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L.-A. SICILIANOS, *L'ONU ET LA DÉMOCRATISATION DE L'ÉTAT : SYSTÈMES RÉGIONAUX ET ORDRE JURIDIQUE UNIVERSEL*, PARIS, PEDONE, 2000

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**L.-A. SICILIANOS,
L'ONU ET LA DÉMOCRATISATION DE L'ÉTAT: SYSTÈMES RÉGIONAUX
ET ORDRE JURIDIQUE UNIVERSEL,
PARIS, PEDONE, 2000.**

*By Grace Li Xiu Woo**

The title of this book will induce many potential readers to leave it on the shelf, smugly confident that they belong to firmly established democracies. Certainly in Canada we are still saddled with the tacit belief that, as an "advanced nation", we are heirs to a "sacred trust of civilization".¹ True, we've changed our vocabulary as we blushinglly side step several rather awkward incidents in the all too recent past. We no longer use the blatantly paternalistic phraseology of British imperialism that characterised the process begun after World War I when the League of Nations placed the colonies of the conquered Germans and Turks under "tutelage".² But the question remains, have we done enough? Have we done our duty as far as the troublesome issues raised by Québécois separatists, prairie farmers and Aboriginal peoples are concerned? That is to say, can we count on remaining eternally immune to external censure? Or will international standards and our own internal discussion eventually bring us to a point where we will be forced to rethink our institutions in terms of the international commitments we have made concerning human rights?

The world is changing and, as Professor Sicilianos demonstrates, these changes have provoked a reawakening of concern for the rights prescribed by post World War II treaties and resolutions such as the *Charter of the United Nations*³, the *Universal Declaration of Human Rights*⁴ and the 1966 *International Covenant on Civil and Political Rights*⁵ and *International Covenant on Economic, Social and Cultural Rights*.⁶ We Canadians see ourselves as stout defenders of international human rights despite our internal problems. Perhaps this is because we tend to overlook the universality of international human rights, assuming they apply only to

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¹ F.P. Walters, *A History of the League of Nations* (London: Oxford University Press, 1960) at 42. The mandate system was instituted by art. 22 in the *Covenant of the League of Nations*, Part I of the *Peace Treaty of Versailles*, 28 June 1919, 225 Cons.T.S. 195 [hereinafter *Covenant of the League*]. The treaty was ratified for Canada by the British Empire, *Treaty of Peace Act*, 1919 (U.K.), 9 & 10 Geo. V, c. 33. *Covenant of the League*, *ibid.*, art. 22.

² 26 June 1945, Can. T.S. 1945 No.7 (entered into force 24 October 1945) [hereinafter *Charter*].

³ GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [hereinafter *Universal Declaration*].

⁴ 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter I.C.C.P.R.].

⁵ 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 368 (entered into force 23 March 1976).

other countries. However, Sicilianos' minutely detailed account of the emergence of a democratic imperative gives those who are in minority positions in Canada reason to hope that a critical eye may eventually be turned on the colonising forces themselves to deflate the last remnants of the civilising myth that inspired Canada's role in Britain's imperial dream. International debate has evolved to focus on democratic legitimacy, and as the nature of "legitimacy" becomes more clearly defined in international law, the coherence of our traditional means of rationalising Canada's emergence as a state is coming under increasing pressure.

Accordingly, this book merits our attention, for if current trends continue our government will inevitably be subject to scrutiny, not just with regard to the rights of Aboriginal peoples, of Québécois or of other marginalised segments of the population, but also with regards to the role of the state and the proper management of public affairs in general. Professor Sicilianos has gone so far as to suggest that recognition of the right of all peoples to self-determination makes it both absurd and unrealistic to imagine that the *status quo* existing at a particular moment will determine the political status of a people once and for all. Referring specifically to the *International Covenants*, he co-relates the collective right to self-determination in the preambles with the individual right to participate in public affairs.⁷ Observing that a people is, by definition, a living entity that evolves in time, he suggests that the right to self-determination must reflect this continuity.⁸ And in so doing, he barely even mentions the right to territorial integrity once considered an inviolable barricade against any initiative to rearrange state boundaries as they appeared at the end of the colonial era.⁹ I am thus using English to review a book written in French to underscore the fact that the need to understand "both official languages" does not just concern Canadian unity. It also concerns the importance of keeping up with the evolution of international standards, an evolution, which can assist us as we struggle for solutions to our own internal problems.

What are these international standards? Approaching this text with the Haudenosaunee *Great Law of Peace*¹⁰ prominent in my mind I am inclined to see

⁷ *Supra* note 5, art. 25.

