INDIGENOUS PEOPLES, THE ENVIRONMENT, AND LAW: AN ANTHOLOGY, Edited by Lawrence Watters, Carolina Academic Press, 2004. pp. 439.

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INTRODUCTION

Indigenous peoples, the environment, and the law have long been sources of conflict all over the world. While humanity is struggling to adapt to the increasing homogenization of cultures, economies, and environments, indigenous peoples are threatened in unique ways by globalization, neo-liberalism, economic development, climate change, environmental degradation, and technological advancements. National and international institutions increasingly have chosen or been forced to deal with the implications of integrating environmental rights, human rights, anthropological and historical facts, scientific knowledge, and economic imperatives with evolving notions of indigenous peoples' fundamental rights.

Each year, scholarly journals are filled with broad ranging discussions of various conflicts involving indigenous peoples, the environment, and the law. "Indigenous Peoples, The Environment, and Law: An Anthology," edited by Lawrence Watters, plays an essential role in collecting many of the best articles on the subject in one book. The book, which includes essays from authors from numerous countries between 1987 and 2004, provides an invaluable one-stop resource for seasoned scholars seeking a holistic look at this important topic as well as for relative newcomers to the subject seeking a broad introduction. The impression this book will leave readers with the impression that, while conflicts between indigenous peoples and dominant societies over environmental and human rights are grounded in unique historical and anthropological realities, common threads of emerging international norms tie this field together into a manageable whole.

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The editor, Professor Lawrence Watters, displays his formidable grasp of the field by assembling a collection of essays packed with information, which he has skillfully edited down to their core. Professor Watters has been a visiting professor at the University of Wuhan in China, the University of Auckland, New Zealand, the University of Lausanne, Switzerland, and the University of Hanover, Germany, among other places. In addition, he authored the introduction, a chapter on Scandinavian indigenous peoples, and contributed as a co-author to a chapter on the well-known Makah whaling dispute in the United States. Professor Watters' concise introduction makes clear that the selections in the book present an interdisciplinary approach to evaluating conflicts between indigenous peoples, the environment, and the law. Professor Watters explains that the theme of the book is the common experience of indigenous peoples and their "struggle for identity, along with the paradox of dependence on the nation-state and their pursuit of a measure of autonomy."[2]

This anthology clearly shows how international and national laws dealing with the rights of indigenous peoples in relation to the environments upon which they depend are moving from the mantle to the tool box. Indigenous peoples and their allies are no longer satisfied leaving useful legal concepts as lofty inspirational goals to be praised in the abstract. Instead, indigenous peoples are attempting to apply these tools to address the problems they face in various countries. A major contribution of this book is that it shows the osmotic, or reciprocal, relationship between international and national laws. These systems interact, communicate, and influence each other in important ways. At times, national strategies for addressing indigenous peoples' claims for justice supplement international legal norms, while at other times international law norms are constricted by limited application at the national level. In this way, the "Indigenous Peoples, the Environment, and Law" effectively illustrates the living and evolving nature of the law in relation to indigenous peoples and the environment.

The anthology is organized in four parts. The selections first set out the basic toolbox of international legal norms applicable to indigenous peoples and then show how those tools are applied in various national and international fora. The anthology

2. INDIGENOUS PEOPLES, THE ENVIRONMENT, AND LAW: AN ANTHOLOGY, at xviii, ed. Lawrence Watters (2004).

presents a broad collage of progress and innovation, demonstrating that respect for indigenous peoples' rights, the environment, and the law are complementary, not contradictory, goals.

INDIGENOUS PEOPLES, THE ENVIRONMENT, AND LAW

(1) *Indigenous Peoples and the Emergence of a Framework*

James A.S. Musisi's essay opens the book and immediately lays out in a sober tone the role and state of indigenous peoples in the modern legal paradigm, stating –

> [Indigenous peoples'] role has always been pushed into the background and ignored. . . . [I]n spite of international legal instruments to safeguard the human rights of these people as far as their environment is concerned, the present global mode of production has instead set a trend for their extinction. . . . [T]hese people are increasingly an endangered species.[3]

Musisi introduces a variety of topics that resurface throughout the book, including the unique knowledge of ecosystems possessed by indigenous peoples. In addition, Musisi introduces several foundational international legal instruments that form the core of all discussions of the rights of indigenous peoples under international law. These international legal instruments are familiar to those knowledgeable about indigenous rights, and include the Stockholm Declaration of 1972, the Brundtland Commission Report of 1987, the International Labour Organization's ("ILO's") Convention 169 of 1989, the Biodiversity Convention of 1992, and Agenda 21 of the Rio Declaration. These instruments provide varying degrees of recognition of indigenous peoples' rights to exist, to self-determination, to be consulted on projects that affect them, and to sustain their unique cultures.

