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Self-Determination, Relational Autonomy, and Transnational Mediation

<https://www.e-ir.info/2014/06/01/indigenous-self-determination-relational-autonomy-and-transnational-mediation/>

RODERIC PITY, JUN 1 2014

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During the past decade, the right of Indigenous Peoples to self-determination has been substantially enhanced in international law, through the overwhelming endorsement by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples. It is no limitation that this document is formally only a declaration, rather than a treaty itself, because it serves to illuminate the full scope of existing human rights treaties, in particular the two covenants on civil and political rights and on economic, social, and cultural rights, both of which begin by recognising that all peoples possess the right of self-determination. The character of contemporary international law has been clarified to include an Indigenous right to self-determination. This is a significant achievement, which was strongly resisted by many states while the text of the draft Declaration was debated and its endorsement delayed for over a decade until 2007.

The resistance of many states to restoring Indigenous self-determination as a right in international law was expressed in various ways, including a semantic refusal to refer explicitly to Indigenous Peoples in official UN deliberations. The annual gathering of Indigenous advocates at the UN is still called the Permanent Forum on Indigenous Issues, because states refused to acknowledge it as a forum for Indigenous Peoples, not just about them. When the forum was being created in 2000, Milelani Trask, an Indigenous leader from Hawai'i, affirmed in response to state intransigence that "We are peoples, not issues. Issues may go away, but peoples do not" (Niezen 2003: 164). She insisted that Indigenous Peoples be recognised as subjects of international law, with a capacity to exercise their right to self-determination, not merely as objects of decisions made about them by states. This capacity was not diminished by changes made to the draft Declaration before it was finalised, such as deleting a reference to the use of competent international bodies to resolve disputes between states and Indigenous Peoples regarding the interpretation of treaties between them.

Six years after the General Assembly endorsed the Declaration, it promotes a clear affirmation of the Indigenous right to self-determination that remains routinely denied in the practice of most states. The four states that opposed the Declaration in 2007 (Australia, New Zealand, Canada, and the USA) have belatedly supported it, but for these states, like for many others, endorsing the Declaration has been treated as a moral gesture requiring no substantive change to the state's political relationship with Indigenous Peoples. The political constraints on Indigenous self-

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determination have changed little since Kymlicka observed, in 1999, that Indigenous Peoples can obtain only “moral victories from international law,” because “the real power remains vested in the hands of sovereign States, who can and do ignore international norms” (quoted in Xanthaki 2007: 119). Yet this situation of states dominating Indigenous Peoples and ignoring their rights is precisely what the Declaration was meant to help change. If the gap that Kymlicka highlighted between symbolic success and political neglect cannot be bridged, then Indigenous self-determination will not really be restored.

The main obstacle to restoring Indigenous self-determination is the refusal by states to renegotiate their political relationships with Indigenous Peoples based on the distinct status accorded to those peoples in the Declaration. As Xanthaki has emphasised, at the core of the Indigenous right to self-determination is the recognition of an Indigenous People’s right to control their political destiny, to be included within a state on their own terms and through their own institutions(2007: 157-9). This right is essentially one of inclusive citizenship, which requires creating a relationship of non-domination between a state and the Indigenous Peoples living within that state. The Declaration provides a guide for how Indigenous self-determination could be restored, particularly in articles 18 and 19 about enabling Indigenous Peoples to participate through their representative institutions in all decision-making that concerns them. These articles support the principle of ensuring that Indigenous Peoples have relational autonomy from a state. As advocated by Young (2004), Xanthaki (2007), and Kingsbury (2000), this is the essential condition required for restoring Indigenous self-determination.

