

Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples

Introduction

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As the United Nations and its member states observe the second International Decade of the World's Indigenous People,¹ native peoples around the world are struggling to protect their aboriginal homelands, natural resources, distinctive cultures, languages, religions, and ways of life. The aboriginal peoples of Australia are fighting for recognition, demarcation, and, in some cases, restoration of their traditional lands. The First Nations of Canada are asserting claims to fish, wildlife, and other natural resources on and off their tribal lands. The Hopi and Zia Pueblo of the American Southwest are fighting to preserve their unique cultural heritages and traditions and to protect their cultural and intellectual property from unwanted appropriation and dissemination. These and other indigenous peoples are fighting for recognition and preservation of rights and resources essential to their survival and prosperity.

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1. See G.A. Res. 59/174 (Dec. 20, 2004). The first Decade of the World's Indigenous People took place from 1995 to 2004. The second began in 2005 and will expire at the end of 2014. The purpose of these decades is to draw the attention of the United Nations and its member states to the unique circumstances of the world's indigenous peoples. In 1994, the U.N. Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a Draft United Nations Declaration on the Rights of Indigenous Peoples. See U.N. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, Comm'r for Human Rights, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/RES.1994.45 (1994) [hereinafter *Draft Declaration*]. This document sets forth far-reaching protections for indigenous autonomy, property rights, and cultural heritage, among other things. It is still under consideration by the Commission on Human Rights and has yet to be adopted as a convention (or other binding instrument) by the member states of the U.N.

Indigenous peoples engage in these struggles not as individuals, but as nations. Worldwide, indigenous peoples are asking to be recognized as autonomous states with their own governments, legal systems, and laws. Indeed, many indigenous peoples believe that their survival as distinct societies is dependent on their right of tribal self-determination. In its strongest form, this right allows indigenous peoples to “freely determine their political status and freely pursue their economic, social, and cultural development.”² Self-determination ensures that indigenous peoples have the right to govern themselves, free from outside interference and control.

Indigenous claims for self-determination have been met with strong resistance. Historically, non-Indian nation states have asserted claims of dominance over the indigenous societies, lands, and resources within their borders. Many states remain unwilling to recognize indigenous peoples as self-governing nations. Those that do acknowledge tribes as separate sovereigns have limited the reach of the tribes’ inherent powers to internal affairs, often leaving tribes without the ability to regulate the activities and property of non-Indians living on or passing through their tribal territories. Powerful economic interests oppose restoration of traditional tribal land bases and recognition of expansive tribal rights to natural resources. Indigenous claims of collective rights to land and resources are perceived as threats to non-Indian economic prosperity and social stability. It is against this resistance that indigenous peoples labor to preserve their autonomy and distinct ways of life.

This symposium presents several contemporary and comparative perspectives on the rights of indigenous peoples in Canada, Australia, the United States, and elsewhere, and the challenges indigenous peoples face as they champion their rights to self-determination, land, natural resources, and cultural property.

CANADA

In his article, John Borrows (Anishinabe/Chippewa) addresses the indigenous legal traditions and contemporary rights of indigenous peoples in Canada. A distinctive feature of the Canadian approach to

2. *Draft Declaration, supra* note 1, art. 3.

Indian law is its recognition of the aboriginal rights of indigenous peoples to, among other things, their traditional lands and natural resources. In its Constitution Act of 1982, Canada “recognized and affirmed” the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”³ In so doing, Canada gave legal protection to aboriginal rights that derived not from treaties (or statutes and executive orders), but from the Indian’s historic and traditional patterns of land and resource use. Since 1982, Canada’s First Nations have successfully asserted their aboriginal rights to land and natural resources.⁴ By contrast, no such protection of aboriginal rights exists under the United States Constitution.⁵

Despite its progressive recognition of certain aboriginal rights, Canada generally does not recognize the inherent sovereignty or right to self-government of its First Nations. Borrows notes that, with few exceptions, affairs in Indian country are governed by the “Indian Act and other non-indigenous bodies under federal creation, [exercising] delegated and ministerial authority.” Under the Indian Act, originally passed in 1876, “traditional Indian governments were replaced by band councils that function as agents of the federal government, exercising a limited range of delegated powers under close federal supervision.”⁶ Band councils may pass laws concerning local matters, but these laws must be consistent with the Indian Act and federal regulations.⁷

3. See Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(1) (U.K.); Constitutional Conference, § 37, Constitution Act, 1982, pt. IV.

