Book Reviews

Karen Knop. ***Diversity and Self-Determination in International Law.*** Cambridge: Cambridge University Press, 2002. Pp. xxii + 434. ISBN 0–521–78178–7.

From a political notion to a matter of international law, the self-determination of peoples has been a conceptual and operational driving force for change since US President Wilson championed it in the aftermath of World War I. Its liberatory thrust, which was made a fundamental legal pillar of the decolonization process, has taken on new impetus in recent years as a result of the emergence of new states following the end of the Cold War, as well as the complex dynamics attached to them domestically.

Whereas mainstream approaches problematize contemporary legal self-determination through the distinction between its external and internal dimensions, Karen Knop's *Diversity and Self-Determination in International Law* highlights the challenge of cultural and gender identity to international legal practice, with a focus on the contested right to secession. She aims to avoid the 'impervious generality' (at 2) of the doctrinal debate as to whether and when a right to independence arises from the self-determination precept by offering a wider perspective that exposes the implicit or explicit interaction between diversity and interpretation in the history of external self-determination and its implications for the claims of the peoples involved.

In essence, Knop's point is that, instead of an indefinite contest over meaning, the discussion about self-determination should be defined by a reflection on the changing impact of the practice of interpretation on the identity, and participation in the process, of such traditionally marginalized groups as colonial and nomadic peoples, ethno-cultural minorities, indigenous peoples and women. Furthermore, the very understanding of the identity of such groups should be seen as crucially significant to the greater or lesser appeal of one interpretation over another. This sets the theme of the book, which is centred on the 'fluidity of interpretive practice' (at 16) — as opposed to providing an exhaustive critique of self-determination or a single best legal account of its specific articulation — and the patterns of exclusion or inclusion embedded in that practice. Indeed, following a survey in Part I on doctrinal views generating, or generated by, assumptions about those who are worthy or unworthy of protection, Parts II and III offer a case-based 'new micro-history' (at 11) of critical engagement that strives to equalize perspectives along cultural and gender lines in the experience of external self-determination and, ultimately, international law in general. The author cautiously acknowledges, though, that this is just one history of attempts, and is rooted in just one set of stories from the margins out of many, both within and outside the groups concerned.

Knop uses the debate about the characterization of self-determination as a rule and/or principle of international law to show what interpretation can broadly entail. She emphasizes how contestable the arguments relating to this debate might be as long as a different conception and narration of the international community are chosen. In this respect, the flexibility of principles, it is maintained, may well be construed as substantively conservative rather than progressive, hostile rather than conducive to equal state participation, unfit rather than congenial to an increasingly diverse and unstable world. By so doing, she paves the way for a closer look at the interrelationship between interpretative approaches and the identity

and participation of groups. And, in effect, Knop argues, both the doctrinal search for new typologies triggering self-determination (called the 'categories' approach) and the doctrinal development of grand narratives of it (called the 'coherence' approach) — whether in relation to the notion of 'people' (mostly defined by ideas of *demos*, *ethnos*, colonial/non-colonial, etc.) or directly to the right to independence (often explained positively or negatively through corrective justice, remedial secession, or security theories) — create, reinforce or alter the image of the groups seeking self-determination 'in ways that we or they may find disturbing or comforting, alien or familiar, strategic or genuine, respectful or demeaning'. (at 51)

The argument is further illuminated by the proposition that groups' images and identities may constitute not only the effect but also the implicit cause of any particular scholarly interpretation of self-determination. This is illustrated by what the author sees as an underlying shift in Thomas Franck's writings from the earlier *ethnos* discourse — now associated *tout court* with 'post-modern tribalism' devoid of legal implications — to the universe of *demos* smoothly making its way into a participation-based legal right to democratic governance abstracted from individual, though important, political events; and in Rosalyn Higgins' somewhat untypical insistence on categories rather than policy, on rules rather than process, in dismissing secessionist claims from ethno-national groups. As a matter of fact, both Franck's and Higgins' rights models appear to be less rigid towards identity than Knop is willing to concede: the first also emphasizes the absence of a norm in international law prohibiting secession of ethno-cultural groups; the second also enters the caveat of remedial secession in the event of gross human rights abuses against minorities.[1] But one can hardly disagree with the author that the ethno-cultural dimension to such views is philosophically perceived as a discourse about containing chaos and illiberal stances rather than a way of expressing a wide conceptual engagement with the complexities posed by the corresponding claims — an element that figures highly throughout the book.