⁸ L.-A. Sicilianos, *L'ONU et la démocratisation de l'état: Systèmes régionaux et ordre juridique universel* (Paris: Pedone, 2000) at 125.

⁹ See e.g. *Declaration on the Granting of Independence to Colonial Territories and Peoples*, GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1961) 66.

¹⁰ The *Great Law of Peace* of the Haudenosaunee (Iroquois) Confederacy is the pre-contact constitution that federated the Mohawk, Oneida, Onondaga, Cayuga and Seneca nations. The oral version is considered definitive, though a partial text can be found in A.C. Parker, *The Constitution of the Five Nations or the Iroquois Book of the Great Law* (Albany: University of the State of New York, 1916); L. Karoniaktajeh Hall, *Gayanerekowa: The Constitution of the Iroquois Confederacy*, trans K.-T. Horn (Kahnawake, Qc.: Oweria International, 1993). The vast literature on Iroquoia includes innumerable references to the "Great Law" (or "Kaianerekowa" - spellings vary). For the early post-contact period see W. N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, Okla.: University of Oklahoma Press, 1988); A. B. Deer, «La "loi des condoléances" et la structure de la Ligue: Commentaire sur *The Great Law and the Longhouse, a Political History of the Iroquois Confederacy* de William Fenton» (1999) 29.2 *Recherches amérindiennes au Québec* 63. Recent reflections on its implications include T. Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999); J. Barreiro, ed., *Indian Roots of*

them as the product of an evolutionary process whose modern incarnation began when a group of British colonies revoked subject status under the *United States Constitution* which was inspired by egalitarian Amerindian federalism¹¹, and which in turn served as a model for the preamble to the *Charter*.¹² Professor Sicilianos' analysis thus seems decidedly Eurocentric. He offers virtually no insight into African, Asian, Middle-Eastern or Indigenous perspectives. Focusing on developments in the post-World War II period, he refers only obliquely to the de-colonisation process, which in some regards began the moment the first indigenous person anywhere, be it in China or Peru, discovered what was in the imagination of European visitors as they started planting flags and crosses on foreign territory. Nevertheless, it was only after World War II that the penny finally dropped and the colonising powers began to realise that self-determination and the protection of human rights are essential if we intend to establish world peace. Professor Sicilianos' concentration on this period is thus appropriate. Perhaps future generations of scholars will even come to see the evolution beginning in the late 1980s that he identifies as a time when the reflective process initiated by de-colonisation began to turn its eye on the colonising powers themselves to address the pressures that pushed Europeans to leave home in the first place.

Certainly the issues surrounding the concept of "democratic legitimacy" concern all nations, including those once considered "advanced" or "civilised". Professor Sicilianos' analysis centres around former United Nations' Secretary General Boutros Boutros-Ghali's conviction that the process of democratisation cannot be dissociated from human rights - a perspective whose continuation is assured with the support of the General Assembly and by the pre-eminence accorded to democratisation by current Secretary General Kofi Annan. It is probably no coincidence that Boutros-Ghali comes from Greece, traditionally considered the cradle of Western democracy, but recently the victim of serious human rights violations under the regime of the colonels. Boutros-Ghali himself passionately reiterates the importance of actualising human rights in his preface to Sicilianos' book saying:

Lorsque la souveraineté devient l'ultime argument invoqué par des régimes autoritaires pour insulter des hommes, des femmes, des enfants, à l'abri des regards, alors - je le dis gravement -, cette souveraineté-là est déjà condamnée par l'Histoire.¹³

American Democracy (Ithaca, N.Y.: Cornell University Akwe:kon Press, 1992) [hereinafter *Indian Roots*]; B. Jacobs, *International Law/The Great Law of Peace* (LL.M. Thesis, University of Saskatchewan 2000) [unpublished].

¹¹ See *Hearing before the Select Committee on Indian Affairs*, 100th Congress, U.S. Senate Con. Res. 76, 2 Dec. 1987. For discussions on this theme see e.g. *Indian Roots*, *ibid.*; B.E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (Harvard, Mass.: Harvard Common Press, 1982).

¹² See H. Kelsen, *The Law of the United Nations: A critical Analysis of its Fundamental Problems* (N.Y.: Frederick A. Praeger, 1950) at 6.

¹³ *Supra* note 8 at 9.

