

14 Self-determination as a basic human right: the Draft UN Declaration on the Rights of Indigenous Peoples

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Introduction

Conventional wisdom suggests that promoting self-determination for peoples and protecting the human rights of individuals are competing priorities. By this is meant that securing individuals in their human rights requires limits on the rights of their peoples, and vice versa. In contrast, the Draft UN Declaration on the Rights of Indigenous Peoples (the Draft Declaration) treats the two as not only mutually supporting but mutually necessary. In the Draft Declaration, the right of peoples to self-determination is more than a principle that constrains states in their behavior towards other states and territories “*outré-mer*”; it also constrains states *within* their domestic realm. This view of self-determination reflects the experience of many indigenous groups, for whom refusal to respect the integrity of their group and failure to respect the integrity of their persons have gone hand in hand.

In this chapter, I give the basic outline of the Draft Declaration’s treatment of self-determination. I argue that this view of self-determination is right: self-determination is a human right and this human right is the same right that underpins the rights of states. Treating an interest of peoples like self-determination as a constitutive element of human dignity raises practical worries about the stability of the international system, and philosophical worries about potential conflicts between individuals and peoples. But it also casts state sovereignty itself in a different light. This new light has interesting consequences both for international law and for philosophical debates about minorities within minorities. In particular, it allows one to think about questions about internal minorities as ultimately questions about legitimacy and representation.

Self-determination in the Draft Declaration

The Draft Declaration consolidates, clarifies and elaborates international norms regarding the rights of indigenous peoples. It is a standard-setting

instrument: a statement of basic principles that an international organization (in this case, the United Nations) has agreed should guide states (or other actors) in their development of national legislation and their interpretation of their international obligations. Standard-setting instruments are important interpretive tools in international law, and they may contribute to the development of treaties or serve as evidence of an emergent norm of customary law. The archetypal standard-setting instrument is the UN's Universal Declaration of Human Rights. Other such instruments include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities Declaration on Minorities, Standard Minimum Rules for the Treatment of Prisoners, and declarations from regional bodies such as the Organization of American States (OAS), the European Commission on Human Rights, or the Organization of African Unity (Toman 1999). The Draft Declaration is currently under consideration by a working group of the UN's Commission on Human Rights, whose aim is to produce a version of the text that has sufficient support among UN member states to be adopted as a resolution. The working group is primarily made up of representatives of states; it hears statements from representatives of indigenous peoples, non-governmental organizations, and inter-governmental organizations as well as from governments.

The rights set out in the Draft Declaration can be grouped under three distinct categories. The first grouping (articles 9, 13, 14 and 16) focuses on language, religious or spiritual expression, and history or heritage. These articles establish a right to *develop* and *interpret* a way of life that is distinctively one's own, both as an individual and as a group.¹ A second group of articles (10, 12, 17, and 24–6) sets out rights of access to and control over land, physical resources and intellectual tools. These articles focus on the material underpinnings of life. They establish a right to *support* and *effect* a way of living that is distinctively one's own.² A

¹ Article 9 sets out the right of persons to belong to an indigenous community in accordance with its traditions and customs. Article 13 names rights to spiritual and religious traditions, customs and ceremonies; to religious and cultural sites; to the use and control of ceremonial objects; and to the repatriation of human remains. Article 14 states that indigenous peoples have a right to their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. Article 16 sets out a right to have their cultures, traditions, histories and aspirations appropriately reflected in education and public information.

