

INTRODUCTION:

Global Dimensions of Indigenous Self-Determination



Seth Davis*

Indigenous Peoples are well aware that economic, social, and legal globalization is not a phenomenon of the twenty-first century alone.¹ Laws of colonial rule, such as the doctrine of discovery, have long had transnational and international dimensions. And while Indigenous self-determination may be rooted in particular places and spaces, Indigenous Peoples have forged transnational ties and emerged as self-determining subjects of international law in their own right.² This symposium issue presents work from the 2016 World Indigenous Law Conference, which was hosted by the Seventh Generation Fund for Indigenous Peoples and titled “Rights, Responsibilities, and Resilience: An International Discourse on Indigenous Peoples’ Jurisprudence.” It addresses doctrinal, historical, economic, and social dimensions of Indigenous Peoples’ self-determination within a world of transnational and international law.

* Professor of Law, University of California, Berkeley School of Law. Email: sdavis@law.berkeley.edu.

¹ While it is useful, as an analytical matter, not to conflate the legal pluralism arising from colonization with the legal globalization arising from economic and social globalization, the two phenomena resemble one another in important ways. Cf. Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 244 (2009) (“Many of the challenges that globalization poses to traditional legal thought closely resemble those formulated earlier by legal pluralists. The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences—all of these topics of legal pluralism reappear on the global sphere.”).

² Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 174 (2014) (describing “a jurisgenerative moment in indigenous rights—a moment when both the concept and practice of human rights have the potential to become more capacious and reflect the ways that individuals and peoples around the globe live, and want to live, today”).

Indigenous Peoples are subjects of international law with rights to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples, among other international instruments, recognizes a right to Indigenous self-determination, by virtue of which Indigenous Peoples may “freely determine their political status and freely pursue their economic, social and cultural development.”³ In pursuing their status as self-determining Peoples, Indigenous Peoples are a familiar presence at international fora and active participants in global human rights movements, not to mention lawmakers in their own right.⁴

Thus, the international law of Indigenous human rights is not the product of nation states acting alone. At the same time, the domestic law of colonial rule continues to pose a challenge for Indigenous Peoples. The movement of legal rules of colonial rule across borders highlights the transnational dimension of this challenge; a nineteenth-century precedent from the U.S. Supreme Court may be taken up by a modern-day court in another colonial state. In response to the transnational movement of legal rules of colonial rule, Indigenous Peoples have built transnational and international networks to advocate for Indigenous self-determination. Through these global networks, Indigenous Peoples may also cooperate with or resist the actions of nongovernmental actors, including NGOs and multinational corporations. This symposium addresses processes of social, economic, and legal globalization and the opportunities and challenges they create for Indigenous Peoples.

The four symposium contributions consider the global dimensions of Indigenous self-determination in different ways. *Robert Miller* focuses on the past, present, and future of the doctrine of discovery. He explores how this doctrine, which he labels the “international law of colonialism,” has impacted Indigenous Peoples and sketches a path towards its repeal. *Walter Echo-Hawk* also considers the past, present, and future of law concerning Indigenous self-determination. He argues that Indigenous Peoples face a moment of opportunity, one in which international human rights law may be incorporated into the domestic law of nation states in order to support Indigenous self-determination. *Naomi Lanoi Leleto* and *Robert Hershey* focus on a different dimension of Indigenous self-determination in an era of globalization. Their contributions consider how Indigenous Peoples may resist destructive social and economic forces of globalization.⁵ Leleto offers a thick description of the ways in which the Maasai, an Indigenous community in Kenya and Tanzania, have worked to protect their cultural resources against exploitative tourism.

³ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁴ See, e.g., Carpenter & Riley, *supra* note 2, at 175–80.

⁵ See generally Geneva E.B. Thompson, *Environmentalism and Human Rights Legal Framework: The Continued Frontiers of Indigenous Resistance*, 4 UCLA INDIGENOUS PEOPLES' J.L., CULTURE & RESISTANCE 9, 10–11 & n.3 (2017) (discussing an Indigenous “resistance strategy,” in the form of “creation and utilization of specific tribal, state, federal, and international laws to honor and enhance sovereignty” of Indigenous Peoples).

Taking a global perspective, Hershey surveys how Indigenous Peoples have sustained their territorial and cultural integrity in the face of processes of commodification and ecological destruction.

Miller's *The Doctrine of Discovery: The International Law of Colonialism* critiques the doctrine of discovery.⁶ In its American formulation, this doctrine holds that “discovery [of Indigenous lands] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments.”⁷ As Miller emphasizes, this doctrine has not been confined to America alone, and instead has been cited repeatedly in other colonial states with common law traditions. The doctrine is rotten root to stem, Miller argues, insofar as it rests on ethnocentric justifications and legitimates colonial governments’ refusal to recognize the rights of Indigenous Peoples. Miller concludes by calling for all states and international actors to repudiate the doctrine and review, in consultation with Indigenous Peoples, existing domestic and international laws with the aim of advancing Indigenous self-determination and human rights.