Accordingly, the goal of Prof. Sicilianos' reflections is to demonstrate the emergence of democratic legitimacy as an established part of international law. He claims not to identify "democracy" with any particular model of government, referring to Boutros-Ghali's definition:

La démocratie est un régime politique où l'appareil institutionnel donne corps à l'idéal d'un pouvoir politique exprimant la volonté du peuple.¹⁴

Despite the pre-eminence given to self-determination in the basic instruments of the United Nations, Sicilianos notes that the period from 1945 to 1989 operated on the basis of the principle of "effectivity" recognising whatever entity exercised *de facto* territorial control to validate the absolute liberty of states to chose their political, economic and social systems independently of consideration for democratic legitimacy. With the restoration of democracy in Portugal, Greece and Spain in the 1970s a progressive movement began, which extended to Central and Latin America and parts of Asia in the 1980s, then to Central and Eastern Europe and parts of Africa with the end of the cold war. Sicilianos suggests that institutionalisation of concern for legitimacy and "good governance" began with a series of conferences for newly restored democracies. The first in Manila in June 1988 was attended by 13 countries,¹⁵ but the concept expanded rapidly and in 1994, 74 states attended a second conference at Managua, which produced a declaration that:

La tendance croissante à la démocratie et au pluralisme politique assure la souveraineté des peuples, la primauté du droit, le plein exercice, le respect, et la protection des droits de l'homme, ainsi que des pratiques sociales fondées sur la recherche pacifique du développement humain.¹⁶

A third conference was held in Bucharest in 1997 to continue reflections on the role of the state and on good management of public affairs and, though these conferences were largely by-passed by doctrine, their recommendations circulated at the UN General Assembly influencing the rapid conceptual reorientation of the 1990s.

Sicilianos argues that regional developments in Europe and in the Organisation of American States (OAS) pressured the United Nations to abandon its traditional neutrality with regard to the nature of state regimes and to recognise the link between democracy and human rights. Unlike the UN, the Council of Europe

¹⁴ *Supra* note 8 at 21; See *Agenda pour la démocratisation*, Doc. off. AG NU, 51^e sess., Annexe, point 41, Doc. NU A/51/761 (1997).

¹⁵ Cited by L.-A. Sicilianos as *Conference Declaration*, 43rd Sess., Annex, UN Doc. A/43/538 (1988).

¹⁶ Cited by L.-A. Sicilianos as *La déclaration et le plan d'action*, 49^e sess., Annexe, Doc. NU A/49/713 (1994).

made democratic legitimacy a fundamental principle, not only for adhesion, but also for continued participation in the organisation. At the OAS, democratic legitimacy was not a condition for membership, however the 1997 Washington protocol adopted after the coup in Haiti established a link between democracy, human rights and development and allowed for the suspension of a member state if a democratic government is overthrown.

It was the end of the East-West confrontation in Europe, however, that served as a lynchpin for re-vitalising the concept of internal self-determination. At this time it came to be seen as part of a holistic vision of security which encompasses good government and development. At Copenhagen in 1990, the Conference on Security and Co-operation in Europe announced that democratic plurality and the rule of law are essential for guaranteeing respect for all human rights and fundamental freedoms, emphasising that free, periodic and honest elections form the foundation of the authority and legitimacy of all governments. Rather than limiting itself to a purely formal conception, the Copenhagen Conference adopted a substantive approach to the rule of law founded on individual rights within the social and political organisation saying:

l'État de droit ne signifie pas simplement une légalité formelle assurant régularité et cohérence dans l'instauration et la mise en œuvre de l'ordre démocratique, mais bien la justice fondée sur la reconnaissance et la pleine acceptation de la valeur suprême de la personne humaine et garantie par les institutions offrant un cadre pour son expression la plus complète.¹⁷

The integration of the human rights - democracy - rule of law trio in the concept of security represented a substantial divergence from the traditional principle of non-intervention in the affairs of other states; however, as pointed out by R. Dumas, the French Minister of Foreign Affairs, there is no interference involved in requiring respect for principles that fully sovereign states have subscribed to themselves.¹⁸ Moreover, respect for human rights has been recognised as an obligation *erga omnes*.¹⁹

According to Professor Sicilianos, the rediscovery of democracy at the pan-European level altered the conceptualisation of the state at the United Nations. Though Article 21(3) of the *Universal Declaration* identifies the will of the people as the foundation of government authority, a restrictive interpretation of the right of peoples to self-determination dominated until the mid 1980s. There has been a perceptible change in recent years with the Human Rights Committee stating explicitly that the right to self-determination belongs to all peoples, not just those that

¹⁷ *Supra* note 8 at 92.