² Article 12 states that peoples have the right to maintain, protect and develop manifestations of their cultures, such as archeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature; and the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs. Article 17 lists the right of peoples to their own media in their own languages. Article 24 includes

third set of articles (15, 29, 33–4) sets out rights to control the development and maintenance of institutions, rules of membership, and the terms on which a community interacts with other communities. These articles focus on the institutional underpinnings of life, and in particular on the link between institutions of governance and cultural expression and development both for individuals and for groups. They establish a right to support and effect a *way of interacting* with other people (both intimates and strangers) that is of one's own choosing, both as an individual and as part of a group: in effect, a right of persons and of communities to some form of self-government.³

Each of these categories includes rights of both peoples and persons. For example, article 42 describes the rights set out in the Draft Declaration as “the minimum standard for the survival, dignity and well-being of the indigenous *peoples* of the world” (emphasis added). Article 7 describes indigenous peoples as having “the collective and individual right not to be subjected to ethnocide and cultural genocide.” Article 8 ascribes “the collective and individual right to maintain and develop their distinct identities and characteristics including the right to identify themselves as indigenous and to be recognized as such.” In fact, the document often seems to go out of its way to identify rights as *both* collective and individual. This is in part to make it unambiguous that the subjects of the rights it names are not just persons belonging to indigenous groups but also the groups themselves.⁴

In itself, naming groups as well as individuals as bearers of human rights is not a radical departure from existing international practice. It articulates in a principled way an idea that has been influencing the development of international norms for quite some time (Anaya 1993: 131–64,

the right to protection of vital medicinal plants, animals and minerals as part of the right to traditional medicines and health practices. Articles 10, 25 and 26 link rights to not be forcibly removed from their lands, territories, waters and resources, to rights of people to maintain and strengthen their spiritual and material relationship with these, and to own, develop, control and use them in accordance with their own laws, traditions and customs, land-tenure systems and institutions.

³ Article 15 states that indigenous peoples have the right to establish and control their own institutions and system of education. Article 29 sets out a right to full ownership, control and protection of cultural and intellectual property. Article 32 sets out the right of indigenous peoples to determine citizenship in accordance with their customs and traditions. Article 33 names a right to promote, develop and maintain institutional structures and distinctive juridical customs, traditions, procedures and practices. Article 34 states that indigenous peoples have a collective right to determine the responsibilities of individuals to their communities.

⁴ Many human rights documents use the locution “persons belonging to” rather than “peoples”. This has the advantage of avoiding the contentious word “peoples” and so making it easier to gain the support of certain states. Of course the reason the “persons belonging to” locution more easily gains support is that it leaves it ambiguous whether, in fact, groups as such may make claims of the states that host them.

1996: ch. 3). It is true that the Draft Declaration is distinctive (at least among United Nations instruments) in offering the possibility that complaints may be filed on behalf of groups as such. As it stands, most of the international forums in which violations of human rights may be pursued as a breach of legal obligation only accept complaints on behalf of individual persons, either severally or in groups. However, this does not arise from the nature of the rights such forums consider, but rather from the specific mechanisms for processing complaints that the various human rights treaties have set up.⁵ So although explicitly naming peoples as the subjects of human rights is somewhat of a departure from the wording of many human rights documents, it is nonetheless consistent with existing international norms and practice; and it can certainly be incorporated into the international bill of human rights without doing violence to its underlying framework.

However, the Draft Declaration goes beyond merely incorporating groups into international human rights discourse. Its interpretive framework presents certain rights of peoples (such as the rights to culture and to self-determination) as not just claims that must be respected as a *matter* of human right, but as fundamental or basic rights in themselves. With respect to self-determination, the document's interpretation implies that the (now widely accepted) norm that states must refrain from attempts to assimilate, submerge or otherwise manipulate the organization, culture and development of "insular minorities" (communities within their borders who are culturally, religiously or linguistically distinct) (Hannum 1990: chs. 3, 4; Lerner 1991; Casesse 1995: ch. 5) establishes a right of such communities to determine for themselves the terms on which they associate with the government that hosts them. The Draft Declaration suggests that states may not interfere with insular minorities because self-determination itself is a basic human right.

