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Book Review, "Diversity and Self-Determination in International Law" by Karen Knop

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Are there any legal questions still to be answered about self-determination? Many would respond in the negative. Decolonization, the doctrine's great high point, has essentially passed into history. State practice evinces virtually no support for a right to secede from existing states. And the overwhelming focus of recent collective responses to group autonomy claims—most notably the "international administrations" of Bosnia, Kosovo, and Eastern Slavonia—has not been to recognize

the groups involved as "peoples" entitled to "external" self-determination. Rather, the United Nations and other international actors have promoted democratic institutions within existing states and sought to convince groups that participation in those institutions, and not continued struggle for full independence, can best serve their interests.

In *Diversity and Self-Determination in International Law,* Karen Knop demonstrates that interesting questions do, indeed, remain, but she wisely avoids revisiting well-traveled doctrinal paths. Instead, she takes an instrumental perspective on self-determination, viewing it as an entry point for marginalized and excluded groups into the framework of international law. Claims of self-determination, she argues, are critical moments of encounter between previously excluded claimants and established legal institutions. The book reviews a series of episodes involving inhabitants of colonial territories, indigenous peoples, women, and other newly arrived actors. Each tells the story of how the new arrivals were received by legal processes overwhelmingly concerned with, and dominated by, Europe. For Knop, these entry points both reveal how international legal institutions adapted to the presence of nonstate actors and expose deep cultural biases of the dominant actors. These qualities are revealed in three ways: the modes of participation permitted the marginalized groups, the ways in which their identities were constructed, and the theories of legal interpretation employed by decision makers sitting in judgment on their legal status.

While the episodes Knop examines arise in the context of established legal processes—treaty negotiations, decisions of judicial and quasi-judicial bodies, petitions to international organizations, scholarly commentary, and the like—their significance does not lie in their contribution to legal doctrine. In Knop's phrase, the book is a "micro-history" (p. 11), a review of the arguments and strategies employed by the groups involved in each episode. Indeed, Knop contrasts her "lens on the past" with the work of other scholars analyzing similar materials, who "deal with these problems more as a challenge for the present" (p. 279).

This approach presents a challenge to the reader. While Knop's analysis of the "encounters" reveals insight into each actor's approach to theories of law and legal reasoning—which Knop refers to as "the enterprise of interpretation" (p. 380)—the sum total of all the encounters is less clear. Each of the marginalized groups clearly "struggle[d] to incorporate their own stor[ies] into international law" (p. 13), and the questions that Knop poses about the encounters "illuminate the deep structures, biases and stakes in the development of meaning in international law" (p. 5). But surely the same would be true for any legal system addressing new and unfamiliar actors espousing claims of entitlement that are foreign to established institutions. In all such cases, the important question would seem to be whether the new claimants remained outsiders or whether, over time, the law came to acknowledge their concerns and legal status.

I will return to the question of how to assess the sum total of these disparate episodes, but posing this question should in no way detract from the many insights that Knop provides in examining each case. As history, the book is exceptionally thoughtful. Part One reviews postwar legal literature on self-determination. Knop contrasts the view that self-determination is a "rule" with the view, common among theorists in developing countries, that it should be seen as "principle"—a perspective arguably permitting more flexible interpretation and broader application. The contrast is intended to highlight the importance of interpretive decisions and "the fact that these decisions are embedded in contexts of inequality and exclusion" (p. 49). Knop also divides commentators on self-determination into those taking a "categories" approach and those taking a "coherence" approach. The former seek to "broaden the interpretation of self-determination by establishing the independent existence of new categories and rules" (p. 50). The latter put forth "a single powerful story of identity" (*id.*). These theoretical frameworks are evaluated using self-determination claims based on a free expression of popular will, corrective justice, and the avoidance of violence. Authors in both schools "inevitably reflect[] and create[] an image or images of those seeking self-determination, the character that makes them worthy or unworthy" (pp. 89–90).

Perhaps most interesting in this section is Knop's close reading of Thomas Franck's[1] and Rosalyn Higgins's[2] writings on self-determination. Both authors strongly oppose expanding either the class of "peoples" or the entitlements of those holding the right in any manner that might threaten the

[1] *See* Thomas M. Franck, *Post-modern Tribalism and the Right to Secession, in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3 (Catherine Brölmann, René Lefeber, & Marjoleine Zieck eds., 1993); Thomas M. Franck, *The Emerging Right to Democratic Governance,* 86 AJIL 46 (1992).

