BUCHBESPRECHUNGEN / BOOK REVIEWS

Julia Kriesel, **Peoples‘ Rights: Gruppenrechte im Völkerrecht, Jus Internationale et Europaeum 162,** Mohr Siebeck, Tübingen 2020, 506 pages, 89 Euro, ISBN: 9783161577215

They are the “unknown category of law”[1]. An inexplicable, unenforceable, vague maverick in the evolution of human rights: Peoples’ rights. For decades, this category of human rights existed in the shadows of academic interest, an anomality to occasionally marvel at in fascination, but not to take seriously. Too deeply entrenched in the international culture of human rights is the Western liberal notion that human rights can only be attributed to individuals. Rooted in the age of enlightenment, this notion has transcended into the fundamental sources of contemporary human rights law. Thus, it is the dominant assumption that collective human rights must be an impossibility as they, by definition, exist beyond the classical relationship of states and individuals. Yet, as usual, reality is a little more complex.

In her phenomenal thesis on Peoples’ Rights in International Public law, *Julia Kriesel* takes up the challenge to radically question the general notions on peoples’ rights in the international discourse on human rights. With great curiosity and attention to detail, she examines how collective rights have, slowly but surely, developed into essential components of human rights theory and practice.

Since 1947, the *American Anthropological Association* (AAA) called for the incorporation of peoples’ rights into human rights law. Western communitarian thinkers, such as *Michael J. Sandel* and *Charles Taylor*, began to argue in favour of a perception of the individual as embedded within certain groups (p. 29ff). This notion of the individual as an inseparable part of a social system motivated attempts to complement the existing twin covenants of the United Nations with a third international covenant for solidary rights. However, these attempts to anchor group rights in a legally binding instrument have so far remained futile. The international community struggles with the recognition of groups as – at least partial – subjects of international law. This hesitancy corresponds with almost non-existent references to groups in universal human rights documents. Indeed, only the UN Convention on Genocide acknowledges collective rights to some extent by stipulating a right to the physical existence of a people.

Instead, in 1981, the African Charter on Human and Peoples’ Rights (so-called *Banjul* Charter) became the first legally binding human rights instrument committed to the protection of peoples’ rights. It appears, however, that the integration of group rights into African human rights law did not help to overcome the “cultural shock” (p. 21) of the international community in the face of potential collective claims of rights. It merely solidified the image of the African human rights system as the exotic animal in the international human rights

1 This and the following quotes have been translated by the author.

zoo. From a present perspective, it is quite astounding to witness that what has once been perceived as a ridiculous particularity of the African human rights system does, in fact, place it at an advantage in the protection of common goods, turning it into a role model that other human rights bodies might turn to for guidance.[2]

In light of the general absence of collective human rights in international human rights law, *Kriesel* focuses her work on the development of group rights within the three major systems of regional human rights protection. The history of enforcement of group rights began to unfold in 2001 with two ground-breaking decisions: The Inter-American Court of Human Rights (IACtHR) recognized collective property rights of indigenous peoples for the first time in *Awas Tingni v. Nicaragua*[3] (p. 204ff.), and the African Commission on Human and Peoples' Rights (AfrCommHPR) proclaimed the enforceability of all group rights laid down in the *Banjul* Charter in its landmark decision on behalf of the people of Ogoniland.[4]

After providing an enlightening introduction in the first chapter, *Kriesel* dedicates the second chapter to approach group rights from a theoretical perspective. In order to formulate the central questions of her analysis, she turns to the fundamental paradigm of subjective rights: legally protectable interests or claims by legal subjects to particular legal objects. As *Kriesel* observes, two of these three criteria are highly controversial with regard to collective rights, namely the nature of the legal subjects and of the protectable interests. Unsurprisingly, it is the question of who these groups are that dominates broad sections of this work. In general, *Kriesel* distinguishes between groups in a broad and a narrow sense (p. 81ff.). The first category captures groups as mere collectives of individuals with separable rights and interests, such as 'the women' or 'the workers'. In contrast, groups in a narrow sense are capable of forming some kind of identity beyond the collective interests of their members. According to *Kriesel*, genuine group rights are rights which can only be held by collectives. However, as she clarifies throughout her analysis, the elements that constitutes a group vary between the regional human rights systems and occasionally even from decision to decision made by the same human rights institution. Consequently, she conducts separate analyses of the three major regional human rights systems in America, Europe and Africa in chapters 3, 4, and 5. Drawing from her extensive research and findings of the previous chapters, *Kriesel* then summarizes the essential elements of her theory of group rights as human rights in chapter 6.

