EVOLVING CONCEPTIONS OF GROUP RIGHTS IN INTERNATIONAL LAW

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For more than two centuries, European law and philosophy have been preoccupied with liberating individuals from groups, whether it be the family, church, class, or state. Thus while the Universal Declaration of Human Rights adopted by the United Nations in 1948 acknowledged the psychological significance of social life, referring vaguely to the individual's "duties to the community in which alone the free and full development of his personality is possible," it made no distinction between "community" and "state," and made no provision for the protection of groups other than the state itself. Its vision was restricted to the autonomy of individuals, and for the better part of forty years, every mention of group rights (or individual responsibilities) has invited charges of recidivism and statism.

All around us, current events are challenging the usefulness of this traditional view. Linguistic, religious, national and ethnic factors are implicated in the great majority of civil disorders and "bush wars," aggravated by disparities in economic power that often seem as great within states as between North and South. The collective identity and rights of intermediate sized groups — religious congregations, ethnic communities, families — is no longer merely an academic proposition. On the contrary, there is growing awareness that according such groups collective legal identity and rights may be absolutely essential for resolving many of the tensions in today's world without violence. My thesis is simple: recognizing the rights of groups other than States is a basic tool of peace.

The Universal Declaration reflected intellectual optimism in the ability of individuals to defy the power of States. Contemporary reality suggests a new view of protecting human rights, however, which recognizes the importance of empowering groups within the State, and enabling them to counteract State power. From this perspective, the recognition of group rights is not statist, but anti-statist.

This essay will address two basic questions: why have group rights so recently re-emerged in international law, and what kinds of rights may be involved?

To a great extent, the ethnic problem has it origins in the United Nations' practice of emancipating territories rather than peoples. In Africa and Asia, decolonisation reproduced within a few decades the same contradictions between ethnicity, geography and political authority that had taken centuries of war and shifting frontiers to accumulate in Europe. Invariably multiethnic and with little in the way of a common national history or identity other than the shared experience of colonialism, new states live in dread of their ethnic enclaves and stress political integration, cultural assimilation and national unity. Ethnic, linguistic and religious diversity is seen as a liability, exposing the state to divisive forces just waiting to be exploited by the former empires as well as hostile neighbours. These fears are heightened by the fact that a minority in one state may be the majority in an adjacent state.

The ideal most often expressed by new governments of both the North and the South is "new democratic culture", to borrow an apt phrase from the Marxist lexicon. Independance and development are supposed to emancipate citizens from regressive cultural forces and lead them into

a new, free, rational association based on national aspirations rather than backward-looking traditions. In reality, however, new nationalisms are not rational or synthetic but reflect, and frequently enshrine, the goals of numerically or politically dominant ethnies. Like the European states from which they were born by decolonisation or revolution, new nations are ethnocentric or, as the sociologist Rudolfo Stavenhagen correctly describes the situation, "ethnocratic." An ethnocracy may have no particular ethnic costume, but a single ethnie or ethnic coalition rules.

Ethnic conflict and development

Of course this process has been evolving since the old European empires began to crumble in the wake of the First World War. What has aggravated matters is the rapidly growing industrial demand for fuel, metals, and fibre as much of the world modernizes. Natural resource extractors are rapidly expanding their operations into previously isolated areas, not only in developing countries but in the peripheral regions of the larger developed states as well, e.g. the Arctic regions of North America, the Soviet Union and Europe, and the intermontaine region of Asia. A great number of peoples who have enjoyed practical autonomy for centuries are suddenly finding themselves in conflict with national and international development schemes.

When a dominant ethnie seizes state power it often reproduces colonial relations with relatively powerless peripheral minorities. Natural resources are extracted zealously from the countryside to energize urban centres, aggravating regional disparities in income and even rendering exploited regions less habitable by destroying forests, wildlife, soils and water. International institutions reinforce this by financing large-scale projects that are capable of displacing and disrupting, regional ethnic minorities definitively, either making them poorer and more powerless, or integrating them into the national economy in a subordinate role such as lowpaid transient labour. The result can be a vicious cycle of powerlessness and underdevelopment. Eghbal (1983) politely calls this process "development exclusion" rather than internal colonialism; in fact it is colonialism wearing the mask (as it always does) of development.