4. See, e.g., *Delgamuukw v. British Columbia*, [1997] S.C.R. 1010; *Sparrow v. R.*, [1990] S.C.R. 1075.

5. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955) (holding that “Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law”).

6. Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 688 (1991).

7. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1322 (1993). Not all First Nations are subject to the Indian Act. Some have negotiated treaties or agreements taking them outside the scope of the Act, either in whole or in part, and allowing them to exercise inherent powers of self-government. See, e.g., *Nisga’a’s Final Agreement Act*, 2000 S.C., ch. 7 (Can.); *Yukon First Nations Self-Government Act*, 1994 S.C., ch. 35 (Can.); *Sechelt Indian Band Self-Government Act*, 1986 S.C., ch. 27 (Can.); *Cree-Naskapi (of Quebec) Act*, 1984 S.C., ch. 18 (Can.).

With few exceptions, Canada's First Nations do not have their own constitutions or courts.⁸ Tribal disputes and claims are resolved in non-Indian courts that often fail to apply indigenous norms or legal principles. Moreover, indigenous peoples are generally subject to the laws and regulations of the provinces in which they are located. Most Commentators describe the governing powers of First Nations as "minimal" and "almost symbolic."⁹ In this context, Borrows suggests, indigenous legal traditions "have often been ignored or overruled."

Borrows makes a compelling case for recognition and reaffirmation of the inherent sovereignty and right to self-government of Canada's First Nations. He suggests that the right to self-government ought to be recognized as one of the "existing aboriginal . . . rights" already affirmed to Canada's "aboriginal peoples" under the Constitution Act of 1982. In Borrows' view, indigenous peoples should be freed from the stranglehold of the Indian Act. They must be permitted to draw upon their unique cultures and norms to develop their own constitutions, councils, courts, laws, and legal systems, free from provincial interference or control, and to exercise inherent, not delegated, powers. This, he says, would increase the legitimacy and accountability of tribal governments "by placing decision-making authority much closer to the people within [indigenous] communities" and by allowing First Nations to exercise "greater responsibility for their own affairs."

For Borrows, "greater recognition of indigenous governments and dispute resolution bodies" is consistent with Canada's longstanding commitment to legal pluralism. Historically, Canada has embraced both civil and common law traditions. Now, says Borrows, it must embrace and incorporate indigenous legal traditions.

8. Even Nunavut, the territory formed as a result of Canada's 1993 land claim settlement with the Inuit people, is part of the Canadian federal government. It is not a distinct tribal government. Elections are open to all residents of the territory, regardless of their tribal affiliation, and territorial laws are subject to the overriding control of the federal government. See Nunavut Act, 1993 S.C., ch. 28 (Can.); Nunavut Land Claims Agreement Act, 1993 S.C., ch. 29 (Can.).

9. Jean M. Silveri, *A Comparative Analysis of the History of United States and Canadian Federal Policies Regarding Native Self-Government*, 16 SUFFOLK TRANSNAT'L L. REV. 618, 656 (1993).