The principle of relational autonomy from a state, based on non-domination, has been contrasted by Young with the principle of non-interference or separation(2004: 189). Non-interference is unnecessary for genuine self-determination, both for Indigenous Peoples and for states. Yet the principle of non-domination is crucial for appreciating what is required to restore Indigenous self-determination. This can be outlined by reviewing how the refusal of states to help create new relationships with Indigenous Peoples is expressed at three different levels of complexity in their engagement with the UN, understood in the context of the three dimensions of UN activity highlighted by Weiss (2012: 8-9). These dimensions are, first, the basic structure of the UN as an international society comprising only states; second, the various agencies of the UN, which include bodies monitoring human rights treaties and the office of the UN Special Rapporteur on the Rights of Indigenous Peoples; and third, the broader range of transnational social movements engaged in advocating for both the member states of the UN and its various agencies to act cooperatively in support of the purposes of the UN Charter, including respect for human rights and self-determination of peoples. While these dimensions overlap, the main obstacle created by states is expressed at the level of international society. By starting with a review of the last two dimensions, it is possible to highlight the nature of the transnational transformation required to overcome the resistance by states to implementing the Declaration.

The collective engagement of Indigenous Peoples with the UN has been transformed in the past generation. Their plight was ignored by the UN for decades until the early 1980s, when they gained access to lobby a UN committee protecting minority rights (Coates 2004: 252). Although the process of creating the Declaration was difficult, once endorsed by the General Assembly, it gave Indigenous Peoples a status in the UN system superior to that of minorities within states who lack an Indigenous heritage. This was reflected in a recent call made by Indigenous leaders for the President of the General Assembly to ensure that an Indigenous representative works alongside a UN representative to facilitate consultations about the format of a UN Conference on Indigenous Peoples to be held in September 2014. These leaders claimed that, based on article 3 of the Declaration, Indigenous Peoples now have “the right of effective participation in all decisions affecting them” made at the UN (Littlechild et. al. 2014). When states face collective pressure from Indigenous Peoples asserting their decision-making capacity at the UN, it is hard for them to exclude Indigenous representatives from formal UN procedures. The fact that only four states opposed the Declaration in 2007 showed it is possible to shame states into supporting Indigenous self-determination at UN plenary meetings. In this context, states that support Indigenous rights are more likely to influence the positions of other states, by amplifying the voices of Indigenous representatives.

The fact those four recalcitrant states endorsed the Declaration by the end of 2010 was the result of much domestic lobbying, and the operation of a regular procedure for the UN Special Rapporteur, Professor James Anaya, to monitor the plight of Indigenous Peoples in particular countries. It is no coincidence that the first two of those four

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countries to renounce their opposition to the Declaration, Australia and New Zealand, were among the first seven countries investigated by Professor Anaya after he took over the role in 2008. Australia announced its support for the Declaration four months before Anaya's scheduled visit in August 2009, while New Zealand announced its support three months before Anaya visited that country in July 2010. For both countries, Anaya's reports (2010; 2011) were critical of entrenched discrimination against Indigenous Peoples, though his criticism would have been much stronger if the governments had not changed their policy to support the Declaration.

In Australia's case, Anaya's report amplified recent criticism by the Human Rights Committee of Australia for suspending the operation of legislation implementing the Convention on the Elimination of All Forms of Racial Discrimination. The Australian government initially rejected Anaya's criticism, but later modified its legislation after further criticism from the UN Committee on the Elimination of Racial Discrimination. While intense scrutiny from UN human rights agencies can lead governments to alter their policies, in this case only the form, not the substance, of the policy changed. The government ignored article 19 of the Declaration, which requires it to obtain the free, prior, and informed consent of Indigenous Peoples before adopting and implementing legislation or policies that affect them (Pitty and Smith 2011: 134). The government did not respect the principle of non-domination, despite responding to criticism from UN agencies about the manner in which it is perpetuating racial discrimination. While scrutiny from Anaya and other UN human rights agencies helped persuade Australia to endorse the Declaration and modify some legislation, it was insufficient to transform the government's lack of support for the Declaration in practice.

The main obstacle to restoring Indigenous self-determination is that governments face only occasional external pressure to uphold the principles of the Declaration. This is a substantial obstacle inherent in the dominant structure of the international society of states, which, as Bull argues, involves a "conspiracy of silence" between states about the human rights of their citizens (1977: 82). External pressure is needed to break this silence and expose the illegitimacy of state domination of Indigenous Peoples.