Basic rights, derivative rights and particular claims

Treating self-determination as a basic human right implies three things: that it is a right of all peoples, as such; that it imposes constraints on states'

⁵ For example, the HRC (the monitoring body for the ICCPR) and CERD (the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination) only accept complaints on behalf of individual persons, either severally or in groups. However, the amendment of the European Convention on the Protection of Human Rights and Fundamental Freedoms to allow individuals and groups to bring complaints before the Court, and the Additional Protocol to the European Charter Providing for a System of Collective Complaints show that, as a pragmatic matter, complaints from groups can be brought within the mandate of instruments for the oversight and enforcement of human rights treaties if there is a will to do so.

behavior that they must respect as a *matter* of human right (i.e. that they must conform to insofar as they respect human rights at all); and that the interest that underwrites a people's right to self-determination is one of a special or basic set, whose moral status is such that they may not be traded off against interests not also within that special set.

Basic human rights generate claims regardless of their having instrumental value in the securing or realizing other rights. *Derivative* or *non-fundamental* rights generate claims because they contribute to or are pre-conditions for securing or realizing basic rights. What a person can claim as a matter of human right may include things which, taken on their own (i.e. apart from the contribution they make to other rights), are not fundamental to securing human dignity.

For example, the right to due process is usually treated as a basic right: it is treated as important in and of itself, regardless of its contribution to protecting or promoting other rights like the right to free expression. Consequently, it is enough to show that a state has not provided me with due process to show that it has violated my human rights. In contrast, the right to an interpreter during legal proceedings is usually treated as a derivative right: it is treated as a right one has because of its contribution to the right to due process. So if a state can show that in a particular set of circumstances providing me with an interpreter was not necessary for me to enjoy due process, it will have shown that in fact it has not violated my human rights in the circumstances (even though, in most cases, refusal to provide an interpreter is rights-violating).

Both of these (the basic right to due process and the derivative right to an interpreter) can further be distinguished from *particular claims* to which those rights give rise, such as the ability to choose for oneself the interpreter that one uses. Particular claims name specific institutional arrangements, ranges of services and/or performances that persons (or peoples) must be able to command or enjoy for one to judge that the state in which they live is in fact observing the constraints on its behavior that respect for human rights requires. For example, in an institutional context that does not offer imprisoned persons parole before the end of their full sentence, the right to non-discrimination on the basis of race could not give rise to particular claims to parole. In an institutional context that grants parole to some persons before the end of their full sentence it may well be that the human right to non-discrimination requires that certain applicants be approved as a matter of human right. In other words, the right to non-discrimination on the basis of race may give rise to particular claims in the latter context where it would not do so in the former.

So basic rights are the constitutive elements of a special set of rights: rights that in themselves justify constraints on state behavior. These

elements may in turn ground other (derivative) rights.⁶ The basic set names capacities, interests or activities which are of such universal and fundamental importance to human beings as such, that securing people in the enjoyment of these as *rights* should be adopted as an end in itself. Achieving this purpose – securing people in their development or enjoyment of capacities, interests or activities vital to them – may, as a matter of contingent fact, require one to protect and promote interests, capacities and activities that are not of vital importance taken on their own, but as a matter of fact are necessary to protect and promote elements of the basic set. Both elements of the basic set (basic rights) and activities, capacities and interests that are important contributions thereto (derivative rights) give rise to particular claims. These claims must be recognized as a matter of universal human right, even though they arise because of specific features of a social, historical or institutional context.⁷

Distinguishing between basic rights, derivative rights and particular claims is important for at least two reasons. First, it distinguishes between the *grounds* on which a particular claim is argued and the state of affairs that a claim is intended *most immediately* to secure in a way that helps clarify what is actually at issue in disagreements about whether specific policies or actions violate one's human rights. For example, the entitlement of all citizens to vote according to their consciences most immediately

⁶ In this, the notion of a basic or fundamental right is similar to Joseph Raz's concept of a core right: a right that can ground duties and is not itself grounded in another right. See Raz 1986: 168–9.