AUSTRALIA

In Australia, as in Canada, indigenous peoples have asserted successful claims for the return of their aboriginal lands. In the 1992 case of *Mabo v. Queensland*,¹⁰ the Australian High Court rejected the historic doctrines of discovery and *terra nullius*, and recognized aboriginal peoples' claims to their traditional homelands. Yet, as Lisa Strelein details in her symposium contribution, developments in the Australian courts and legislature since *Mabo* have rendered native title "inherently fragile." According to Strelein, it has become increasingly difficult for Australia's aboriginal peoples to assert claims of exclusive land ownership over their native lands. In addition, the Australian government has consistently rejected aboriginal claims to sovereignty or self-government over their territories. Taken together, these dynamics have severely limited the ability of Australia's indigenous peoples to control their own destinies. Strelein is careful not to minimize the importance of the Australian High Court's landmark decision in *Mabo*. The decision, she notes, was based on progressive notions of "justice and human rights," and in many ways, it presaged important developments in international law recognizing the validity of aboriginal Indian title.¹¹

However, Strelein notes that despite its potential, *Mabo* contained the seeds of its own undoing. The decision recognized the power of the Australian Parliament to extinguish native title by positive

10. (1992) 175 C.L.R. 1.

11. A number of recent international cases have recognized the legitimacy of aboriginal title. For example, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), the Inter-American Court of Human Rights upheld the aboriginal land rights of the Awas Tingni Indians in Nicaragua. The court ordered Nicaragua to retract logging concessions it had granted on Awas Tingni indigenous lands and further ordered the state to demarcate and legally secure the lands customarily used and occupied by the Awas Tingni. Similarly, in *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, (Oct. 24, 2003), the Inter-American Commission on Human Rights found that Belize violated the human rights of the Maya Indians by granting logging concessions over traditional Maya territories. The Commission found that indigenous property rights, "are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law . . . [T]he property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition." *Id.* ¶ 117.

legislative enactment. Since *Mabo*, the Australian courts have found native title rights to be extinguished, in whole or in part, by legislative grants to non-Aborigines of pastoral leases, freehold estates, and fee simple estates on native lands. Similarly, grants of subsurface mining rights, the establishment of public works on native lands, and other exercises of sovereign power inconsistent with aboriginal ownership can operate to extinguish native title.

Australian aboriginal peoples face an additional hurdle in establishing their native title rights. The Native Title Act, passed the year after *Mabo* was decided, requires aboriginal claimants to prove that they have existed continuously, from the time of assertion of Crown sovereignty to the present, as distinct societies with continuous and substantially uninterrupted customary connections to the lands they claim. Strelein notes that these requirements are susceptible to varying interpretations and can be manipulated to deny indigenous land claims.

Strelein makes the case for greater protection of native title and greater recognition of aboriginal societies' rights to sovereignty over their peoples and newly-recognized territories. In respect to aboriginal sovereignty, Strelein notes that, to date, "the courts have refused to hear argument on the continuing sovereignty of Indigenous peoples" in Australia. This must change, she says, if Australia's indigenous peoples are to realize their goal of meaningful self-determination.

UNITED STATES

In the United States, Indian tribes are recognized as "self-governing political communities"¹² that possess "attributes of sovereignty over both their members and their territory."¹³ Although they are politically dependent on the United States, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependent status."¹⁴ Unlike their counterparts in Canada and Australia, American Indian

12. Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985).

13. United States v. Mazurie, 419 U.S. 544, 557 (1975).

14. United States v. Wheeler, 435 U.S. 313, 323 (1978).

tribes exercise inherent powers of self-government. Generally, they have the right “to make their own laws and be governed by them.”¹⁵ They have their own constitutions, governments, courts, legal systems, and land bases.

Despite this, American Indian tribes are subject to the overriding power of the national government. Congress asserts “plenary authority over the tribal relations of Indians.”¹⁶ In the exercise of that authority, Congress has repeatedly enacted legislation regulating the internal affairs of Indian tribes. In addition, Congress has delegated to the Secretary of the Interior and the Bureau of Indian Affairs (BIA) the power to oversee many, if not most, aspects of tribal governance.