Russel Barsh's selection logically follows this introductory framework with a discussion of the core issue of self-determination in several contexts, including the formulation of the Draft Declaration on the Rights of Indigenous Peoples ("Draft Declaration"). The Draft Declaration is another of the foundational international legal instruments applicable to indigenous peoples and the environment. While nation-states have been reluctant to accept a broad definition of self-determination for fear it would allow secession or greater land claims by indigenous groups, several nations have been willing to codify the right of indigenous peoples to retain some degree of autonomy within the context of

3. Id., at 3-4.

the larger nation-state. In addition, this selection shows how indigenous peoples have attained rights unparalleled by non-indigenous ethnic groups, such as being given representation on United Nations bodies and working groups independent of the nation-state where they reside.

These foundational international legal instruments surface time and again throughout the anthology, validating the editor's wise decision to lay them out *ab initio* in broad terms.

(2) *Indigenous Peoples and Contemporary Dimensions*

Part II of the anthology provides useful examples of how the foundational international legal instruments provide incomplete protection for indigenous peoples' natural resources, biodiversity, community well-being, and traditional knowledge. A recurring theme throughout these selections is that while there have been several international and national legal instruments recognizing the right of indigenous peoples to consultation or participation in conservation efforts, these largely procedural rights have failed to give indigenous peoples meaningful control over natural resource decisions. Until dominant nations provide benefits, rather than solely burdens, to indigenous peoples through conservation efforts, the legacy of injustice for indigenous peoples will be perpetuated.

Gregory Maggio's section thoroughly reviews the many international legal instruments intended to give indigenous peoples an equitable share of the benefits from the protection of biodiversity, ultimately concluding that these instruments are insufficient to address current inequities. In addition to the foundational international legal instruments discussed in Part I of the anthology, Maggio shows how the International Convention for the Regulation of Whaling, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the IUCN Draft Convention on Environment and Development, and the Desertification Convention all state to varying degrees that local communities should share in the benefit from the exploitation or use of indigenous peoples' land and traditional knowledge.

However, these instruments ultimately fail to provide enforceable mechanisms for indigenous peoples to control development or management of natural resources upon which they depend. The shortcomings in international law are supplemented by experimental national efforts, such as community-based conservation. The editor's selection in the anthology provides highlights

of community-based conservation efforts in India, Namibia, Kenya, the Philippines, Zimbabwe and Thailand that seek to provide benefits to indigenous communities as part of conservation efforts. One of the most widely celebrated examples is the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) in Zimbabwe, which "gives locally controlled district councils full authority to implement conservation strategies the way they see fit within a legal framework dictated by the government."[4]

Part II concludes with the presentation of other innovative theories for protecting the rights of indigenous peoples in the context of development and environmental protection. Srividhya Ragavan suggests indigenous peoples make use of traditional intellectual property rights law in non-traditional ways by using trade secret law to protect cultural knowledge such as folklore from expropriation. The two final selections in Part II explain the role of the World Bank and multinational corporations in protecting indigenous peoples' rights as part of development projects. In both instances, these selections show how economic interests continue to receive preference over indigenous rights. To counteract this imbalance, David Fagan presents a novel theory based on the concept of "unjust enrichment" that would allow indigenous peoples to recover for harms caused by multinational corporations. Fagan's theory, like many others in the anthology, is part of the necessary process of experimentation and pushing the boundaries of the law to achieve substantive justice for indigenous peoples.

(3) *Indigenous Peoples, the Environment, and Conflict in a Comparative Context*

With the essential foundational legal instruments and their limitations set out in a clear and concise way in the first two parts, the anthology proceeds to provide the reader with a broad set of case studies that highlight the most important and well-known conflicts around the world related to indigenous peoples, the environment, and the law. These selections cover a variety of themes that are common to all indigenous peoples. All disputes involving indigenous peoples, the environment, and the law are based on histories of colonization, conflict, dispossession, and va-

4. Sean T. McAllister, "*Community-based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way*. 10 COLO. J. INTNTL. ENVTL. L. & POL. 195, 211 (1999).

rying degrees of assimilation, which are followed by tenuous recognition of indigenous rights and some level of reconciliation of historical injustices consistent with emerging international norms. The pattern reveals itself time and again throughout Part III of the anthology and provides the reader with a nearly complete catalogue of the most instructive examples of how nations have attempted to resolve conflicts related to indigenous peoples, the environment, and the law.

