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In this presentation[1] I shall explore the question of whether or not it is defensible to grant legal group rights through international instruments and national legal systems.

I shall proceed in the following way. First, I shall briefly examine the conceptual consistency between group rights and the framework of rights discourse, and I shall conclude that it is conceptually possible to include group rights in ordinary rights talk. Secondly, I shall explore what the basic requirements would be for the recognition of a group right. I shall suggest that the use of rights discourse bears a number of conceptual as well as normative constraints that carry important practical consequences, and that these constraints must be understood as conditions of admissibility for any group right.

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I. THE POSSIBILITY OF GROUP RIGHTS

It has been argued that group rights raise no analytical difficulties.[2] There are two possible ways to understand this claim, and both possibilities seem correct.

On the one hand, we can think of a right from a functionalist perspective. From this point of view, the expression "to have a right" is a linguistic shortcut, a middle link that connects one or several states of affairs with one or several normative consequences.[3] This is perfectly compatible with the possibility of there being group rights.

On the other hand, we can examine the reasons why we consider that someone has a right. The possibility that groups might have rights is also open, since the two main theories in this respect, the choice theory and the interest theory, leave unanswered the question of who qualifies as a right-holder. This is what Makinson, Hartney and Waldron have in mind when they claim that group rights raise no analytic difficulties.

The choice theory, prominently held by H.L.A. Hart, holds that a right is a protected array of choices of enforcing duties that bind other people.[4] In order to find a group right, therefore, the choice theory would need only to find acceptable that some ways for the formation of collective will are valid — i.e., voting or appointing representatives. This seems to be non-controversial.

The interest theory, defended by Joseph Raz and his followers, holds that a right is a protected interest that places duties on other people.[5] In order to find a group right, therefore, the interest theory would need only to admit that some interests are collective interests, both in the sense of belonging to a group and being indivisible. This is precisely what Joseph

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2. David Makinson, *Rights of Peoples: A Logician's Point of View*, *in* THE RIGHTS OF PEOPLES 69 (James Crawford ed., 1988); Michael Hartney, *Some Confusions Concerning Collective Rights*, 4-2 CAN. J.L. & JURIS. 293 (1991); Jeremy Waldron, *Taking Group Rights Seriously*, *in* LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 203 (Grant Huscroft & Paul Rishworth eds., 2002).

3. Alf Ross, *Tû-Tû*, *in* FETSKRIFT TIL HENRY USSING (Borum & Illum eds., 1951), quoted from the Spanish edition translated into Spanish by Genaro Carrió, *Tû-Tû* (Abeledo-Perrot ed., 1972).

4. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); H.L.A. Hart, *Legal and Moral Obligation*, *in* ESSAYS IN MORAL PHILOSOPHY (A.I. Melden ed., 1958); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 2 (1955).

5. Joseph Raz, *Right-Based Moralities*, *in* THEORIES OF RIGHTS 182 (Jeremy Waldron. ed., 1984).

Raz, Jeremy Waldron and Neil MacCormick, among others, have claimed in defense of group rights.[6]

It seems, therefore, that no conceptual consideration rules out the possibility of there being group rights. But even if some rights might be group rights, can they be basic or fundamental rights? Or to put it in terms better suited for international law, can they be human rights?

The answer is yes — from a purely conceptual point of view, group rights can be fundamental, basic or human rights. Probably the most accepted way of understanding basic rights is to consider them as trumping-rights, as shields that protect minorities by trumping consequentialist considerations.[7] Nothing in this formulation precludes in principle taking minorities as groups, as opposed to taking their individual members one by one. Will Kymlicka has defended precisely this kind of group rights for cultural minorities. He refers to them as "external protections," and they are at the core of his theory of differentiated citizenship.

From a substantive point of view, both major theories of rights can accommodate fundamental group rights. The choice theory only needs to accept that some minority decisions are particularly important or worth protection. The interest theory only needs to consider that some of the interests at stake are basic or fundamental, as to give rise to basic or fundamental "rights" in the strongest possible sense.

There can be group rights, therefore, and they can be fundamental rights.

II. THE CONDITIONS FOR GROUP RIGHTS

So far I have said nothing about there actually being group rights. The mere possibility of the category says nothing about the actual admissibility of any specific group right. It could very well be that group rights are as extraterrestrial life, an open possibility that knows no actual instances for the moment.

In order to find out whether or not there is any group right some method of recognition is needed. One option is to look for a theory of rights that defines what counts as a relevant consideration for the attribution of

6. JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); NEIL MACCORMICK: LEGAL RIGHTS AND SOCIAL DEMOCRACY (1982); Jeremy Waldron, *Can Communal Goods Be Human Rights?*, *in* LIBERAL RIGHTS 339 (Jeremy Waldron ed., 1993).

7. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

rights, and what specific rights we have. I do not intend to offer such a theory.

In what follows, I shall instead use a negative approach. I will not look for a method of recognition, but for a method of discarding. I shall look for criteria that can discriminate between admissible and inadmissible group-right claims, criteria that can bring about an admissibility test. The test will not tell, therefore, which claims qualify as group rights, but only which claims do not qualify. In other words, I shall not offer a set of sufficient conditions for group rights. The criteria of admissibility can only be used as necessary conditions, without which no group right can be granted.

What would be the conditions for group rights, then? Let me put the question in different words. What set of circumstances would need to be the case for a group right to be still in the realm of possibilities?

Here I shall hold that at least five conditions of admissibility apply to group rights. They arise from the demand of consistency (either conceptual or normative consistency) with rights discourse. These conditions work at two levels of abstraction. First, they check the admissibility of group-rights claims in the highest level of abstraction, as a matter of principle. Secondly, they rule out that some specific groups in some specific circumstances can be right-holders. The five conditions are as follows:

1. INDIVISIBILITY

A group right must be indivisible into individual rights. In other words, rights that can be understood as arrays of individual rights are not group rights. Suppose that this requirement of indivisibility was not in place. Then all individual rights would also qualify as group rights, and the difference between individual and group rights would vanish — individual and group rights would be just two possible ways of referring to the same thing. The way in which any individual right can be understood as a group right is the following: individual rights always apply to specific classes of people — in the logical sense of the word "class." For example, individual human rights apply to the class "human beings," the group called "humanity." Are individual human rights a group right? Well, this is one possible way to look at them, no doubt about it, but it is hard to see the point in doing so.

It is hard to see why it would be a good idea to use two different labels — i.e., "individual rights" and "group rights" — to indicate one single normative status. It is easy to see, in contrast, why it would be a bad idea:

it would lead to confusion, misunderstandings, and probably also to moral errors.[8] If group rights were only sets of individual rights, then, the concept of "group rights" would be redundant. If we are to use the concept of "group rights" at all, we need to apply it to group rights that cannot be broken up into individual rights.

Some of the frequently called "group rights" do not satisfy this condition, and therefore, it would be advisable to stop calling them "group rights." Examples are rights that exempt a class of people from the application of some rules;[9] rights allowing Canadian sikhs to drive motorbikes not wearing a helmet (so they can keep their turbans on their heads, following a religious mandate); or rights exempting from application of anti-drug legislation some native Americans who are allowed to smoke peyote. If these normative situations are considered to be rights, they are individual rights, but not group rights.

2. ENFORCEABILITY

It must be justifiable to enforce the duties that correspond to these rights. This condition draws the difference between moral and legal rights. I have a moral right that you always tell me the truth — with some possible exceptions that are irrelevant here — but there is no justification available to make it my legal right, and therefore your legal duty. However, if you sell me a used car with a serious mechanical problem that you are aware of, there is a really good justification for making it my legal right that you tell me the truth about it. There are some circumstances, therefore, in which it is justifiable to enforce some moral duties. Only in those cases does it make sense to grant legal rights. The fact that the right-holder is a group, rather than an individual, does not seem to add anything to the rationale that demands some extra justification for the use of force. What is true for individual rights in this respect must also be true for group rights.

Is this less true for international law? No, it is not. The lack of an enforcing agency is irrelevant here because the requirement is not an empirical necessity, but a normative one. The enforceability condition does not ask for the *actual* ability to enforce duties. It asks whether or not it would be justified to enforce the duties arising from a group claim *in the case that we could do so.* It asks a normative question in a hypothetical world. This undoubtedly abstract question has, however, a

8. Michael Hartney, *Some Confusions Concerning Collective Rights*, 4-2 CAN. J.L. & JURIS. 293 (1991).

9. Jacob T. Levy, *Classifying Cultural Rights, in* NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 22 (Ian Shapiro & Will Kymilicka eds., 1997).

serious practical potential. In international law there are a great number of situations in which this question is already relevant in practical terms — whenever the means of coercion, pressure and enforcement that are peculiar to it can actually be implemented. It is also relevant because the assertion of a group right is often the beginning of a political striving that aims to achieve changes in international law. The enforceability requirement sets a condition for the justifiability of such political claims. If we cannot think of any justifiable coercive enforcement, then the possibility of granting a group right will be immediately ruled out. Any political striving exclusively based on such a claim would, therefore, be disqualified as unreasonable. There might still be a moral right backing the group's political demands, but the aspiration to have a legal right recognized by international law on the basis of this non-enforceable moral right will have to be dropped.