While confirming interpretation as an open process, Knop thus offers ground for counter-narratives going beyond traditional scholarship on self-determination. She examines: the International Court of Justice's efforts in *Western Sahara* to capture the identity of certain Muslim tribes — and even wider historical identities affected by colonialism — through its interpretation of the concepts of *terra nullius*, legal ties and legal entity, as it rejected Morocco's and Mauritania's claims to territory that included those tribes; the embrace by some of the Court's judges of varying degrees of cultural functionalism, most notably to redefine an existing concept (Judge Ammoun's understanding of *terra nullius*), or to make it work in that particular, non-Western context (Judge Dillard's approach to legality and legal ties); the 'new geometry' (at 186) reflected in the European Community Arbitration Commission Opinion No. 2 on Yugoslavia, whose originality would lie, in the author's view, in its refusal to confine the recognition of Serbian identity within the territory of the state and its suggested link of self-determination with a new trans-border nationality recognizing Serbian *ethnos*; the representation of identity resulting from a reconceptualization of the 'sacred trust' in Article 73 of the United Nations Charter in the arguments and opinions presented in *East Timor*, with their dismissal of the principle of tutelage and their emphasis on East Timorese representation and consultation; as well as other cases mostly pointing to institutional, as distinct from judicial and quasi-judicial, interpretative perspectives on self-determination and group (including gender) protection. On a closer look, although most of these cases revolve (directly or indirectly) around external self-determination, one is left to wonder whether and to what extent they present any truly genuine

[1] Higgins, 'Minority Rights: Discrepancies and Divergences between the International Covenant and the Council of Europe System', in R. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, vol. III (1994), at 195 *et seq.*, 198.

connections with secession indicated as the substantive area of the inquiry. Whereas it is involved (though not necessarily centrally implicated) in the opinion on Yugoslavia and the later discussion about indigenous rights, overall the theme tends to evaporate in the practice that is examined. Consistent with the book's mantra, Knop in fact invites the reader to a historical journey through the broader ramifications of legal reasoning and the range of possibilities they provide in respect of a host of issues affecting diversity that are far from exhausted by secessionist claims per se.

Whatever one's views of this line of discourse, the implications attached to some of the legal constructs to which the author draws attention seem problematic. For example, it might be questioned whether the reference to a trans-border nationality made by the European Community Arbitration Commission in its opinion relating to the situation of the Serbian population in Bosnia and Croatia can be really valued as a way forward for the international law of self-determination. First, the Committee's statement is, at best, unclear, while the connection between self-determination and human rights that precedes such a statement should arguably account for minority rights instruments that do *not* endorse the notion of pan-ethnic communities but instead recognize free and peaceful contact rights across state borders. Second, the Commission's mention of inter-state agreements endorsing pan-Serbian nationality casts doubts as to whether it is treaty law, rather than self-determination, that is being offered as the legal basis of this. Third, the Commission at no juncture affirms a distinctive right to self-determination for the Serbian minorities in Bosnia and Croatia. Rather, it points to a comprehensive process with minority rights at the epicentre of the system. Yet, Knop's insistence on the above group right generates a separate discourse about transnational identifications (curiously inferred from what the Commission itself frames in the language of individual rights), de facto abandoning the previously acknowledged distinction between 'minorities' and 'peoples' for self-determination purposes. More importantly, that insistence reduces multicultural democracy — seemingly associated by the Commission with a reassessment of the legal understanding of 'people' — to a project of new sovereignty that is largely symbolic. Indeed, on that assumption, the fundamental legal space for the group would lie outside the state where their members live. In highlighting this option, Knop does not seem to be concerned about its potentially serious human rights implications, whether or not in connection with dual nationality, as has been pointed out with regard to the 2001 Hungarian law on kin-Hungarian minorities abroad,[2] not to mention the appalling Bosnian experience itself. Fourth, the analogy with the supranational identity reflected in EU citizenship is equally puzzling. The latter is meant to transcend, not affirm, ethno-cultural identity. The notion that multicultural democracy can temper internally the excesses of *ethnos* externally — just as EU citizenship is supposed to temper nation-state affiliations — does not match the reality of internal nation-state systems being tempered, not by a diffuse European multicultural project,[3] but by more general external affinities and decision-making processes.

The theme of a legal construct operating as an interpretative filter between democracy and identity in a way that neither classical *demos* nor exclusionary *ethnos* can prevail is somewhat implicitly echoed in Knop's reading of the *Lovelace* case, involving an indigenous woman. The case turned on whether Sandra Lovelace's loss of her Indian status under domestic law violated the ICCPR. The author frames the Human Rights Committee's focus on Article 27 ICCPR, particularly the statutory limits placed by Canada that interfered in the enjoyment of Article 27 rights, in terms of

[2] See e.g., the Report on the preferential treatment of national minorities by their kin-state prepared by the Council of Europe's Venice Commission in late 2001, CDL-INF (2001) 19.