External pressure is a vital source of support for Indigenous Peoples, who, as Young notes, require regular and direct access to "agents outside the state" with "the authority and power" to influence how the state treats them (2004: 189). Yet, because of the conspiracy that Bull highlighted, only rarely will such agents be other states. While article 11 of the Convention on the Elimination of All Forms of Racial Discrimination enables states to lodge complaints about breaches of this convention by other states, no state complained about Australia's suspension of its obligation to prohibit racial discrimination, nor highlighted this suspension to question Australia's credentials when it was elected as a member of the Security Council for 2013-14. Because of the conspiracy of silence, states still routinely tolerate the structural violence of racism in order to uphold the principle of not interfering in another state's internal politics.

If Indigenous Peoples lived in an external relationship only with international society, such as that which characterised colonialism, there would be little prospect of overcoming the political neglect of their rights by states that affirm the principle of non-interference. Yet the contemporary world is more interdependent and diverse than the colonial era. As Clark has observed, in recent decades "international society has been progressively encroached upon by global civil society," by various transnational social movements advocating for the creation of a world or cosmopolitan society in place of the inter-state order marked by the conspiracy of silence (2013: 35). Such advocacy, Clark points out, has often "been conducted through moral argument," which has helped to bring about normative change (2013: 35). The moral critique of the domination of Indigenous Peoples by states has established a basic premise for generating external pressure on states. This is the idea that the plight of Indigenous Peoples, in particular states, is now a matter of global concern. This idea is expressed in different ways through the UN, such as in the mandate of the Special Rapporteur and the holding of UN conferences. It is often expressed as a rejection of the Westphalian principle of non-interference. Thus, in John Pilger's recent film *Utopia*, Professor Jon Altman, an anthropologist at the Australian National University, says Australia requires international aid to help it transcend the powerlessness experienced in many Aboriginal communities.

This comment raises a vital question: what type of appropriate and feasible aid could help restore Indigenous self-determination in Australia? Because the problem is a political one, the aid must be of a type that could help overcome the political impasse that stops Australia from implementing articles 18 and 19 of the Declaration. Efforts to overcome this impasse within Australia have not succeeded. The need for Australia to facilitate a democratic process of

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recognising Aboriginal autonomy was highlighted 20 years ago by its most distinguished public servant, H.C. Coombs. He called for “an internationally recognised Act of self-determination” for Aborigines, but, despite the official apology in 2008 to generations of Aboriginal families forcibly separated by brutal paternalism, no such process has yet occurred(1994: 227). This shows there is a need for qualified international intermediaries to help Australia negotiate an Accord with Indigenous representatives, as advocated by the Aboriginal elder Mary Graham. She emphasised that independent, third-party negotiators, who recognise the legitimacy of each conflicting party, could encourage them to resolve their conflict(2001). Such intermediaries could help clarify the key terms of relational autonomy between Australia and its Indigenous Peoples, to be formalised in a treaty (Pitty 2006: 65).

Restoring Indigenous self-determination is a process that requires a dialogue between governments and Indigenous Peoples, in which both seek to create a new situation of relational autonomy, based on the core principle of non-domination expressed in the Declaration. The conditions for such dialogue are clearly stated in the Declaration, and repeatedly affirmed by the UN Special Rapporteur, by human rights agencies, and by transnational social movements. Where the prospect of dialogue seems distant, as in Australia, Indigenous Peoples are likely to seek external sources of support in their struggle for self-determination. It is likely that transnational mediation will be needed to persuade the Australian government of the need to recognise Aborigines’ relational autonomy, based on the principle of non-domination. There is no guarantee that such mediation would succeed, but the growth of an interdependent, world society means that such international assistance could be both feasible and appropriate as a way of encouraging a shift from the idea of non-interference to that of non-domination.

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