The reasons that a morally justified claim may not be enforceable can be of at least two varieties. First, it may be the case that enforcing the correlative duty or duties is not found justifiable, but too aggressive. Notice that this is still compatible with asserting that the group has a moral right, and therefore that there might be some correlative moral duties that ought to be satisfied. It is considered, however, that the use of force is too aggressive a way of demanding these duties. Secondly, it may be the case that the duty-holder cannot be identified, and therefore the duty cannot be conceivably enforced. In this case, there could be more doubts about whether or not we can even speak of a justifiable claim, let alone a moral right.

3. UNIVERSALIZABILITY

When universalized, the group right of one group ought not to be incompatible with the same right of other groups that share the same relevant characteristics. This condition carries strong Kantian moral connotations, however stretched, since Kant never considered group rights and it would be highly controversial to say that they fit in his moral theory at all. Behind the logical demand of consistency lies the moral demand of equal concern and respect for all persons as beneficiaries of rights. On the one hand, the rights of all rights-holders need to be compatible, because what we create when we engage in the activity of granting rights is a system of interconnected arrays of duties. As a system, this requires consistency between its component elements. It is therefore crucial to shape every group right in such a way that all agents who share the same relevant characteristics enjoy it in the same degree. If this is not possible, then the claim cannot be a right. On the other hand, all groups that share the same relevant characteristics must be

treated with equal concern and respect. No group ought to be left aside. Most of the groups for which group rights are claimed live intermingled with other groups or share with them resources needed by all members of the groups in order to have good lives. Equality of needs, interests or protected choices ought to be taken into consideration. Whenever the claimed group right cannot be exercised simultaneously by all groups that share the same relevant characteristics considered appropriate to identify the first right-holder, a strong reason emerges against considering such a claim to be a right.

This condition of universalizability brings about two further effects. On the one hand, it helps to prevent rights inflation. On the other hand, it works as a disincentive for those groups that are ready to claim a right for themselves and to deny it to other equally qualified candidates. This second problem is rather common, for example, among groups that claim to have a right to self-determination.

4. INCLUSION

The problem of over and under-inclusion possibly generated by the group right must be morally outweighed by the benefits that the right brings about. Many group rights commonly create a double frustration. On the one hand, some individuals who would need or deserve the benefit provided by the group right do not qualify as members of one of the groups that hold the right to the benefit, and therefore are excluded from its enjoyment. On the other hand, some individuals do not really need or deserve, or even want, the benefit for which they qualify as group members. To summarize, in order to provide benefits to a group that qualifies as a whole, granting a group right brings about the cost of providing benefits to individuals who do not qualify but belong to the group, while not helping out individuals who need this kind of benefit but do not belong to the group. This is known as the problem of over and under-inclusion.[10] Over and under-inclusion may be considered extremely serious or merely a minor problem, depending on the importance that is assigned to this cost, which would have to be examined on a case-by-case basis.

A pertinent question in examining the relevance of the over and under-inclusion problem is whether or not there are alternative policies that can obtain similar results with lesser costs. Even when it is concluded that no better policies are available, it must still be acknowledged, however, that

10. Joseph Tussman & Jacobus TenBroek, *The Equal Protection of The Laws*, 37 CAL. L. REV. 341 (1949).

something clearly unsatisfactory is happening when under and over-inclusion occurs. It might be acceptable to grant the group right in such a case, but it should not be forgotten that better ways of addressing the issue at stake must be looked for.

5. LACK OF OPPRESSION

Groups do not have the right to oppress their members. The leading idea here is that individual and group rights need to be consistent. This is probably the hottest area in the entire debate about group rights. What we find at the edges is harsh disagreement about the extension and limits of the concept of oppression. I want to point out that such a disagreement at the edges progressively dissolves, nevertheless, as we get closer to the core of the concept of oppression, and this is of critical importance.

Think of the following way of fleshing out the anti-oppression condition in the abstract presentation of a claim: "a claim to the group right of maintaining or revitalizing the ancient group tradition of slavery is not a right." Or else, in recognition of the specific right holders: "the right to self-determination ought not to be granted to a group that openly plans to commit genocide, or to a group that has already taken some steps in this direction, until these plans or practices are gone." Constraints like these would meet with very little opposition from group-rights defenders. This proves that the anti-oppression condition does have some practical relevance. How much and how far it can go is another issue that lies beyond the boundaries of this presentation. Undoubtedly, the challenge is to define "oppression," in other words, to single out those individual human rights that have priority over any claimed group right.