[3] The EU's well-known reluctance to endorse an internal minority rights policy is only one major reflection of the traditional difficulties encountered by European states in legally defining themselves as truly multicultural entities.

defining a minority space that interposes itself between the universalistic vision of the equal rights of women and the complexities raised by Lovelace's indigenous belongingness, the self-determination demand of the group itself, and the legacy of colonialism. Although Knop rightly emphasizes the ethno-cultural perspective ignored by the scholarly view prioritizing standard equality, she also appears to downplay the fact that minority rights themselves (whether in the form of indigenous autonomy, membership or otherwise) are not an 'equality-free' area, as broadly indicated in *Lovelace* and specifically confirmed in later General Comments of the Committee.[4]

Certainly the uniqueness of indigenous peoples tends to complicate categories in human rights law, and the actual degree to which indigenous claims find a place in international law very much depends on the process that is designed to address them. In Chapter 5, Knop interestingly contrasts the role of the International Labour Organisation's drafters of Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries as interested experts serving the Organization's tradition of pragmatic functionalism, with the mediation — and more equalizing — approach adopted by the UN Working Group on Indigenous Populations during the drafting of the draft declaration on the rights of indigenous peoples. In both cases, indigenous groups were involved in the process and voiced their claims. Yet, the author argues, lower or higher levels of non-state participation have no single meaning per se, since the participants may be viewed as unhelpful visionaries, information providers (ILO process) or equal partners with state actors (Working Group process), thereby defining how they themselves perceive the legitimacy, inclusiveness, and thus responsiveness of the exercise. As is indirectly highlighted by the problematic combination of a rights model of self-determination with historic claims (mostly favoured by indigenous peoples) offered by the Working Group's Chairperson, Erica-Irene Daes, the fundamental challenge ultimately lies not only in whether, but also in *how*, we capture identity in the international law discourse.

This is further illustrated from the wider perspective of women's identity, discussed in Chapters 6 to 8. The analysis articulates the challenge of gender to the substance of pre- and post-1945 self-determination in ways that progressively expose the complex role of women as members of the 'self' — from the classical equality issues posed by the right to vote in the inter-war plebiscites and the separate right of option that followed, to the complications implied by women's identity in trust territories and within indigenous communities. The assessment of the first two issues reveals successes (women's vote in the plebiscites), limitations (unclear evidence of state acceptance of women's view of that vote), and failures (men-only vote for some planned plebiscites, and dependent nationality of married women linked to broader narratives of gender and the international legal order) of the international law response to women's activism. Knop subsequently presents the versions of women's issues emerging from the process of colonial self-determination as 'objectifying' (at 356) women to varying degrees. In this sense, the contributions of Western women's organizations, the UN Commission on the Status of Women, and the UN Trusteeship system are contrasted with the reality of the subjective identity of the women involved. It is the petitions from the women of trust territories to the Trusteeship Council and, in connection with indigenous women, the *Lovelace* case that are used to illuminate the intricacies of such identity. They in effect extend to matters of substantive equality and culture, sidelined by an important, yet almost exclusive focus on individual equality, civil and political rights as well as

[4] HRC General Comment No. 23 (50) on Article 27, UN Doc./CCPR/C/21/Rev.1/Add.5 (1994), para. 6.2; HRC General Comment No. 28 (68) on Article 3 (equality of rights between men and women), UN GAOR, 55th Session, Supplement 40 UN Doc. A/55/40 (2000), Vol. I, Annex VI, Section B, para. 32. The same point has been made by several commentators and interested parties regarding controversial aspects of indigenous rights protection.

protection of physical integrity, on the one hand, and by Western (notably European) models of gender relations (and hierarchy) and later non-Western anti-colonial priorities, on the other.

Looking back at this practice comprehensively, equal rights, recognition of cultural differences or even attendance to cultural perspectives, are all distilled as viable responses to the challenge of diversity. All, however, vary in scope and reach. For example, the ones based on formal equality differ from others resting on positive equality, and the dialogic acceptance and rejection of indigenous views in *Western Sahara* differ from the far more ambitious attempt at 'rebuilding' (at 379) international law across truly universal lines reflected in some of the interpretative efforts discussed. Nevertheless, in addressing the problem of partiality and group exclusion, interpretation here is said to look more promising as a means of reconciling perspectives than the prevailing categories and coherence approaches to self-determination/secession seem to allow. Responsiveness to diversity may come in the form of reasons, results or both, and the reasons offered in one case may possibly lead to results in another (illustrated by the impact of *Western Sahara* on the recognition of aboriginal title in *Mabo v Queensland (No. 2)* before the High Court of Australia). Yet, Knop emphasizes, the above responses 'yield no single method of interpretation, uniform direction or perfect balance point between identity and participation' (at 377). But does that raise a question of interpreting, and thus embodying, diversity differently (somewhat echoing the diverse range of interpretative orientations emerging from the relevant practice), or is it that diversity itself needs to be unpacked? Two observations may be submitted in this regard.