[2] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994).

integrity of existing states. Knop argues that in seeking this result, both writers effectively depart from the general interpretive theories elaborated at length in their other writings. Their view of who is entitled to participate in the self-determining process and of the identity of groups so engaged is, in Knop's view, dictated not by the two authors' well-elaborated theoretical frameworks, but by an alarming vision of the consequences of broadening self-determination. Knop describes this vision as one "of a world on the verge of pandemonium" (p. 91).

Part Two of the book examines self-determination in practice, reviewing four judicial opinions (the *Western Sahara* case,[3] the *Dubai/Sharjah* arbitration,[4] Opinion No. 2 of the Badinter Commission,[5] and the *East Timor* case)[6] and the negotiation of two legal instruments (the International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries[7] and the UN Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)).[8] For *Western Sahara*—decided by the International Court of Justice in 1975—Knop discusses the wide range of substantive claims put forth by the participants, each of which claims is parsed in detail. Both the state litigants and the judges were compelled to ask how contemporary international law should interpret pre-twentieth-century, non-Western notions of identity that carried with them conceptions of ties to territory. In so doing, they were required "to deal with the centrality of European colonialism in international law" (p. 115). The critical question was whether the Court should "provide a new way forward based on the free will of the colonized, taking colonialism as a fact, or [whether it] should . . . look backwards to the precolonial situation, treating colonialism as an injustice done to the previous sovereigns" (*id.*).

Knop's treatment of *East Timor* contains an important insight on the contemporary vitality of the trusteeship principle, which lay at the heart of the UN Charter's original conception of colonialism. The Court found the contemporary right of self-determination to be grounded in instruments that "made no room for the idea of trusteeship" (p. 201) but that demanded, instead, immediate consultation of colonial peoples. The Court thus had an opportunity to ask whether "the traditional understanding of the administering power as the better-knowing trustee still govern[ed] or [whether it] had . . . been replaced by some conception of the administering power as the agent of the people" (*id.*). Because the case never reached the merits phase, this question went unanswered.

In reviewing the ILO Convention and the Draft Declaration, Knop suggests that including some form of a right to secession was seriously debated in both settings.[9] But her review of the drafting histories makes clear that neither instrument was destined to depart from prior practice and subordinate in any manner the established preference for states' territorial integrity. Of more interest is the question of participation, since indigenous peoples groups played a variety of roles in both drafting processes. Consistent with her focus on the perspectives of the actors involved, Knop discounts the importance of participation per se. "[T]he presence . . . or absence of a group does not speak for itself" (p. 214), because "participation is experienced and processed through an idea of participation" (p. 215) unique to each group. She does not take as self-evident the usual assumption that greater participation in norm creation lends the resulting rules a greater legitimacy; "participation has no single meaning, readily apparent to all" (p. 274). Thus, in self-determination cases (and presumably elsewhere), "participation is not a straightforward panacea for the democratic deficit of international law, but requires a more complex analysis" (p. 215).

The final section of *Diversity and Self-Determination in International Law* focuses on the role of gender in self-determination episodes. Knop examines the plebiscites held in Europe following World War I, petitions by women's groups to the UN Trusteeship Council, and claims by indigenous women, focusing on the *Lovelace* case before the Human Rights Committee. Knop treats these episodes as additional instances of international law engaging with a marginalized group. But she also finds them valuable as contributions "to the much-needed larger project of unearthing and examining feminist landmarks in international legal history" (p. 278). Some of the cases demonstrate

[3] 1975 ICJ REP. 12 (Oct. 16).

[4] Oct. 19, 1981, 91 ILR 543.

[5] Conference on Yugoslavia, Arbitration Comm'n Op. No. 2 (1992), *reprinted in* 31 ILM 1497 (1992).

[6] 1995 ICJ REP. 90 (June 30).

[7] No. 169, June 27, 1989.

[8] UN Doc. E/CN.4/SUB.2/1994/2/Add.1 (1994).

[9] In regard to the Draft Declaration, for example, Knop writes that the "issue of secession to be resolved in the declaration on the rights of indigenous peoples was whether to recognize a right to secede and if so, on what basis" (p. 262). And in contrasting two possible readings of the approach of the chair of the Indigenous Peoples Working Group, Knop identifies as a "difficulty" the fact that one reading "seems to justify a more limited right of secession" than the other (p. 273).

remarkable progress by women long before gender equality was codified in international law. In the postwar plebiscites, for example, women voted in all of the referenda that were held—even though they lacked the vote in national elections in many of the affected territories. Similarly, beginning in 1947, the UN Committee on the Status of Women began to review the political rights of women in trust and non-self-governing territories, as well as to condemn social practices such as dowry, suttee (the Hindu custom in which a widow is cremated with her deceased husband), and child marriage. By contrast, however, when the border changes resulting from World War I settlements called for individuals to exercise a "right of option" in choosing their nationality, wives were permitted no right of choice independent of that made by their husbands. Knop makes the interesting point that in justifying this idea of "collective option," European governments equated a woman's duty of loyalty to her family with her duty of loyalty to the state. This strategy was a highly effective one in the intensely nationalistic campaigns mounted to influence the outcomes of the territorial plebiscites.