Once large-scale projects get underway, peripheral groups have little choice but to participate in whatever way they can. Rising prices and ecological deterioration make them more dependent on food imports and cash income, which in turn may result in deteriorating health (Waldram 1985) and force them to cannibalize their remaining natural resources (Collins 1986). The role of development projects in triggering firewood shortages and famine was highlighted in the 1980 World Conservation Strategy, a collaboration between UNEP, FAO, UNESCO, and the International Union for Conservation of Nature and Natural Resources, an NGO. Yet these same projects tend to enrich developing countries' urban technocrats and entrepreneurs — as well as overseas financial institutions, consultants and contractors. In an ethnocracy, regional and ethnic economic disparities thus widen dramatically.

The disruption of regional ethnic enclaves is often not only the result of large-scale development projects, but the underlying objective. This has been especially evident in a number of recent "transmigration" or agrarian resettlement schemes in southern Asia, including Sri Lanka (Ponnambalam 1983). The fact that none of these projects have been cost-beneficial in strict economic terms (Oberai 1986) gives rise to suspicion that their real goals are typically political: if not to dilute ethnic enclaves, then to relieve population pressure and economic tensions in urban areas, or to shift population to strategically-sensitive areas, as may be the case in Indonesia's efforts to settle its easternmost territorial claims. Otherwise uneconomical demonstrations of sovereignty are

not the exclusive possession of developing countries, as illustrated by Canadian efforts to develop marginal Arctic mineral deposits.

Exclusive or discriminatory development strategies increase ethnic tensions by adding economic substance to real or imagined cultural and historical grievances, and readily lead to violence. This suggests what might be called the paradox of national unity: the harder states try to integrate the diverse elements of their populations, the more disunited and fragile they become. Sharing power through federalism or autonomy arrangements, on the other hand, institutionalizes the centrifugal forces in a regionalised, multiethnic society. While recognising the legitimacy of ethnic differences, it provides a means for keeping them in a peaceful, albeit dynamic balance.
It is of course necessary to distinguish genuine conflicts from ethnic opportunism. As Smith (1981) observes, ethnicity is readily exploited by newly-emerging, educated elites to justify reproducing power centres and bureaucracies. It is just as readily exploited by third powers to destabilize nascent national governments. So-called "bush wars" along disputed frontiers that transect ethnic regions, such as the current conflict along the Rio Coco in central America, or regional secessions such as the Katangan rebellion a generation ago, arguably create rather than culminate ethnic tensions. At the same time, it is foolhardy to dismiss "tribalism" in Africa, for instance, as entirely the work of neo-colonialists and opportunistic local leaders. Refusing to accomodate ethnicity simply makes it stronger and attracts more extreme leadership.

There is also a need to recognize the relationship between ethnic and class conflict, especially in Asian countries suffering from residual feudalism, or the strongly hierarchical societies of Latin America. When one ethnic group or coalition first acquires state power or financial means following independence, and thereby cuts off (or devours) the development of all others, the resulting struggle is ethnic in appearance and rhetoric but economic in its origins. The fact that economic conflicts tend to trigger ethnic ones does not make the ethnic factor irrelevant, however, because merely sharing national income and employment more equally does not make these conflicts disappear. Without measures for sharing power as well, peripheral groups feel they have no security against future exploitation, and no opportunity for real development in the sense of achieving what is important to them. Groups trust power in the hands of their own.

Which groups have rights?

How has the international legal system responded to this new strategic reality? The traditional dichotomy between the rights of the individual and the state remains a formidable conceptual barrier for Western governments, and they reflexively reject collective rights, like economic and social rights, as subversion from the East. For its part, the East avoids any concrete elaboration of these rights because the legal acknowledgment of ethnic and religious groups is subversive to central planning. Developing nations see concern for disenfranchised groups as simply the latest Northern pretence for intervening in the affairs of the South.

This near-stalemate of mutual suspicion has prevented any coordinated legislative attack on the issue of group rights. There have developed, instead, a number of separate strands of thinking, reflected in a proliferation of definitions and institutions within the United Nations. At least four distinct kinds of groups are now recognised, for different legal purposes.