First, the book's focus on external self-determination arguably affects, at least in part, the way in which the challenge of culture and gender is portrayed. The internal link between self-determination and human rights suggested by Arbitration Commission Opinion No. 2 is referred to only in passing, while the (tentative) establishment of 'transnational social identifications' (at 378) is said to be key to giving the population group in question a voice. Most indigenous peoples are not really interested in secession, yet Knop leaves the fundamental debate about autonomy schemes unexplored. Her reading of *Lovelace* also assumes independence as the ultimate indigenous objective (at 359, n. 4), questionably relaxing the equality dimension to minority and indigenous rights within the state. This indirect reductionism hardly matches Knop's framing women's issues within the external self-determination context, as part of the 'larger project of unearthing and examining feminist landmarks in international legal history'. (at 278) Second, and more importantly, the book's broad characterization of the challenge of diversity may prove unclear, if not misleading, to the extent that it legally visualizes selected forms of difference and how to possibly accommodate them rather than addressing the reasons why any particular sort of difference is or should be supported by international law in the first place.[5] The issue goes in fact far beyond the questions of 'romanticization' (at 380) and 'equal respect' (at 381) of groups' standpoints cautiously evoked in the concluding section. By depicting a mosaic of third-party judgments on diversity, ranging from the nomadic peoples' social and religious practices in *Western Sahara* to the articulated women's campaigns and demands, Knop aims only at 'recreating a sense of the enterprise' (at 377) for future interpretative work. While flowing from a tightly-argued discussion, this is apparently of no less 'impervious generality' (at 2) than the debate on self-determination from which the analysis begins. Nor is it more reassuring about the boundaries of interpretation in the face of the ideal of a universal international law based on a Rawls-type over-

[5] For example, there exists substantial difference between identity-based claims to minority rights and claims deriving from broadly construed communitarian views, see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at 129.

lapping consensus across cultures and genders that the author seems to uphold.

Still, at a time when ethno-cultural and women's perspectives are running high on the global agenda, Knop's intriguing approach must be given credit for thoughtfully shedding light on the multifaceted and typically controversial role of interpretation in the international legal history of self-determination and group identities in general.

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Baderin, Mashood A. ***International Human Rights and Islamic Law***. New York, NY: Oxford University Press, 2003. Pp. 279, including Annex, Glossary, Bibliography and Index;
Khan, Mainul Ahsan. ***Human Rights in the Muslim World: Fundamentalism, Constitutionalism and International Politics***. Durham, NC: Carolina Academic Press, 2003. Pp. 489, including Appendix of Documents, Glossary of Islamic Terms and Index.

Despite the similarity in their titles, these are quite different books in many ways. I am examining them together because their combined subjects and themes are revealing of the complexity and contingency of protecting and promoting human rights today, which is the point I shall be attempting to make in this review. The compatibility of Islamic law with modern notions of democracy and constitutionalism, and more recently human rights, are familiar themes in current Islamic scholarship. This sort of scholarship is particularly important for informing public policy in the present international environment, amidst claims of a 'clash of civilizations', to rationalize extraordinary measures in the 'war against terrorism' in which Islam is popularly represented as inherently violent and incompatible with civility and peaceful co-existence. But the sort of dialogue that Baderin seeks to promote between international human rights and Islamic law can work only when it is mutual and not a *solitary dance*. Whatever conceptual or theoretical clarity such a dialogue may achieve needs to work through the complex realities of national politics and international relations that Khan analyses in his book in relation to a particular region of the world.

Baderin declares his aim in writing *International Human Rights and Islamic Law* to be 'construct[ing] dialogue between international human rights law and Islamic law to promote the realization of human rights within the context of application of Islamic law in Muslim States'. (at 2) He rightly emphasizes the practical importance of conceptual differences between the two systems, and proposes a framework to mediate tensions that underlie perceptions of the inherent incompatibility of Islamic law and human rights law. This framework draws on the Islamic law principles of '*maqaasid-al-Shari'ah*' (overall goal of the *Shari'ah*) and '*maslahah*' (welfare), on the one hand, and the human rights law principle of 'margin of appreciation', on the other.

In Chapter 2 Baderin presents a masterful and thoroughly documented definition, exploration, and historical analysis of both 'human rights' and 'Islamic law'. He also introduces a distinction between universality of, and universalism in, human rights. (at 23–26) '"Universality of" human rights refers to the universal quality or global acceptance of the human rights idea, while "universalism in" human rights relates to the actual interpretation and application of the human rights idea'. (at 23) This distinction between universality as a theoretical construct and universalism as a sociological and political reality can be useful because promoting consensus around the former can be conducive to overcoming obvious difficulties with the latter. But as I will emphasize later in this brief review, the failure to live up to the values of international legality and universality of human rights can render theoretical consensus meaningless.

Baderin discusses four categories of Islamic responses to the human rights debate (at 13–16): namely, the inherent incompatibility claim; the view that true human rights can