The curious juxtaposition between federal plenary power and tribal sovereignty led one Supreme Court Justice to describe federal Indian law as “schizophrenic.”¹⁷ According to this Justice: “[F]ederal Indian law is at odds with itself The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling ‘sovereignty.’”¹⁸

In his article, Matthew L.M. Fletcher (Ottawa/Chippewa) powerfully illustrates this incoherence in U.S. Indian law. He notes that Congress has routinely “unilaterally abrogate[d] treaties and take[n] tribal property with little or no compensation.” But the primary focus of Fletcher’s attention is not Congress, but the administrative bureaucracy charged with the everyday management of Indian affairs. Fletcher argues that the BIA “has its tentacles all over every Indian tribal government,” and that it routinely “seeks to persuade, coerce, intimidate, or otherwise force” to act in accordance with federal desires. For Fletcher, bureaucratic interference with the ability of American Indian tribes to determine their own affairs is among the most “insidious” forms of modern colonialism.

Fletcher cites numerous examples of this interference: federal influence and control over the ability of tribes to define their own membership; bureaucratic meddling in, and influence over the

15. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

16. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

17. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

18. *Id.* at 225.

outcome of, tribal elections; the refusal of the Secretary of the Interior to place off-reservation Indian lands into federal trust status; and BIA mismanagement of tribal trust funds.

Fletcher argues that in these and other ways, the federal government's control over Indian affairs undermines tribal self-government and self-determination. He advocates greater coherence in U.S. Indian law through federal recognition of tribal sovereignty and self-government free from federal domination and control.

Fletcher's article, like those of Borrows and Strelein, highlights a common feature in the experience of indigenous peoples worldwide: the reluctance of non-Indian nation states to recognize and affirm the full right of indigenous peoples to exist as sovereign independent nations. In the United States, Canada, Australia, and elsewhere, indigenous peoples challenge that reluctance, pursuing claims for greater powers of self-government, while at the same time struggling to defend their collective group rights to land, resources, and cultural integrity.

CULTURAL AND INTELLECTUAL PROPERTY RIGHTS

Contemporary Indian struggles concern not just real property and natural resources, but cultural and intellectual property as well. In their article, Lorie Graham and Stephen McJohn stress the importance to indigenous peoples around the world of preserving and protecting their cultural property and traditional knowledge. Such property and knowledge are the cornerstones of tribal cultures. They are also vital to the realization of tribal self-determination. For example, tribal values and beliefs are embedded in the sacred songs and dances of the Hopi Indians of the American Southwest, the exquisite artwork of Australian aboriginal peoples, the sun symbol of the Zia Pueblo Indians of New Mexico, and the traditional knowledge of medicinal plants of the Indian communities in Mexico. These sacred songs, dances, artworks, and knowledge "must be learned and renewed by each succeeding generation of indigenous children."¹⁹

19. Erica Irene-Daes, U.N. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Protection of the Heritage of Indigenous Peoples*, ¶ 4, U.N. Doc. E.97/XIV.3 (1997).

They must also be protected from unauthorized acquisition and dissemination.

Noting the vulnerability of indigenous cultural property and traditional knowledge to commercial exploitation, Graham and McJohn advocate the application of firmly defined intellectual property rights and “intellectual property protection for indigenous cultures.” Their position is similar to that articulated in the Draft U.N. Declaration on the Rights of Indigenous Peoples: “Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.”²⁰

In advocating this position, Graham and McJohn respond to anthropologist Michael F. Brown, who suggests in his book, *Who Owns Native Culture?*, that modern intellectual property rights are ill-suited to protect tribal cultural property, and that instead of attempting to create new forms of property rights, indigenous peoples should strive to negotiate meaningful compromises with non-Indians who seek to acquire their property and knowledge. For Brown, negotiation based on mutual respect for indigenous culture is the ideal, not “rights talk.”