⁷ This distinction can be seen in practice in the differing positions adopted by the justices of the European Court of Human Rights in the case of *Buckley v. United Kingdom*. The complainant in that case was a gypsy woman who had been denied permission to park her caravan on a piece of property which she owned on the grounds that using her land in this way “would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan.” The complainant argued that her rights to respect for private life, family and home, and the right to enjoy all Covenant rights without discrimination under the European Convention for the Protection of Human Rights and Fundamental Freedoms, had been violated. The European Court's assessment of the complaint was divided. The majority opinion (six of nine) found that there had been no violation on the grounds that the decision as to whether the complainant's interests in parking her caravan on her property could be traded off against the municipality's interests in controlling local development lay within the authority of the national government in question to decide. Each of the dissenting opinions rejected this. They took the complainant's Covenant rights to be fundamental or basic constraints on the kinds of trade-off between interests that state parties may make, and so argued that reviewing the appropriateness of the trade-offs that internally determined norms permit is precisely what the Court in its supervisory capacity is supposed to do. A difference in various judges' understanding of what kind of constraint the rights set out in the Covenant represent – derivative or fundamental – led to very different conclusions regarding the scope of freedom in their decision-making that states are allowed. *Case of Buckley v. United Kingdom*, European Court of Human Rights Reference Number 00000664, Reports of the European Court of Human Rights 1996(IV), 23/1995/529/615, 25 September 1996.

secures persons' capacity to establish and maintain a democracy. The *grounds* on which individuals claim this entitlement as a human right is not a right to vote; it is a right to political participation (or perhaps a derivative right to democracy). It may turn out that there is disagreement about whether voting is, in fact, necessary to secure persons in their right to political participation. Distinguishing between political participation as the grounds for particular claims, and voting as the particular claim that the right to political participation (allegedly) establishes clarifies the conceptual relationship that is supposed to obtain between a person's human right to political participation and prohibitions on voting.

Second, the distinction between basic rights, derivative rights and particular claims separates out the specific actions, policies and/or provisions that respect for human rights requires a state (or other actor) to undertake or refrain from undertaking, and the general and abstract form in which the rights themselves are couched. For example, the right to due process may ground a particular claim for Cree persons to have the manner in which they interact with judges or other officers of the court left out of deliberations about credibility or sentencing. But this is not to say that the right to culturally sensitive legal institutions is a *basic* right, nor that the only way to ensure that Canada's legal institutions are sensitive to cultural differences between Cree persons and Anglo-Saxon persons who appear before a criminal court is to bar judges from considering *anyone's* manner of interacting with court officers. Rather, there is an abstract universal right to due process, respect for which requires (among other things) that one limit as much as possible the likelihood that a person will fail to receive a fair hearing (be it as defendant or as victim) because an officer of the court misreads his or her body language. This establishes a derivative right to culturally sensitive legal proceedings, which (depending on the context) may in turn establish a particular claim for a Cree person to have his or her interactions with officers of the court treated differently than is usually the case.

Self-Determination as a basic right

Obviously the rights that the Draft Declaration lists are supposed to be read as constraints that states must respect as a *matter* of human right. But this does not necessarily mean that each clause within the document names a right that is basic in and of itself. There are several arguments in favor of indigenous self-government in the contemporary literature on group rights that appeal not to a general right of peoples to self-determination but rather to the specific circumstances in which indigenous peoples find themselves in many parts of the world. For example,

Allen Buchanan argues that the strongest case for according collective rights to indigenous peoples is “that they are needed as special protections for the distinctive interests of indigenous peoples and other minorities – typically as a result of historical injustices perpetrated against them (1993: 104). Will Kymlicka similarly defends indigenous rights to cultural and political protection as a response to unequal circumstances (1989a: ch. 9). On these (derivative) justifications, the right of self-determination has an (historically contingent) empirical relationship to securing the dignity of indigenous persons, and *that* is why it is appropriate to talk about a right of indigenous peoples to self-determination that must be respected as a matter of human right. There is no basic right to self-determination. At best there is a derivative right; more probably there is only a particular claim.

