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Essay

THE RIGHTS OF INDIGENOUS PEOPLES AS COLLECTIVE GROUP RIGHTS*

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The movement for international and domestic legal protection of the rights of indigenous and tribal peoples has refocused attention on the fundamental nature of our conception of human rights. Many of the proposals for the protection of tribal rights deal with such questions in the manner in which the affected indigenous peoples understand them, as group rights. For example, in the draft Universal Declaration of Indigenous Rights,[1] many provisions overtly refer to the collective or group nature of the right. Paragraph four, for example, protects the "[t]he *collective* right to maintain and develop their ethnic and cultural characteristics and identity, including the right of *peoples* and individuals to call themselves by their proper names." Paragraph five protects a collective right against ethnocide, including any act that has the aim or effect of depriving indigenous peoples of ethnic characteristics or is designed to produce forced assimilation. This protection against ethnocide also prevents the imposition of foreign life styles and prohibits propaganda directed against indigenous peoples. Similarly, paragraph eight protects rights to observe, teach, and practice tribal religious traditions and ceremonies and article nine protects the right to maintain and use tribal languages. Article twelve protects *both* collective and individual indigenous rights of ownership to land. In short, most of the protection of political, cultural and religious autonomy proposed in the draft Declaration are afforded to indigenous and tribal peoples, as *groups*

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1. U.N. Doc. E/cn.4/Sub.2/1988/24, Annex II.

as well as individuals. The Declaration, therefore, recognizes that efforts to protect indigenous rights require careful assessment of and recognition for the principle of group rights, the collective rights of certain peoples or societies.

To American and many western observers, such notions of group or collective rights do not sit well with Euro-American notions of liberty and individual freedom. Tensions between indigenous peoples and western commentators regarding the need to protect a group's right to autonomy emerge, I believe, from an important jurisprudential difference in perspective about the origins of human rights and liberties. This essay briefly explores those themes and then discusses why some of the concepts of group rights imbedded in the draft Declaration, while initially appearing foreign to Anglo-American jurisprudence, may share more in common with existing western, and in particular American, legal doctrines than first suspected. Indeed, the manner in which indigenous peoples view their rights has considerable force. In fact, the indigenous peoples perspective suggests certain inadequacies and inconsistencies in the method by which nations schooled in western legal traditions view questions of rights and relations with the state.

HUMAN RIGHTS AND THE STATE: A DIFFERENCE IN PERSPECTIVE

Many American and European notions of liberty, and of the relationship between individuals and the state, emerged from secular natural law jurisprudence which flourished in Europe during the seventeenth, eighteenth, and early nineteenth centuries. These notions significantly influenced not only western legal development, but, through colonialism and other processes of western legal penetration, the legal institutions and conceptions of many nonwestern states as well. In the natural law tradition, all organized society, including the state, represents a compact among the people by which the people delegate some of their sovereign prerogatives and autonomy to the state in exchange for the peace, security, and personal well-being established by the organized society. Thus, conceptually, western thought imagines that the individual antedates the state. Under this view, the individual theoretically or metaphorically could exist in a state of nature divorced from organized society. This idea ultimately reflects Biblical creation stories of the Garden of Eden. Ironically, western legal perceptions of the state of nature clearly were heightened by Eurocentric perceptions that emerged from contact with North American Indian tribes, whom their early Euro-American "discoverers" wrongly believed were in a disorganized state of nature unshackled by the fetters of organized governments or society.

Because western thought begins with the isolated individual separated from organized society, it focuses extensively on the relationship of the individual to the state. Rights are thought of as limitations on organized society and government in favor of the individual, areas of personal autonomy and prerogative not delegated by the social compact to the sovereign. Rights are legal constructs that limit state action. At core, most modern western conceptions of human rights owe their existence to some pattern of thought of this type, whether derived from Locke, Hobbes, Rosseau, Rawls, or, possibly,

Dworkin.[2] Such social compact theories have been the dominant fountainhead of thinking about rights and the relationship of the individual to the state for many centuries. These theories are all variations on this theme of the relationship of the individual to the state. Certainly there have been western dissenters from this trend. Some political philosophers developed group theories animated by notions of fraternity that first emerged during the French Revolution.[3] These works later helped influence British socialist thought,[4] and more recently these works have been advanced under the guise of community and communitarian values.[5] Nevertheless, the basic and most dominant western themes about rights pit the individual *against* the state and presume that the individual rights emerge from the limited nature of the social compact and the restraints imposed by notions of popular consent. Indeed, western legal thought remains formed primarily by social compact theories of the relationship of the individual and the state. This conception, of course, leaves little room for other group affiliations or group, collective, or societal rights — a problem that sometimes leads to absurd results or absolute injustices.