Cultural bias on the part of decision makers is a central theme in Knop's discussion of gender. Bias is evident for Knop even when the outcome of a particular episode is, on balance, favorable to the women involved. One example concerns a UN Trusteeship Council mission to West Africa, sent to investigate, among other things, claims in a petition challenging polygamy and child marriage in the British-administered Cameroons. In its report, the mission noted both the deep social roots of polygamy and the security that it offered women in precarious economic conditions. It concluded, however, that polygamy's harmful aspects outweighed its benefits, and recommended that the British work for its abolition. The full Trusteeship Council adopted a weaker position, however; after reviewing Britain's report, the council resolved only to condemn compulsory and child marriage "'as set forth' in the petition" (p. 339). Knop describes these and other acts of the Trusteeship Council as revealing "an inability to see either the possibility that gender equality might look different from Western relations between men and women or the possibility that the model they sought to impose encoded the gender hierarchy of their own Western societies" (p. 341).

One important role of international norms is to mediate such problems of intercultural gridlock, at least as a matter of positive law. In some situations, of course, the norms themselves may be criticized as culturally particular. In the case of the Cameroons, however, Knop provides no information on which norms, if any, guided the Trusteeship Council's decisions concerning gender. If none existed, one wonders how else the council should have acted other than steering the middle path that it appeared to choose—namely, between outright condemnation of practices unacceptable to Western standards, on the one hand, and full deference to indigenous practice, on the other.

Knop's microhistory of interpretive episodes thus brings together moments when international law was challenged to bestow rights on groups that not only lacked an established place or status in doctrine, but were culturally, geographically, and in other respects distinct from the European guardians of interstate legal process. Because self-determination is necessarily a group claim, each episode raised pointed cultural challenges for the Europeans. In Knop's telling, each aspect of a group's cultural difference becomes a point of demarcation that reveals multiple departures from international law's putative ideal of universality.

The evidence that Knop uses to demonstrate the insularity of dominant legal institutions is largely a matter of rhetorical analysis. It relies on how groups and ideas are described, and legal claims conceptualized. An insightful example of this approach is her analysis of claims by indigenous women to the Human Rights Committee (chapter 8). Knop shows how even within the Canadian indigenous community, men and women understand group traditions differently. But because of the particular voices that the Committee took to represent the indigenous community—not surprisingly, those of male leaders—the Committee's "deference" to indigenous traditions effectively replicated, in Knop's view, the very patriarchal concepts under challenge.

Despite these many insights, one inevitably returns to the more general question of how to assess the episodes overall. As noted, Knop explicitly disclaims any intention to draw conclusions for legal doctrine as such. At the same time, she clearly does not view the episodes as wholly lacking in systemic implications. The very presentation of the episodes as "landmarks" suggests that they altered or affected a broader intellectual project that is distinct from the events themselves. Similarly, her concern for "a more general problem of diversity," "embedded inequalities" (p. 373), and other implied instances of injustice suggests a normative framework consistent with contemporary human rights law. Knop clearly finds

merit in each of the challenges to equality she reviews, and at one point she describes that evolution in terms that approach doctrinalism:

> The development of self-determination in international law is thus of broader relevance because in it we may find glimmers of striving toward an ideal of interpretation for our age of diversity. While such moments may be downplayed as relatively few, minor or even unsuccessful by this very standard, their instructiveness lies in the attempt, and their hope, in the recognition of inclusion and equality as essential to interpretation. (P. 5)

Every legal system, of course, has specific doctrinal tools designed to measure the success of outsiders striving for inclusion. Doctrines of standing, capacity, legal personality, and the like, as well as a system's potential to expand categories of special legal protection (such as "suspect classes") to include those whose disabilities are newly recognized, all function as gatekeepers to the acquisition of legal entitlements. That Knop has chosen not to assess self-determination directly in these terms is certainly understandable, as there is no shortage of purely doctrinal literature on self-determination. But by presenting the legal arguments in self-determination episodes largely as rhetorical tropes or cultural markers, while at the same time making clear that claimants in these episodes were *entitled* to better treatment, Knop leaves us with no clear means of assessing whether the exclusions have persisted, and if so, to what extent. Clarity on this point would have provided an important linkage between otherwise disparate episodes.