The Draft Declaration treats self-determination of peoples as a *basic* right. Failing to respect the right of self-determination is explicitly included with rights that are usually taken to be fundamental such as the right to life, to physical integrity and to freedom of conscience. Denying or obstructing an indigenous group’s self-determination is treated as wronging the members of that group directly, over and above any wrong done them by such action’s undermining of other of their rights (Anaya 1996: chs. 3, 4). In this it offers an argument for indigenous self-determination that applies *in addition* to arguments based in indigenous peoples’ legal rights to have their treaties honored, but that does *not* rely on the special circumstances in which indigenous persons and peoples find themselves in many parts of the world. In the Draft Declaration self-determination is a right that indigenous peoples have as peoples, regardless of the circumstances in which they find themselves, and not only a special right that they have as subjects of past injustice.

There the Draft Declaration’s view reflects a more realistic conception of the role of group autonomy in securing human dignity, even though the derivative view is more common. In the words of Rosemarie Kuptana of the Inuit Tapisariat of Canada, “Our humanity has a collective expression, and to deny us recognition as a people is to deny us recognition as equal members of the human family” (Moss 1995: 70). Human lives are lived in concert with other people, and not just in separation from them. This is true not only symbolically but materially as well. People live their lives in *groups* as well as individually. This implies that some of the decisions they make will be decisions about aspects of life that they share with specific others and about features of themselves that tie others to them.

Further, individual human beings require continuous investments of time, energy and resources to bring them to maturity, and even healthy, strong adults continue to require significant physical as well as mental

contributions from other people to maintain themselves and flourish. How social and political systems distribute the burdens of those investments, ensure (or fail to ensure) that such burdens are borne and organize the delivery of contributions from others has a huge impact on individuals' day-to-day lives.

This suggests that self-determination is an essential condition for indigenous persons to live dignified lives because it is an essential condition for groups of persons whose lives are closely integrated to determine for themselves what their collective life means and what future course it should take. Indigenous persons, *like everyone else*, have an interest in determining the circumstances under which their lives unfold, and this *includes* an interest in determining for themselves the significance and terms of their relationships with one another, with the state that hosts them, and with the people and way of life that have gone before them.

An example may help to bring home this point. Suppose I own and live in a condominium that is part of a larger complex. Decisions about the schedule and terms of work on the building, use of facilities, exterior decoration and so on will have a significant effect on the way members of my family organize our time, resources and joint activities, and on the way I as an individual organize my time, resources and activities. My ability to make decisions in my own life will consequently be importantly affected by my ability to influence decisions about the life of the condominium complex. In fact, the potential for such decisions to make my life easier or more difficult, better or worse, is one of the reasons that such decision-making is usually at least partly democratic or co-operative within such complexes.

Now imagine that some branch of government were to try to take decision-making about the building's administration and upkeep out of my and my fellow condominium-owners' hands and put it instead into the hands of government officials (a "Ministry of Condominium Affairs"). Most of us would say that they ought to have a very good reason, grounded in the need to protect persons within the complex or outside of it from a serious harm. And if the government did not have a compelling reason, if there is no reason to think that government officials are better qualified to guard against the harm in question, or if it looked as though the take-over was going to be more than temporary, most would agree that both I and the complex ownership as a whole had a legitimate grounds for complaint.

Of course, membership in an indigenous community and ownership of a condominium are importantly different. One might say that I have chosen to live in a condominium rather than a separate house; and so that I have (at least implicitly) agreed the vulnerability to actions and

decision-making by others that such a living arrangement entails. A condominium owner can sell up and move if she finds the situation undesirable. And really, at the end of the day, it is just an apartment.