A good illustration of this principle is the manner in which American constitutional law treats freedom of religion. While organized religious groups constitute groups which might presumably seek *group* protection for their religious autonomy, American law recognizes only the right of the *individual* adherent to the free exercise of his or her religion.[6] While organized churches might sue to vindicate religious autonomy from state regulation, American domestic law only permits an organized church to proceed through litigation on the theory that it represents religious adherents' individual rights to the free exercise of religion. For example, if the United States Congress enacted a statute tomorrow that outlawed the giving of the sacrament of communion, our existing jurisprudence would not permit the organized Catholic Church as a group to claim that this statute violated its free exercise rights. Instead, first amendment law in the United States would require the members of the Catholic church to sue for infringement of their individual rights of religious observance or, maybe, first amendment law would permit the Church, to sue as an organized religious association, to enforce its members *individual* rights to religious autonomy. In most western conceptions those rights are held by the individual, not by the religious group seeking autonomy *as a group* — a proposition I always have found rather strange.

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2. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); T. HOBBES, LEVIATHAN (M. Oakeshott ed. 1960); J. LOCKE, TWO TREATIES OF GOVERNMENT (P. Laslett ed. 1970); RAWLS, A THEORY OF JUSTICE (1971); J ROUSSEAU, THE SOCIAL CONTRACT (D. Cress trans. ed. 1983).

3. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J. POCOCK ED. 1981); G. HEGEL, PHILOSOPHY OF HISTORY; G. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans. ed. 1967).

4. *See generally* M. BEER, A HISTORY OF BRITISH SOCIALISM (1919); J. CALLAGHAN, SOCIALISM IN BRITAIN SINCE 1884 (1990). *See also* S. WEBB, SOCIALISM IN ENGLAND 1-17 (1890); R. OWEN A NEW VIEW OF SOCIETY (3d ed. 1817).

5. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 597-600 (1983). *See generally* R. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987).

6. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 765-66 (1986).

This illustrative window into American and western thought on individual rights explains why western legal thinkers have trouble with concepts of group, collective, or societal rights within the context of a larger nation-state. There simply is little room for subgroups and group identifications in most western thought relating to rights and legal obligations.

By contrast, Indians and many non-westerners, often have a very different view of the nature of their rights and legal relationships. Deriving their legal vision from their tribal associations, tribal traditions, and the natural ecology with which they often seem more familiar than many western political philosophers, native peoples see humans as inherently social beings. As social beings, people never exist isolated from others in some mythic, disorganized state of nature. Rather human beings are born into a closely linked and integrated network of family, kinship, social and political relations. One's clan, kinship and family identities are part of one's personal identity and one's rights and responsibilities exist only *within* the framework of such familial, social, and tribal networks.[7] Nonwestern thinkers, therefore, naturally think of their rights as part of a group. Certain rights exist within each social group and other rights and responsibilities are attendant to their relations with members of other groups within the web of associations that forms the tribe or the state. For them, the tribe or state is merely composed of interlinked group associations and affiliations. But if that is the case, from where, you might ask, does one derive any notion of basic human rights or human dignity. Such notions of group and communal relationship rights derive from basic principles of mutual respect and respectful behavior within and between kinship and tribal groups. Thus, an individual's right to autonomy is not a right *against* organized society, as it is in western thought, but a right one has *because* of one's membership in the family, kinship and associational webs of the society. To Native Americans, many other nonwesterners, and some western thinkers interested in the ideas of community and fraternity, then, group and individual rights are not antithetical concepts, they are complementary concepts. Group rights go hand in hand with group membership and individual rights are unthinkable except in contemplation of how those rights relate to the larger political group. For them, my hypothetical of a mythical statute outlawing communion poses few conceptual problems; it is an affront, a wrong, to the Catholic Church, as a group, just as much as it wrongs each member of the Church. Indeed, since the entire group shares the wrong equally it may wrong the Church *as a group* more than it wrongs any particular individual member of the Church. This

