text: www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf.

⁹ There was a host of rather critical publications on the Declaration, see one of the most recent ones, an in-depth analysis of the Declaration: Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-determination', 15 *International Journal of Minorities and Group Rights* (2008) 1.