Part III highlights numerous strategies that have been used all over the world to address indigenous rights and the environment. These strategies include (1) creation of local, regional, national, or international bodies that provide special input or rights for indigenous peoples in matters that directly affect their well-being; (2) national recognition through legislation of indigenous peoples as distinct "peoples" entitled to special rights in regard to natural resource development, exploitation, and preservation; (3) constitutional amendments specifically recognizing or protecting indigenous peoples' rights in relation to their environment; (4) granting local self-governing autonomy to indigenous peoples; (5) establishment of land rights agencies or commissions to settle disputes over indigenous land claims; and (6) applying international legal instruments or legal doctrines from other countries in domestic fora to resolve disputes with indigenous peoples. While these strategies have revolutionized national recognition of indigenous rights, the case studies in Part III show how in many, if not most, instances implementation of these rights remains incomplete, fragmented, uneven, and subject to negation without due process.

For example, Jennifer McIver shows how the Arctic Council, an inter-governmental body created by the eight Artic nations to deal with the unique impacts of pollution on the Artic region, gives indigenous peoples special, yet incomplete, participatory rights in this body. Similarly, Laurie Sargent explains the Bolivian Constitution amendment recognizing the social, economic, and cultural rights of indigenous peoples. However, despite these protections, oil industries have still been able to move forward with projects opposed by local communities. Moreover, Morihiro Ichikawa shows how evolving international norms helped move Japan to recognize special rights for the Ainu people, but those rights remain vague and untested. Benjamin Kahn's selection about the Maori of New Zealand shows how interpretation of old treaties in the colonizer's language can di-

lute the rights granted to indigenous peoples if those treaties are not interpreted in a light most favorable to the indigenous peoples. Finally, Gail Osherenko's selection shows how indigenous peoples in Russia were granted limited self-governing autonomy to resolve disputes over natural resources and how those rights were then whittled away by subsequent narrow interpretations of the rights granted.

Charles Marecic lays out the impressive development of the creation of a new Canadian Territory called Nunavut, which is comprised of 80-85 percent Inuit indigenous peoples. While this was clearly a huge advance for the Inuit people, it also came with restrictions on the governance of Nunavut that continue to limit the role of traditional Inuit concepts and forms of justice. For example, the Canadian government required that the new Nunavut courts contain essentially similar procedural and substantive rights as in all other Canadian courts. In addition, Nunavut government proceedings and documents must be in English or French, as opposed to the Inuit's native language, which could undermine the retention of the indigenous language.

Karen Bravo's chapter on the rights on indigenous peoples in Australia shows how the American legal regime of recognizing aboriginal title to land helped to influence Australia to provide indigenous peoples with land rights. Australia's willingness to accept transnational jurisprudence led to the Australian Land Rights Act, which allowed the transfer of up to 46 percent of the Northern Territory to the previously dispossessed indigenous peoples there. Similarly, Marissa Leigh Hughes' selection highlights the important ruling of the Supreme Court of the Philippines granting standing to sue to unborn future generations to prevent the misappropriation of rainforest resources. Granting standing to future generations, or to the environment itself, has been a rallying cry for activists in other countries seeking to expand indigenous and environmental rights.

Editor Watters' chapter on the Sami people of Scandinavia condenses into one selection nearly all of these trends, persuasively arguing that Norway has been on the leading edge of indigenous rights. The Supreme Court of Norway recognized the Sami as a distinct people entitled to special rights under the Covenant on Civil and Political Rights. Norway adopted a Constitutional amendment recognizing the rights of the Sami and ratified ILO Convention 169. The Sami were given limited self-government in the form of a parliament empowered to make internal decisions

for the Sami people. Norway has established a land rights forum, which includes representatives of the Sami peoples, that is charged with co-managing natural resources to benefit the Sami, protect Sami reindeer hunting activities, and prevent any significant encroachment on the natural environment causing harm to the Sami. These principles have been adopted in significant instances by Norwegian courts. Watters concludes, "The fusion of international law and domestic law provides a firm basis for both new legislation, executive action and judicial interpretation guaranteeing a dualism that retains sovereignty but protects the people who have lived in [indigenous lands] for time immemorial."[5]

Part III concludes with four chapters dedicated to indigenous rights in the United States in the context of special representation of Hawaiian peoples, protection of sacred sites, and disputes over water rights and whaling. These selections demonstrate the difficulty with which modern nations attempt to reconcile special rights for indigenous peoples based on their unique history within the larger societal norms of non-discrimination and non-favoritism. In the case of Hawaiian peoples and indigenous sacred sites in the U.S., indigenous rights have been subsumed by the dominant culture's legal norms of equality and non-favoritism. In the case of the controversy involving the hunting of gray whales by the Makah peoples, Watters' selection shows how the United States is walking a fine line of attempting to uphold indigenous rights without unraveling the international regime designed to ensure the sustainability of whale populations.