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7. *See, e.g., In re J.J.S.*, 11 Indian L. Rep. (Am. Indian Law Training Program) 6031 (1983); Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 249-50 (1989). *See generally* F. EGGAN, SOCIAL ORGANIZATIONS OF THE WESTERN PUEBLOS (1950). *See also* Eggan, *Pueblos Introduction*, 9 HANDBOOK OF NORTH AMERICAN INDIANS (SOUTHWEST) 224, 227 (A. Ortiz ed. 1979) (a common thread among Pueblo social organizations is that they are familial based); Bodeni, *Taos Pueblo*, 9 HANDBOOK OF NORTH AMERICAN INDIANS (Southwest) 255, 260-61 (A. Ortiz ed. 1979) (explains that for the Taos Pueblo Indians "extended family is of great importance for the individual. This group of relatives constitutes the primary nexus for socialization as well as the source through continued security throughout life"); T. McGuire, *Walapai*, 10 HANDBOOK OF NORTH AMERICAN INDIANS (SOUTHWEST) 25, 30 (A. Ortiz ed. 1983) (Pre-reservation Walapais social organization was subdivided into groups of several families who lived together and cooperated economically).

conception of rights tends to provide a richer, more realistic perspective from which to analyze the problem.

In this respect, the debate over individual versus group rights, which one often hears whenever the rights of Native and indigenous peoples are raised, really represents a clash over views about the nature of organized society. The debate is really over whether Eurocentric definitions of government and rights should be adopted in preference to a broader, more inclusive, and, I would argue, more social and communitarian, conception of society and the rights, roles, and relations held by individuals and groups within society. Indeed, I submit that if western legal thinkers would listen respectfully to the claims for *group* protection of culture, autonomy and religious freedom, rather than attacking such notions from their own jurisprudential perspective, a much richer conception of human rights and the relation of the individual to society might emerge.

GROUP RIGHTS IN WESTERN LEGAL TRADITIONS

Although the dominant themes in western legal thought are not easily accommodated with notions of group rights, that has not stopped western legal traditions from recognizing and defending separate legal protections for various groups and individuals as members of those groups. Such features are sometimes found in the governance of culturally pluralistic western communities. The pluralistic origins of such group protection might derive from the existence of significant numbers of indigenous peoples. For example, the New Zealand constitution fixes the number of Parliamentary seats assigned to the indigenous Maoris.[8] Alternatively, group protections might derive from pluralistic linguistic or cultural traditions within the nation state. Switzerland, which has such traditions, offers canton protection to its various national and linguistic groups.[9] More recently, Canada has begun to protect bilingualism and provide culturally appropriate educational facilities to recognize the group aspirations of its Francophone communities.[10] In each of these cases, and many others, western legal traditions have developed special legal protections that can best be explained as group rights, but which are often advanced, like the right to free exercise of religions, as if they were individual rights. The concern with preserving the French language and the French culture in Quebec and throughout Canada, for example, does not constitute a separate individual guarantee to all Canadians of their *individual* right to speak and learn in either English or French. Rather, it is an effort to assure the Francophone community, as a *group*, of their rights to linguistic, educational, and cultural autonomy. One cannot easily exercise one's *individual* right to speak French if

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8. Electoral Act of 1956 §§ 11 & 23, *reprinted in* Clark, *New Zealand*, CONSTITUTIONS OF THE WORLD 279 (A. Blaustein & G. Flanz ed. 1987); R. CLARK, THE DEVELOPMENT OF THE NEW ZEALAND CONSTITUTION 56-57 (1974); G. PALMER, UNBRIDLED POWER: AN INTERPRETATION OF NEW ZEALAND'S CONSTITUTION & GOVERNMENT 151 (2d ed. 1987).

9. *See generally*, C SCHMID, CONFLICT AND CONSENSUS IN SWITZERLAND (1981).

10. Section 23 of the CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Canada Act, 1982, c. 11 (U.K.), Schedule B, *Constitutional Act*, 1982, Part 1, SS. 1-34. *See also* Magnet, *Minority-Language Educational Rights*, 4 Sup. Ct. Rev. 195 (1982). *See also* MEECH LAKE AND CANADA, 171-200 (R. Gibbons, H. Palmer, B. Rusted, & D. Taras ed. 1988)

there are no other French speakers around with whom to converse. The right is a group, collective, or societal right of the French community.

Even in the United States, we have constitutionally wrestled with concepts of group rights, not always with happy consequences. Group or societal rights have been extensively debated in American jurisprudence, albeit not in those terms, in the on-going constitutional dialogue over protection of state rights. Early in American history this concept hampered the union and produced a Civil War. More recently the legal community has used the debate over state rights as a stalking horse to resist federal civil rights initiatives and to limit the expansion of national economic regulatory power.