¹⁸ *Supra* note 8 at 96.

¹⁹ By a resolution of the Institut de droit international alluding to an *obiter dictum* in *Barcelona Traction (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 32.

have been colonised.²⁰ A discussion has also emerged concerning the relationship between the collective right of peoples to self-determination and the individual right of each citizen to participate in public affairs as asserted by article 25 of the I.C.C.P.R.

This reaffirmation of the democratic imperative has affected not only UN resolutions, but also UN practice. Over 60 states, amounting to almost one third of UN membership, have requested electoral assistance of one kind or another since 1989. This has been accompanied by a change in attitude towards *coups d'État*, particularly when a government elected with UN assistance is overturned as happened when President Aristide was ousted in Haiti. States established through the violent over-throw of legitimately elected governments are now considered illegal and subject to sanctions. Meanwhile the tasks undertaken by the UN have diversified to assure the effective functioning of democracy. Thus, for example, assistance is provided to restructure state apparatus to establish the rule of law through supporting institutions such as civil administration and the police. Though there is no formal definition of the "rule of law" at the United Nations, Professor Sicilianos identifies the operation of a renewed and enlarged two-dimensional concept: at the substantive level it requires limitation of the discretionary power of the state by means of an ordered juridical structure founded on the recognition of human rights; at the instrumental level it requires the creation and reaffirmation of institutional mechanisms to assure the proper functioning of the rule of law.

Professor Sicilianos' exposé is well organised according to the French convention of an essay in two parts, with the first part focusing on the conceptual evolution that universalised the democratic imperative and the second part dealing with the functional operation of this imperative. However, the tendency to split all parts and sub parts of the analysis into binary topics leaves the reader scrambling at times to figure out where they are in the argument - especially when part 2 emerges as the follow up of the sub-part 2 you've just been reading. A more holistic organisation, perhaps related to the chronological evolution of the international thought process might have been helpful, saving the reader from the nagging fear that the artificially binary organisation disguises some huge rift in the conceptual fabric.

Readers familiar with the Haudenosaunee concept of consultative government may find that Professor Sicilianos does not go far enough with some of his analyses. For example, despite his identification of the connection between the collective right to self-determination and the individuals' right to participate in public affairs, he sometimes refers to states as if they are entities, which are distinct from the people they supposedly represent. This is probably a hold over from past conceptualisations born in the era of the effectivity principle. Yet it is worth remembering that when we speak of state action, the state is represented by people and only people act. Thus, despite the sanctification of human equality in the international instruments that Professor Sicilianos refers to, the particular people who

²⁰ *Supra* note 8 at 127 referring to *Report of the Human Rights Committee*, AGDO, 47th Sess., Supp. No. 40, UN Doc. A/47/40 (1992) at para.195; *Report of the Human Rights Committee*, AGDO, 49th Sess., Supp. No. 40, UN Doc. A/49/40 (1994) at vol.1 para. 296.

represent states wield inordinate power compared to their fellow citizens. In the western style democracies, held up as an ideal to be emulated by others, elected representatives are free to make decisions without consulting those affected. Meanwhile, in Canada at least, our Members of Parliament seem powerless to solve most of our problems, the cost involved in trying to obtain judicial review of bureaucratic action is often prohibitive and our democratic rights boil down to little more than a right to periodically change autocrats. As a result, citizens in countries operating according to the western democratic ideal are becoming disillusioned. Sicilianos' failure to provide a discussion of equality rights, within the context of democratic legitimacy is thus perplexing, but this may be a representation of the state of current discussions at the UN and a portend of things to come. There is certainly a lot of work to do before we attain some of the ideals so eloquently expressed in the leading international human rights instruments.

Professor Sicilianos' detailed argument and his richly annotated analysis gives us reason to hope that productive change is possible. His generous references invite the reader to explore the issues he raises further and we can only regret that the book has not adopted the conventions of English language legal texts by including an index and tables of cases and UN documents. These are useful tools, particularly when trying to cross reference interpretations of particular concepts or concerning a particular country. One wonders why French publishers have not adapted, especially now that computers have simplified such tasks. Few people have time for the type of intensive scholarship that Professor Sicilianos offers and such aides would assist in the comprehensive multilateral reflection that is necessary if we are ever to achieve a social order that genuinely delivers the democratic ideals that most of us aspire to. Regardless of these minor shortcomings, Professor Sicilianos has made an interesting contribution that should interest anyone attempting to understand their own national problems in the context of international discussions on democratic legitimacy.