Peoples, the subject of self-determination and decolonisation in the Charter and subsequent instruments, are nowhere defined, but General Assembly Resolution 1541 (XV) defines the related

concept of "non-self-governing territory" as any place that is culturally and geographically distinct from the state administering it, and which is economically or politically subordinate. Identifying peoples has been the responsibility of the Special Committee on Decolonisation since 1960, but no consistent criteria can be detected in its practice. "Peoples" have been recognised when it was expedient to do so, or when the eruption of an armed struggle made classification disputes academic. Minorities are generally identified by numerical rather than geographical factors, but the Commission on Human Rights and its Sub-Commission have repeatedly failed to agree on a more precise definition. Soviet writers such as Levin (1963) tend to emphasize geographic dispersal to distinguish minorities from peoples, while Dinstein (1976) maintains that peoples, too, may be dispersed without losing their right to self-determination. Although Deschenes (1985) has argued that only non-dominant groups should be considered minorities, this makes little difference as long as the only right assigned to them (by Article 27 of the International Covenant on Civil and Political Rights) is freedom to enjoy their own languages, culture and religion. An open-ended working group of the Commission has been labouring unsuccessfully for nearly a decade on elaborating additional principles of minority rights.

The term indigenous was originally used in the League Covenant to distinguish colonised peoples from their colonisers. Beginning with ILO Convention No. 107 (1957), it assumed a somewhat different meaning, referring to the "less advanced" or unassimilated elements of an aboriginal population that remained within the borders of an independent state. The only real difference between an "indigenous population" and a colonised "people," then, is demography. If the colonisers remained a numerical minority, the aboriginal inhabitants have been considered a "people," as in Namibia. Where the invaders multiplied and formed a new majority, the groups they engulfed have been called "indigenous." The terminology conceals an essentially political bias against dividing the contiguous territory of existing states, regardless of how that territory was acquired. What rights to autonomy indigenous groups may have, short of independence, is now before the Sub-Commission's Working Group on Indigenous Populations, which has a mandate to develop a "declaration of principles" (Barsh 1986).

ILO Convention No. 107 made a further distinction between indigenous and tribal populations. A recent ILO Meeting of Experts recognised that "tribal" implies a form of social organisation as opposed to historical factors as in the case of "indigenous." Some groups are tribal but not indigenous, others are indigenous but not tribal. Asian and African states have difficulty with the idea that some of their constituent ethnies are more indigenous than any of the others, but concede the existence of marginalised groups that have been either excluded from the national economy, or victimized by it. There appears to be growing agreement that these "tribal" groups warrant the same general kinds of protection as indigenous groups in the regions of the world colonised by Europeans. Obviously these definitions overlap. A people may also be a minority while it awaits its independence; if divided by state borders it may be a minority in one state and a majority in another. Peoples and minorities may also be indigenous, or tribal.

The nature of group rights

It will be essential at the outset to distinguish between the rights of categories of persons, such as non-smokers, the elderly, or the disabled, and the rights of organised groups which have some sociopolitical structure of their own. Individuals may be assigned rights because they belong to categories, while group rights only exist to the extent that they can be exercised through collective institutions (Ben-Israel 1981). Indeed, group rights are rights to establish and maintain institutions

such as schools, co-operatives, and legislative bodies. From this it is clear that the right to enjoy one's own culture, a right of persons belonging to minority groups under Article 27 of the International Covenant on Civil and Political Rights, is not a group right at all unless it implies the right to organise separate, culturally-distinct communities.

We must likewise distinguish between the power of states to classify persons and discriminate in favour of some of them — subject always to certain limitations, such as race — and the inherent right of certain kinds of groups to exist and to define themselves (Van Dyke 1974). Nearly all laws create categories. This includes many international instruments, such as the convention on torture, which establishes a fund for the victims of that crime. But the victims of torture were not a group possessing collective rights before the convention, and it will not make them one. On the other hand, laws can acknowledge, but neither create nor destroy the Sioux tribe or the Serbian nationality — only genocide can accomplish that, and we presumably agree that would be unacceptable. Indeed, the 1948 convention on genocide, while prohibiting only the physical destruction of groups, implies more generally the right of groups to collective existence.

Lastly, there is a relationship, as well as an important difference, between the rights of groups and the right to individuals to freedom of association, found in Article 20 of the Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights. The right to join groups such as trade unions necessarily implies the right to form groups, albeit within the existing institutional structure of the state. Association is a right to organize and communicate, but confers no power on the organizations thus formed. Hence Article 8 of the International Covenant on Economic, Social and Cultural Rights must explicitly recognize trade unions' right to strike. Similarly, the fact that Native Canadian women have a right to live, if they wish, on an Indian Reserve among other Native people, as the Human Rights Committee ruled in Lovelace (1981), does not in itself establish that Natives have the right to self-government.