The recent American constitutional debate over the judicial protection of state rights, in fact, highlights both the American ambivalence about group rights and the political importance of documents like the Universal Declaration on Indigenous Rights that recognize and protect group rights. In American constitutional law, during at least two important periods, the first third of the twentieth century and the decade from 1976 to 1985, the federal judiciary sought to protect such group rights by limiting national legislative authority.[11] This effort ostensibly was undertaken to protect the rights of local government and to preserve the states' group autonomy. The courts generally found these protections enshrined in the tenth amendment to the United States Constitution. In each case, the Court ultimately backed off from its judicial activism in the protection of group political rights. The Supreme Court's recent decision, *Garcia v. San Antonio Metropolitan Transit Authority*,[12] declared that the states and their people, as groups, were adequately represented in the political structure of the nation, particularly in the structure of the Senate which provides equal state representation. The Court held that the protection of such group rights, and the balancing of them against other national interests, was best accomplished by the politically elected branches of government, rather than the judiciary.

Indian tribes and other indigenous peoples also have legitimate claims to group rights. In the United States, for example, the tribes of the southeastern states ceded large portions of their land in exchange for explicit treaty promises. These treaties, made under the solemn authority of the United States, promised that the tribes would remove to an area outside of state or federal governance and once there exclusively govern themselves under their laws, rather than being governed by any state or federal territory.[13] The United

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11. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); National League of Cities v. Usery, 426 U.S. 833 (1976) *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)

12. 469 U.S. 528 (1985).

13. Treaty with the Cherokees, Dec. 29, 1835, United States — Cherokee Tribe, art. 5, 7 Stat 478 states:

> The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them
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> . . . .

States broke these express treaty promises at the turn of the century when the State of Oklahoma, which included the former Indian Territory to which these tribes had removed seventy years before, was admitted to the United States as a pluralistic, non-Indian state.[14] Similarly, most tribes agreed to cede lands, end hostilities, or otherwise remove to those Indian islands that we call Indian reservations based on explicit or implicit guarantees that these islands would provide *group* sanctuary. These agreements envisioned that tribal reservations would allow the tribes to continue some of their culture, their way of life, and their political autonomy, without influence from the dominant colonial society which rapidly was encroaching on and eroding important components of that culture, such as the decimation of the buffalo herds upon which many American plains tribes depended during the late nineteenth century. All of these rights involved demands for the Indians' rights of group autonomy, not individual freedoms. Indeed, the treaties were negotiated with the tribes, as separate domestic dependent nations, not with individuals. In American domestic law such rights are held by Indians as groups, not by the individual members, although tribal members may in fact constitute third party beneficiaries of such rights.[15] Thus, at least in the United States, the tribal claim to group political, cultural, religious, and other forms of group autonomy and rights is far stronger than the states claim to state rights as a group.[16]

Although other nations containing indigenous peoples had different historical experiences, many of the vestigial problems created by colonialism have common roots and common themes. Expropriation of the land and resources of indigenous peoples for the benefit of the dominant colonial society recurs in most sagas of colonial contact between indigenous populations and the colonial

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Similarly, Treaty with the Creeks and Seminoles, Aug. 7, 1856, United States — Creek Tribe— Seminole Tribe, art. 4, 11 Stat. 699 states:

> The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined [herein] shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

See also, Treaty with the Pottawatomie Indians, Feb. 27, 1867, United States — Pottawatomie Tribe, art. 3, 15 Stat. 532; Treaty with the Cherokee Indians, July 19, 1866, United States — Cherokee Nation, art. 13, 14 Stat. 799; Treaty with the Creeks and Seminoles, Aug. 7, 1856, United States — Creek Tribe — Seminole Tribe, art. 15, 11 Stat. 699; Treaty with the Chocktaws and Chickasaws, June 22, 1855, United States — Chocktaw Tribe — Chickasaw Tribe, art. 7, 11 Stat. 611.

14. *See generally*, A. DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 245-90 (1961); A. DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940).

15. *See, e.g.*, James v. Watt, 716 F.2d 71 (1st Cir. 1983); Canadian St. Regis Band of Mohawk Indians v. New York, 573 F. Supp. 1530 (N.D. N.Y. 1983); Northern Paiute Nation v. United States, 8 Cl. Ct. 470 (1985).