This constraint would be understood more generously by some group-rights defenders than it would by others. Will Kymlicka, for example, establishes a similar constraint in his theory of differentiated citizenship, in which he prohibits any "internal restriction" against group members.[12] Other defenders of group rights such as Chandran Kukathas or Charles Taylor would accept the anti-oppression constraint only if the concept of oppression were understood in a very narrow sense.[13] Taylor gives great value to at least one putative group right, the right to cultural preservation, and thinks that this right has priority over a number of

12. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995).

13. Chandran Kukathas, *Are There Any Cultural Rights?*, *in* 20 POL. THEORY 105 (1992); Chandran Kukathas, *Cultural Toleration*, *in* ETHNICITY AND GROUP RIGHTS (Ian Shapiro & Will Kymlicka eds., 1997); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND 'THE POLITICS OF RECOGNITION' (Amy Gutmann ed., 1992).

individual rights — i.e., it has priority over the right of parents to choose the language in which they want to educate their children. Kukathas holds a more radical view, according to which the only individual right is the right to be free to leave one's own cultural community, "all other rights being either derivative of this right, or rights granted by the community."[14] Kukathas claims that this does not entail group rights, and therefore I am misrepresenting his self-understanding when using him as an example of a defender of group rights. It is hard to see, however, what else but a group right of some sort — i.e., to collective self-rule — this power to grant individual rights that Kukathas assigns to groups could be. In different ways, both Taylor and Kukathas see the current list of individual human rights as too long and too intrusive. They both think that defending group interests demands shortening individual rights. Their views are hardly compatible with the current system of protection of human rights. They are implicitly asking for a profound reform of this system.

This condition that tries to prevent the legal recognition of oppressive practices, therefore, might be universally agreeable only at a bare minimum. It is, however, crucial to fix this minimum that group claims cannot trespass. Precisely because it is a minimum, it expresses the most fundamental conditions for human dignity. Its recognition and protection is far from trivial. Under contemporary international law, the international and regional declarations of human rights have been so far the best-suited instruments to fix this minimum. Consistency demands that any recognition of group rights incompatible with these declarations brings about an explicit reform and adjustment of all relevant international legal instruments. Otherwise, the group claim ought not to be granted as a group right. It is rather obvious that enlarging the list of human rights, by adding group rights openly incompatible with previously recognized individual rights without making the necessary legal adjustments first — i.e., eliminating the conflicting individual right from the list or qualifying it — would not merely increase rights inflation and confusion, it would make the protection of the incompatible rights highly impracticable. In any case, the question of what individual rights have priority over group claims needs to be answered before the constraint that tries to prevent oppression can be neatly defined.

The literature on group rights often gives the impression that how to define 'oppression' or this constraint regarding its prevention is the only issue at stake. By suggesting four additional admissibility conditions of

14. Kukathas, *Are There Any Cultural Rights?*, *supra* note 13, at 238.

group rights, I hope to have shown that it is not. By putting it in negative terms, as a requirement that ought not to be violated, I also hope to have provided a way of granting a number of group rights — the ones that pass the requirement without any controversy — as well as a way of rejecting some group-rights claims — the ones that fail the requirement without any controversy. This approach is a way of avoiding, as much as possible, the risk of complete paralysis arising from the substantive controversy's inconclusive nature.

I shall add two final considerations. First, the conditions above need to be interpreted. Secondly, whether or not a specific group claim meets those conditions needs to be assessed on a case-by-case basis. This leaves room for disagreement. There is, however, no other way to establish legal rules. This is exactly what adjudication is all about. Not only adjudication, but also continuous discussion may narrow the range of interpretations available. Were such not the case, at least the previous conditions will serve to single out some of the main points of disagreement and to clarify, to some extent, the limits of our consensus on this issue.

If the set of conditions that I have suggested is found acceptable — either unaltered or with some modification — then it must be concluded that there might be some unproblematic group rights. I shall leave open here whether or not there are any, which rights they are and who are the right-bearers. Nathan Lerner once wrote that "What seems beyond doubt is the need, at the national as well as the international level, to deal with the recognition of group rights, establishing a minimum standard in this respect that may help to reduce tension, friction, and violence."[15] Here I have tried to take a tentative step forward in this direction.

15. Nathan Lerner, *The Evolution of Minority Rights in International Law*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77-101, 100 (Catherine Brölman et al. eds., 1996).