In *March Toward Indigenous Justice*,⁸ Echo-Hawk looks to international human rights law as the next step in a march towards justice for Indigenous Peoples. Focusing on U.S. domestic law, Echo-Hawk considers “strategic law development” from an Indigenous perspective.⁹ Within the United States, he argues, Indigenous Peoples have made the best of a challenging body of law, one rife with internal contradictions. On the one hand, U.S. law’s Indian trust doctrine directs the United States government to treat American Indian Nations with the loyalty and care of a fiduciary towards the beneficiaries of a trust.¹⁰ On the other hand, U.S. law recognizes a federal plenary power that authorizes Congress to deny Indigenous property rights and self-determination.¹¹ The strategic challenge for Indian Nations and their advocates, Echo-Hawk argues, “is to save the very best, most protective features from the old framework and [to] merge them with the new human rights framework” of international law.¹² Comparing this challenge to that faced by the NAACP on its “march to victory” in *Brown v. Board of Education*, the U.S. Supreme Court’s famous school desegregation decision, Echo-Hawk concludes

⁶ Robert J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 UCLA INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE 35 (2019).

⁷ Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

⁸ Walter Echo-Hawk, *March Toward Indigenous Justice*, 5 UCLA INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE 7 (2019).

⁹ *Id.* at 16–19.

¹⁰ See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (explaining that United States must treat with Indian Nations as a trustee for their interests).

¹¹ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”).

¹² Echo-Hawk, *supra* note 8, at 10.

that American Indian Nations “stand at [a] crossroads,” with the path forward being paved with the language of human rights.¹³

Leleto similarly focuses on the responsiveness of domestic law to Indigenous human rights, but considers a different dimension of the question in *Maasai Resistance to Cultural Appropriation in Tourism*.¹⁴ Her focus is on the cultural rights of the Maasai and her starting point is Kenya’s Traditional Knowledge and Traditional Cultural Expressions Act. This Act, she argues, presents both an opportunity and a challenge. Because the Act recognizes an intellectual property right held by Indigenous communities themselves, it presents an opportunity for the Maasai to assert their right to cultural self-determination and to resist the exploitation of their cultural resources by non-Maasai. But the Act also presents a challenge of implementation, which creates the risk of conflicts among and within Maasai communities. To meet this challenge, Leleto considers several approaches to responsible tourism and sketches a pluralist solution that would marry traditional Maasai knowledge and governance with a nonprofit corporate organization. “Can a Tribe Sue for Copyright?” one business commentator has asked.¹⁵ As Leleto sees it, the answer is “yes.” She describes a general assembly of Maasai elders, trained in intellectual property law and operating through a corporate form to enforce Maasai rights within Western legal systems. Such a model, she suggests, may be part of the future of Indigenous cultural self-determination on a transnational scale.¹⁶

Hershey invites us to think about Indigenous self-determination on that scale. He surveys Indigenous persistence and resistance in the face of various economic and social threats from globalization. In *‘Paradigm Wars’ Revisited: New Eyes on Indigenous Peoples’ Resistance to Globalization*,¹⁷ Hershey argues that economic globalization poses a particularly pressing threat to Indigenous Peoples: “Many Indigenous systems of collective economic production and distribution do not conform to capitalism’s cultural emphasis on individual accumulation.”¹⁸ Notwithstanding this structural and cultural incompatibility, many Indigenous Peoples around the world have persisted despite colonial rule, ecological destruction, and social dislocation. Thus, the story Hershey tells is not a tragedy. Instead, it is one in which Indigenous Peoples have pushed and

¹³ *Id.* at 19.

¹⁴ Naomi Lanoi Leleto, *Maasai Resistance to Cultural Appropriation in Tourism*, 5 UCLA INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE 21 (2019).

¹⁵ *Id.* at n.65 (citing Stephan Faris, *Can a Tribe Sue for Copyright? The Maasai Want Royalties for Use of Their Name*, BUS. WEEK (Oct. 25, 2013, 7:29 AM), <http://www.businessweek.com/articles/2013-10-24/africas-maasai-tribe-see-royalties-for-commercial-use-of-their-name>).

¹⁶ *See id.* at 33–34.

¹⁷ Robert Alan Hershey, *‘Paradigm Wars’ Revisited: New Eyes on Indigenous Peoples’ Resistance to Globalization*, 5 UCLA INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE 43 (2019).

¹⁸ *Id.* at 47.

negotiated for recognition of their lands and rights to self-determination. To cite but one of many examples, Hershey describes how the Poplar River First Nation and the government of Manitoba, Canada, agreed upon legal protection for approximately two million acres of forest on the Nation's aboriginal lands.¹⁹ There are difficult questions, as Hershey describes, in the design of protocols for consultation and collaboration between and among Indigenous Peoples, nation states, nongovernmental organizations, and multinational corporations. But there are also new opportunities for Indigenous Peoples to meet these challenges, not only through international legal strategies, but also through the strategic use of traditional knowledge and cutting edge technologies of communication.²⁰

Indigenous self-determination is in the midst of a global moment. Indigenous Peoples are engaging with nation states, NGOs, and multinational corporations not only in their local places and spaces, but also on a transnational and global scale. These symposium articles help us understand not only the past and present but also the future of Indigenous self-determination in a global economy and a world of transnational and international law.

¹⁹ *Id.* at 74–75.

²⁰ *Id.* at 102–11.