16. The people of the states consented to the diminution in their sovereign autonomy which occurred through the adoption of the United States Constitution. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). By contrast, the tribes were involuntarily forced into the federal union, often in violation of express or implied treaty guarantees of political autonomy. *See generally*, Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841, 852-65 (1990); Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).

power. Collective internment sometimes was practiced. Actual genocide or cultural genocide, which the draft Universal Declaration creatively labels ethnocide, was not uncommon. Cultural genocide emerged from western notions of the nation-state and efforts to create the cultural homogeneity that it required through either forced assimilation or extermination. In short, western colonial societies regularly reacted to Indians and other indigenous peoples because of their group affiliations and dealt with such groups, as groups, to accomplish western objectives. It is truly ironic that western legal theory now questions the validity or existence of such group rights when indigenous peoples demand vindication of those group rights, the very same rights that western governments promised to the disadvantaged indigenous groups.

Unlike state rights, however, the rights of indigenous peoples generally find few, if any, protections in the political structures of the nations in which such indigenous populations are found. While many Indian tribes and other indigenous peoples were promised structural protection, such as the promises of potential statehood made in 1778 by the United States to the Delaware and the later abortive discussions of statehood or other organized legal protection for the Indian tribes of the Indian territory in the United States, very few of these promises ever reach fruition.[17] The New Zealand legal guarantee of four Maori seats in the New Zealand Parliament is the only major structural assurance of representation for indigenous peoples in the legislative chambers of the dominant society of which I am aware and that guarantee constitutes far less than a voting majority. Indeed, the New Zealand provision originally was intended to diminish the voting power of Maori who otherwise might have been entitled to larger numbers of representatives based on their then existing percentage of the population. Because indigenous peoples have no structural political guarantees that the nation in which they find themselves located will respect their group rights to land, culture, religion and political autonomy, special legal protection that limits the power of the state is critically important. Some such protection might emerge from domestic constitutional limits on the exercise of national power. Because majorities, however, rarely vote to limit their political autonomy in favor of indigenous, sometimes disenfranchised, minorities, international protection of such group rights is also terribly important. Indeed, the United States Supreme Court's rationale in *Garcia* for not intervening to protect the group political rights of states, suggests that active legal protection of the indigenous peoples group rights is critical. In *Garcia* the Court held that the ample protections in the political structure, obviated a need to protect a states rights. As compared to the states, indigenous peoples, however, have far fewer, if any, structural protections in the organization of the nation state that will recognize and preserve their group interests. The political processes do not work for them and resort to legal protection, such as the group rights of the Universal Declaration of Indigenous Rights, is critical to protect their legitimate group rights claims from national encroachment.

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17. Treaty with the Delawares, Sept. 17, 1778, United States — Delaware Nation, art. 6, 7 Stat. 13. *See also* Treaty with the Choctaw, Sept. 27, 1830, United States — Choctaw Nation, art. 22, 7 Stat. 333; *see generally* Abel, *Proposals for an Indian State 1778-1878*, AMERICAN HISTORICAL ASSOCIATION, 1907 ANNUAL REPORT 89.

CONCLUSION

The draft Universal Declaration of Indigenous Rights should be seen as a constructive challenge to nations organized on western models of sovereignty. It constructively challenges the jurisprudential assumptions upon which many nations base their theories of rights and their conceptions of the relation of individuals to states. It requires them to reconsider these notions and to take broader account of communitarian values and group identifications. It also challenges them to honor legitimate claims to autonomy, separate development, and self-determination made by indigenous peoples. Western colonial governments, in fact, acceded to and promised to honor some of these claims in now forgotten treaties and agreements in the distant mists of the historical saga of colonial contact between indigenous peoples and the dominant colonial society. Finally, and most importantly, the Universal Declaration challenges nations containing indigenous populations to satisfy an emergent international set of minimum standards of human decency that many indigenous populations would simply recognize as the result of respectful behavior between various groups in a larger society. The peoples whom Euro-Americans discovered and considered savages in a state of nature had certain insights into social and human organization which western societies are only now beginning to understand. Insofar as the draft Universal Declaration of Indigenous Rights provides long overdue legal protections for the group rights of indigenous peoples, the Convention affords the basis for emergence of a broader dialogue on such questions between nations and their indigenous minorities. Perhaps after almost 500 years of colonial contact, Euro-American nations and other nations modelled on western legal traditions, may finally understand the flaw in western political thought about which indigenous peoples have complained for so long. Group rights are every bit as important to human dignity and well being as individual rights.