The comparative analysis of the regional human rights systems reveals highly different developments and levels of integration of collective rights, with the African human rights system standing at the forefront of efforts to promote collective rights. The African system

2 Like the IACtHR already did in its *Saramaka* decision by refering to the Ogoni decision of the AfrCommHPR, for further detail see *Kriesel*, p. 220.

3 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C 79, 31.8.2001.

4 AfrCommHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 155/96, 27.10.2001.

has fundamentally been shaped by the perception of the individual as an integral part of its social group. Community and individual are interdependent, as is perhaps best described by the concept of *Ubuntu*, roughly translated as "I am because we are". The integration of collective rights and individual duties are normative proof of the communitarian influences on the drafting process of the *Banjul* Charter (p. 272ff.). The articles 19 to 24 *Banjul* Charter explicitly stipulated peoples' rights to common goods: the right of all peoples to equality and rights, the right to self-determination, the right to free disposal of wealth and natural resources, the right to economic, social and cultural development, the right to national and international security and peace, and the right to a satisfactory environment. However, notwithstanding the normative commitment to peoples' rights, the *Banjul* Charter is silent on the meaning of the term 'people'. Instead, the task of interpretation falls on the AfrCommHPR and the AfrCtHPR. The AfrCommHPR used the opportunity of the *Endorois* case[5] to elaborate for the first time in detail on the term 'people' (p. 285ff.). The famous case concerned a complaint against the Kenyan government about the forced removal of the *Endorois* peoples from their ancestral lands, preventing the community to practice their traditional way of life on their ancestral lands. In its decision, the AfrCommHPR developed a broad conception of the term 'people', based on a flexible and interchangeable set of objective and subjective criteria. According to the AfrCommHPR, the decisive element, however, is the self-identification of a certain group as a people. The African Court on Human and Peoples' Rights (AfrCtHPR) confirmed this interpretative approach in its *Ogiek* judgement, the first decision by the court on collective human rights, in May 2017.[6] In line with the standard practice of the AfrCommHPR, the court concentrates on elements that unite a community and shape their common identity (p. 283ff.).

Within the Inter-American system, the emergence of group rights is intrinsically linked to the protection of indigenous peoples and comparable communities (p. 201ff). There is a growing awareness for the endless experiences of injustice of indigenous peoples which led the Inter-american human rights institutions to continuously promote their rights since the adoption of the *Awas Tingni v. Nicaragua* decision. From a legal standpoint, it is important to emphasise, that the AmCHR does not protect group rights *de lege lata*. It does, however, provide a pivotal loophole: Art. 29 (b) AmCHR prohibits any interpretation of the Convention which might restrict "the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party […]". This provision blazed the trail for the incorporation of national guarantees of peoples' rights, such as collective property rights, into the regional human rights practice. In addition, the IACtHR has performed a major paradigm shift with regard to the recognition of groups as genuine legal subjects. Until 2007, the court held that members of an injured community must be named individually. However, in

5 AfrCommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 25.11.2009.

6 AfrCtHPR, *African Commission on Human and Peoples' Rights v. Kenya*, 006/2012, 26.5.2017.

Saramaka people v. Suriname[7], the IACtHR declared the *Saramaka* people itself as the injured party and, thus, confirmed their right to be recognized as a legal subject. Then, in 2012, it took the decisive step to recognize indigenous communities as subjects of international public law in *Sarayaku v. Ecuador*[8]. Due to the lack of guidance by general international public law, the Inter-American human rights institutions also face the problem of how to conceptualize groups. For instance, it is commonly acknowledged that minorities are groups in the genuine sense. However, international public law offers no definition on what constitutes a minority. Even the Framework Convention for the Protection of National Minorities (1998) of the Council of Europe, hailed as one of the most comprehensive instruments on minority rights, establishes no criteria whatsoever for the determination of a minority. The Inter-American human rights institutions, like their African counterparts, therefore place great importance on self-identification as a central element in the determination of a group (p. 440ff). For legal scientists in their constant pursuit of certainty and predictability in law, this vagueness might seem hard to bear. However, as *Kriesel* suggests, the lack of established definitions could also be regarded as an opportunity for the advancement of group rights as it creates space for flexible and case-related interpretations.

In contrast to the African and Inter-American human rights systems, the analysis of the European system reveals a rather limited level of protection for collective rights. European human rights law only acknowledges group rights within the narrow frame of minority rights as well as in the context of freedom of religion. As the wording "either alone or in community with others" makes clear, only Art. 9 ECHR encompasses an individual and a collective dimension and, thus, stands out from the remaining individualistic catalogue of rights. Of course, the exceptional status of religious freedom is based on the fact that "religious communities traditionally exist in the form of organised structures".[9] Therefore, the protection of religious communities as groups is based on their status as legal persons. To what extent the ECtHR may be willing to recognize communities other than legal entities, remains yet to be seen. As *Kriesel* rightly points out, being regarded as a *living instrument*, the ECHR bears potential for a future accommodation of collective rights.