Graham and McJohn believe that existing (or perhaps slightly modified) intellectual property laws can, indeed, be used to protect indigenous cultural property: native songs, dances, and artwork can be copyrighted; native symbols can be trademarked; and processes used to make traditional medicines can be patented. While they share Brown’s desire for negotiation and mutual respect, Graham and McJohn believe that firm property rights are essential prerequisites for meaningful negotiations with outsiders. Graham and McJohn argue—as have others²¹—that such rights are necessary to ensure the equal bargaining strength of indigenous peoples. This, in turn, will guarantee respect for indigenous interests.²²

In the end, for Graham and McJohn, intellectual property law can play a key role in safeguarding indigenous cultures. Firmly

20. *Draft Declaration*, *supra* note 1, art. 29.

21. See, e.g., Carol Rose, *Property in All the Wrong Places?*, 114 *YALE L.J.* 991 (2005).

22. Graham and McJohn do not share Brown’s concern that the recognition of indigenous intellectual property rights will result in a significant withdrawal of indigenous cultural property and knowledge from the public domain. Thus, they see no need for measures to dilute indigenous intellectual property rights.

established rights help ensure that indigenous people are in control of negotiations concerning the use and dissemination of their cultural property and traditional knowledge.

INTERNATIONAL BORDERS AND BEYOND

Complex negotiations of a different sort are required for indigenous peoples whose traditional homelands are divided by international borders. For these peoples, the right “to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders,”²³ is essential. Indigenous peoples prefer a regime in which they can exercise this right, free from outside regulation or control. Yet, this preference is tempered by the desire of indigenous peoples to prevent the illegal trafficking by non-Indians and others of people, drugs, and contraband across international borders. To police their borders effectively, indigenous peoples often must work in close collaboration with state officials. Just as often, they must recognize the authority of federal and state officials to regulate border crossings and prosecute criminal conduct occurring on tribal lands.

In the final article of the symposium, Eileen Luna-Firebaugh (Choctaw/Cherokee) describes the efforts of one Indian tribe, the Tohono O’odham Nation of Arizona, to work together with the United States and the State of Arizona to police the tribe’s border with Mexico, while at the same time preserving the tribe’s right of passage across the border at traditional crossing points.

The Tohono O’odham Nation is one of twenty-four Indian nations in the United States whose reservations are located on or near the U.S. borders with Canada and Mexico. Together, these twenty-four reservations straddle over 260 miles of the United States’ international borders. The Tohono O’odham Nation shares a seventy-five-mile border with Mexico. It is estimated that every year 10,000 or more undocumented immigrants cross (or attempt to cross) the U.S.-Mexican border on Tohono O’odham lands. These immigrants threaten to imperil the safety and quality of life of the Tohono

23. *Draft Declaration, supra* note 1, art. 35.

O'odham people. Trafficking in drugs and other forms of contraband is commonplace, as is the degradation of environmentally protected and sacred land. Under U.S. law, the Tohono O'odham Nation lacks criminal jurisdiction over the conduct of non-Indians, including undocumented immigrants. Thus, to patrol their border, the Tohono O'odham people must collaborate with state and federal officials.

According to Luna-Firebaugh, in 2004, the Tohono O'odham Nation, the United States, and the State of Arizona came together to form the Arizona Border Control Initiative. This initiative strives to patrol the Arizona-Mexico border and apprehend non-tribal members attempting to cross illegally over Tohono O'odham (and other) lands. Federal officials have broad authority to apprehend and prosecute undocumented immigrants and criminals on Tohono O'odham lands. At the same time, care is taken to protect the Tohono O'odham peoples' rights of passage across the border for traditional purposes. Initiatives like this, and the compromises they represent, are essential to the preservation of traditional rights of passage in the modern world.

Taken together, the contributions to this symposium illustrate the complex challenges facing indigenous peoples in the twenty-first century. They also demonstrate with clarity the value inherent in recognizing indigenous peoples as distinct sovereigns with secure rights to their lands, natural resources, cultural property, and self-government.