There are other, more specific consequences of rejecting the use of doctrine as a means of assessing the condition of excluded groups. Early in the book, Knop states that she will focus only on external self-determination—the secessionist option—and not address internal approaches that seek to work within the political structures of existing states. The justification for this emphasis is that "external self-determination has attracted the widest range of interpretation and best shows the nature and history of the debate" (p. 19). In other words, it provides better source material for a rhetorical or cultural analysis. But to the extent that self-determination retains any vitality in contemporary practice, it is in its internal form. As noted, state practice has almost uniformly rejected secession as an option.[10] To discuss argumentation strategies or cultural predispositions in self-determination struggles without including the internal option substantially restricts the range of policy choices presented as legitimate alternatives for the parties. Internal strategies are obviously more important in some settings than others—decolonization being a prime example of where they are not. But they are central to the former Yugoslavia and also to claims by indigenous peoples, both of which Knop discusses, as well as to a host of other cases that she does not.

Excluding doctrine as a means of assessing progress may also distort the importance of parties' cultural attributes to legal decision makers. Knop quotes Robert Lansing's famously apprehensive view of self-determination, in which he warned of "the danger of putting such ideas into the minds of certain races," leading to "impossible demands on the [post–World War I] Peace Conference and creat[ing] trouble in many lands" (quoted at p. 8). "The phrase," Lansing concluded, "is loaded with dynamite" (*id.*). Knop takes this statement to suggest that international law "contemplates, with apprehension, those who will clamour unwisely for" self-determination (p. 7). In Knop's words, Lansing argued,

> [i]n effect, . . . that the hot-bloodedness of these races demands the clearest of rules. They cannot be trusted to acknowledge or respect legal distinctions among claimants for self-determination. So whatever the merits of a more nuanced rule or broader principle on self-determination, the rabidity of the Irish, the Indians, the Egyptians [all of whom Lansing mentions] and others makes a simple 'no' rule the only prudent formulation. (P. 8)

While the racist views of decision makers may have contributed to the clear "no" rule that has emerged outside the decolonization context, this factor is surely not the only one at work. States' simple desire to maintain their territorial integrity transcends cultures and has, indeed, been most clearly articulated by African states in the Cairo Declaration.[11] The possibility that secessionists may take with them valuable natural resources is another factor. The inevitable carnage that would attend most secessionist struggles is a third. Most importantly for lawyers, the long and highly contested list of factors suggested as criteria for a valid secessionist claim has made formulation of a more nuanced rule—one that would permit some

[10] This practice is exhaustively reviewed by James Crawford in *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT'L L. 85 (1999).

[11] Organization of African Unity, Border Disputes Among African States, July 21, 1964, OAU Doc. AHG/Res. 16(1), *reprinted in* BASIC DOCUMENTS ON AFRICAN AFFAIRS 360, 361 (Ian Brownlie ed., 1971).

secessions but not others—a virtual impossibility. Yet Knop takes the context-specific experience of a few actors—here, Lansing writing in 1918 about the first normative challenge to dominant European imperialism—as an indication of what international law generally "contemplates" (p. 7). In the end, after consideration of these other variables, a relationship between European racism and the failure of a right to secession may well emerge. But without examining other factors, it is simply not proven.

Another example of the potentially distorting effect of rejecting doctrinal considerations comes in Knop's discussion of the *Western Sahara* case. The General Assembly's phrasing of its questions to the Court required Morocco and Mauritania to show that prior to Spanish colonization, they had ties to the territory that might supersede the will of the present population. Knop concludes that "[s]ince an appeal to 'territory' generally lacks the power of an appeal to 'self', this put Morocco and Mauritania at a rhetorical disadvantage" (p. 118). But it also put them at an enormous *legal* disadvantage. As Thomas Franck wrote in his separate opinion in a preliminary phase of the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case:

> Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law . . . Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.[12]

Absent this important point of doctrine, rhetorical constructs appear to play an unduly enhanced role in argumentation before the Court.

In the end, the search for a doctrinal context in which to situate Knop's microhistory may matter little. Her focus is the episodes themselves. As discrete analytical units, her chapters shine, illuminating how the use and application of self-determination cannot be divorced from conceptions of the marginalized claimants. But it is just because these specific discussions are so insightful that the reader is left wondering about their more general implications.

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[12] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application of the Philippines for Permission to Intervene, Sep. Op. Franck, J. *ad hoc*, para. 15 (Int'l Ct. Justice Oct. 23, 2001).