In addition to these points of discussion, *Kriesel* discusses the practical aspect of enforceability of collective rights which so far has mostly been disregarded in human rights literature. As the ECthR does currently not recognize genuine groups, applications by ethnic groups or minorities are usually treated as claims of a specific number of individuals, leading to a somewhat arbitrary fragmentation of natural courses of events. In contrast, both the Inter-American and the African human rights systems permit the use of *actio popularis* to a certain extent. In the context of group rights, the importance of *actio popularis* as a procedural tool can hardly be stressed enough. Especially for indigenous groups living in

7 IACtHR, *Saramaka People v. Suriname*, Series C 172, 28.11.2007.

8 IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C 245, 27.6.2012.

9 ECtHR quoted from *Kriesel*, p. 168.

total isolation from the modern world, it proves an indispensable prerequisite for the judicial enforcement of group rights.

Last but not least, *Kriesel* sets out to assess the prejudices and misgivings against collective human rights claims, in particular the ever-lurking accusation of collective rights being a threat to individual rights (p. 103 ff). Considering the ubiquity of this assumption, it is quite remarkable to learn from *Kriesel's* research that this potential conflict is of little to no relevance for judicial practice. Instead, conflicting interests between groups and the state turn out to be the recurring theme in the adjudication of group rights. As *Kriesel* points out, as any conflict of rights, these conflicts may simply be solved by applying the basic methodological tools for the harmonization of competing legal interests: the principles of legality and proportionality (p. 108). With that in mind, conceptions of individual and collective human rights as opponents quickly lose their persuasive power.

With *Kriesels* work focusing almost exclusively on regional human rights systems, there is room for future investigations at other levels of human rights protection. At the international human rights level, in 2007, the adoption of the UN Declaration on the Rights of Indigenous Peoples marked the first time that the international community confirmed the equal and non-hierarchical coexistence of individual and collective human rights (Art. 1 UNDRIP). Undoubtedly, this was a crucial turning point in international public law towards the recognition of group rights. However, group rights will continue to fall into a legal gap as long as the complaints procedures to the human rights bodies are limited to the claims of individuals. In contrast, it is all the more noteworthy that international adjudication on peoples' rights can be found outside the human rights system, as other' international courts and tribunals have recently begun to integrate collective dimensions of human rights into their judicial practice.[10] In Africa, courts of sub-regional economic communities, namely the courts of the East African Community (EAC) and the Economic Community of West African States (ECOWAS), have in recent times attracted attention as defenders of collective human rights, such as the right to a healthy environment. Indeed, there are strong indications that collective rights might prove a promising avenue to address global threats to biodiversity and climate protection. In addition, it might be worth it to look into the developments on group rights in the emerging human rights systems in Asia and the Arab regions. However, these considerations should only be understood as modest incitements to build upon *Kriesels* analysis and integrate her fundamental findings in further research projects on peoples' rights. After all, the most important and innovative achievement of *Kriesels* work lies in the in-depth discussion of the normative foundations and requirements of collective human rights. She makes perfectly clear that a holistic and modern conception of human rights must inevitably embrace the fundamental rights of groups and consider individual and collective human rights as two sides of a coin with the potential to complement and reinforce each other.

10 For an instructive introduction see *Martin Scheinin* (ed.), Human Rights Norms in 'Other' International Courts, Cambridge 2019, p. 21f. and *passim*.

On top of its valuable insights, "Peoples' Rights: Gruppenrechte im Völkerrecht" also appeals to the reader by offering the most comprehensive overview on the existing scholarship and case law on group rights, including the landmark decisions of the African and Inter-American human rights institutions. Finally, it is *Kriesel's* vivid and eloquent style that makes the work all the more compelling and a must-read for everyone interested in the field of human rights law.

Dr. Romy Klimke[11]

11 Romy Klimke is a post-doctoral research associate at the chair for Public Law, European Law and International Economic Law of Professor Christian Tietje at Martin-Luther-Universität Halle-Wittenberg. Albeit Professor Tietje was the supervisor of the present thesis, I hereby confirm that I have prepared this book review on my own initiative and without knowledge of Dr. Kriesel or Professor Tietje. Dr. Kriesel had already terminated her employment relationship at the chair of Professor Tietje before I joined the staff of the chair, and we are not connected professionally or personally.