The case studies in Part III validate the editor's comment in the introduction that an interdisciplinary approach to resolving disputes among indigenous peoples, the environment, and the law requires ample attention to anthropology, history, science, economics, and legal norms. While Part III well illustrates that there remains a disjunction between the lofty pronunciations of many nations and the implementation of indigenous rights, this anthology also shows the interconnected and fluid nature of national and international legal instruments that are coalescing to create greater protections and benefits for indigenous peoples around the world. A strong understanding of the lessons implicit in the case studies in Part III provides an essential database of information for all those interested in indigenous rights and the environment.

5. Id., at 333.

(4) *Indigenous Peoples, Convergence and Globalization*

The editor's introduction to Part IV sets out a quote that is a unifying theme for the entire book, stating –

> [Indigenous peoples'] sustainable lifestyle and cultures, traditional knowledge, cosmologies, spiritualities, values of collectivity, reciprocity, respect and reverence for mother earth, are crucial in the search for a transformed society where justice, equity and sustainability will prevail.[6]

Alex Seita's selection follows with a succinct explication of the dominant themes and impacts of economic and political globalization. Seita notes that historical divisions of race, class, and ethnicity are beginning to give way to a new unifying vision of one human race, a globalized identity that transcends all others save nationality. The globalization of consensus on important issues such as human rights and the rule of law have important implications for indigenous peoples, who have much to gain from a broad universalist approach to these issues. At the same time, the homogenization of identity also threatens indigenous peoples by allowing some to dismiss their distinctive cultural differences as irrelevant in the modern age.

The danger of marginalizing the differences of indigenous peoples in the name of globalized equality is well demonstrated by the last selection in the anthology by Joel Paul. Paul notes that one of the defining elements of globalization is the dismissal of cultural distinctions as antiquated and divisive notions. This dismissal of distinction plays out in the conflict over whaling, where Japanese and Norwegian whalers have consistently refused to support international limits on whaling imposed by the International Whaling Commission ("IWC") under the International Convention for the Regulation of Whaling. While Japanese and Norwegian whalers do not have claims to whaling from time immemorial, they still demand special rights based on their relatively well entrenched cultural practices of whaling. The IWC has consistently rejected these pleas, while granting special exceptions to other indigenous peoples such as the Inuit and Makah. Ultimately, the only justification that remains for such a distinction is that indigenous peoples, as a result of their long history of oppression by dominant societies, deserve some special rights that depend on their differences.

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6. Id., at 409.

Ultimately, differences do matter. The entire anthology reminds the reader that conflicts do not exist in the abstract without historical and anthropological contexts. For example, the emerging global paradigm, and indeed imperative, of sustainable development has little meaning in the abstract. Such concepts, like freedom and democracy, can only have meaning in their application. Indigenous peoples are playing an important role in bringing real world meaning to the term "sustainable development." For this reason, understanding their rights and responsibilities in relation to the environment and the law are essential to understanding the future course of sustainable development.

CONCLUSION

"Indigenous Peoples, the Environment, and Law" makes an important contribution to the scholarly field at a crucial time in the development of international and national norms of indigenous rights in the context of the environment. Globalization has forced humanity to deal with many problems simultaneously. Solutions require broad integration and syntheses of the successes and failures playing out across the globe. This anthology provides that synthesis and allows the reader to grasp the complexity and diversity of the problems faced by indigenous peoples.

Ultimately, in a world moving toward the dismissal of difference and the embrace of a global culture, indigenous peoples will suffer yet another generation of oppression if they are forced to surrender the things that make them unique. Dominant societies everywhere will be forced to reconcile how best to balance the demands of justice from indigenous peoples with the drive for economic growth by the majority populations. The extent to which indigenous values and ecosystems are preserved and enhanced over the next generation will tell how far the world has come in finally learning to tolerate differences and live in a more sustainable way. "Indigenous Peoples, the Environment, and Law" will no doubt serve as a valuable compendium to those engaged in this worthy endeavor.