Group rights are therefore more than the right of members of groups to physical existence, cultural tolerance, or association with one another. On the contrary, group rights are inherently institutional in their nature and exercise. Thus while individual rights belong to the realm of arithmetical equality, i.e., each person having the same rights and responsabilities within the state, group rights fall within the concept of geometric equality in which the state may consist of different organized communities possessing different rights and relationships with one another. This is what states most strenuously resist, yet it is little different from the practice of federalism, especially in federal states such as Canada which have admitted new members on varying terms and conditions.

Within this context it is possible for groups to have both positive and negative rights. The right to a public benefit, such as education, is a positive right. Freedom from discrimination or interference is negative. Traditional conceptions of human rights in the West involve negative rights, while newly-emerging economic and social rights are chiefly positive in nature. It will be much easier to reach international consensus on the negative rights of groups, including existence and autonomy, than positive rights to enjoy advantageous public encouragement and subsidies. Programmes to stimulate cultural diversity and cultural development, already undertaken by many states, go beyond what may be required for the reconciliation and co-existence of groups in today's world, but may yield considerable benefits for future generations.

Current proposals

The heart of the matter remains groups' desire to maintain some degree of institutional identity separate from the state. Just as self-determination has been called the right from which all other human rights flow (Gros Espiell 1980, 159), group rights generally reflect a desire, and all too often a genuine need, for collective self-defence against state power. As traditionally interpreted, at least, the right to self-determination may go too far in suggesting a choice between the existing state and the establishment of a new state. Over the past few years there accordingly has been growing interest in the idea of "autonomy" or "internal" self-determination as an alternative to complete independence (Hannum and Lillich 1980; Sohn 1980). Thus while a recent International Labour Office (1986) expert meeting was reluctant to conclude that indigenous and tribal peoples have the right to complete independence, it nonetheless was comfortable recommending that these groups enjoy "as much control as possible" over their own economies and territories.

At least three important new concepts have emerged from recent United Nations debates. The most far-reaching may be the idea that self-determination is a continuing right, not one lost when a people achieves independent statehood. Forcefully articulated by Australia (United Nations 1985, 170), the main thrust of the argument is that individuals retain the right to influence government policy through democratic means. In other words, it is an argument for a right to democracy. It also implies, however, a "right of divorce" in the extreme case when a group is totally debarred from power, as Eastern European jurists have long argued from somewhat different premises (Bokor-Szego 1970). This comports with General Assembly Resolution 2625(XXV), which conditions the territorial integrity of existing states on the representativity of their governments.

Another new factor in the debate is the principle of "popular participation," which has been closely associated with proposals for a "right to development" (United Nations 1985). All that seems to be intended by the proponents is the right of individuals to have some voice in decisions affecting their socio-economic development. This might be satisfied through "bottom-up" development strategies, the encouragement of co-operatives and trade unions, and various forms of community consultation. Of course, popular participation should mean more than a right to be heard. It should represent an effective voice in decisions, and this is turn implies some actual sharing of decision-making power. Since the subject of the right is the individual, however, it does not really help us establish the legal personality of groups. Capitalist states will see "popular participation" in voting and the freedom of economic association in corporations and unions, and socialist states in a collectivization of ownership.

The latest twist is Austria's proposal that a draft declaration on "the rights of persons belong to minorities" explicitly protect the demographic integrity of ethnic regions (United Nations 1986, 117). The obvious targets of the proposal are transmigration and resettlement schemes calculated to break up regional concentrations of ethnic economic and political power. There are broader political implications, however, should such a proposal be adopted, since the demographic protection of regional minorities guarantees, within an administratively decentralized state, a certain degree of localized ethnic control of the state apparatus.

Nearly all modern states are associations of different peoples, frequently in explicit confederations recognizing their independent origins and diversity. What states resist is the idea that federal or autonomy arrangements are a matter of right rather than a result of history or convenience. Even if distinct groups enjoy an autonomy right that falls short of "divorce," the recognition of such a right creates an engine for continuous constitutional revolution in culturally-diverse states. For

bureaucrats, the prospect of endless renegotiations of power relations with the state is horrific. From an individual perspective, however, the consolidation of state power is just as threatening, and a dynamic balance of power between the state and its constituent groups offers a more workable compromise between anarchy and centralism than traditional conceptions of individual civil liberties alone.

NOTES

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