In contrast, individuals do not choose to be born into an indigenous community; and membership in such a community is not a severable good that one may sell on the open market. The lives of persons within an indigenous community are often closely integrated and inter-dependent in a way that the lives of persons who own units within a condominium complex usually are not. It is rare for a person who owns a condominium to find herself discriminated against because of such ownership. Governments seldom see the mere existence of condominium complexes as a barrier to national projects or unity. And those who own condominiums often have considerable economic and political resources at their disposal in battles over resources, land and other goods that they control but others want.

Yet these differences seem to make communal decision-making more important for persons in indigenous communities than for communities such as my condominium complex. Most of my claims to independence from government interference in decisions about my condominium complex arise from interests in being able to secure and enjoy important items of personal property; but the common life of an indigenous community often includes much more than property. In an indigenous community, decisions about communal organization and administration often affect a person's ability to maintain family ties, to develop intimate relationships, to express and develop views of her own about her life and her surroundings, to learn and practice a livelihood, and more. This is the core of the case for treating indigenous peoples' right to self-determination as a basic human right. Self-determination is a group's right to make decisions *together* and *for themselves* about the conditions and terms that govern shared aspects of life. The more extensive and integrated a group of persons' common life, the greater the scope of activities, institutions and conditions of life for which their capacity to deliberate as a group becomes part of what it is for each of them to live life on their own terms.

Establishing self-determination as a basic right is also significant for pragmatic reasons. First, by obviating the need to go looking for empirical arguments establishing that the violation of self-determination violates other rights, and by making it possible for self-determination to figure as a grounding right for particular claims and for derivative rights such as the right to land,⁸ it shortens the chain of argument for a large range

⁸ Many would argue that right to land is itself a basic right. In the case of indigenous people, the grounding of a right to land is overdetermined: it may be grounded through the right to culture, the right to due process or the right to non-discrimination.

of complaints. In effect, it reduces the scope for those resisting a human rights claim to use empirical indeterminacy as an excuse to continue their course of action, and makes the relationship between problematic state action and respect for human dignity starker.⁹

Second, the symbolism of redescribing indigenous peoples' right to self-determination as a derivative right or a (mere) particular claim is deeply problematic. Historically there is a pattern of treating indigenous rights as exceptions, different in scope or kind from the rights of persons as such. This effect of this is usually to exempt states and other actors from (otherwise universal) obligations when their actions regard an indigenous person or group (Barsh 1983; Williams 1990; Anaya 1996: ch. 1). Historically, describing indigenous rights as exceptional or special has had the practical effect of making them less constraining.

One might worry that these pragmatic arguments miss the point of derivative justifications. One might reply, for example, that describing self-determination as at most a derivative right is not intended to make them less threatening *states*, only less threatening to individuals, and in particular to individuals within a group. In this regard, it is important to note two things.

First, it is illusory to think that one can weaken a right's importance vis-à-vis the rights of other individuals without this having an effect on the extent to which it constrains states. These days it is rare for a state to argue that they may violate a human right "just because." States rather argue that they must act as they do, even if that *seems* to violate a right because their obligation to protect the rights of other segments of their citizenry requires it. In *Buckley v. United Kingdom*, for example, the state party successfully argued that the decision to interfere with a gypsy complainant's right to culture (by forbidding her to park a caravan on her land) ought to be left to the state's discretion because it involved a trade-off between comparable interests (the complainant's interest in culture and the interest of local residents in an unobstructed view of the countryside). Deflating or otherwise qualifying group rights widens the scope

⁹ For example, in *Lansmann v Finland* a group of Saami reindeer breeders argued that the Finnish government violated the right to culture outlined in Article 27 of the International Covenant on Civil and Political Obligations (the ICCPR) by granting logging concessions in areas that reindeer normally use for winter grazing. The decision went against the complainants because the Committee found that the evidence did not permit them to conclude that the logging concessions constituted a pressing threat to the Saami's ability to herd reindeer. The Finnish government has taken this to indicate that it need not change its policies with respect to logging in the area. Had the Saami been able to appeal to a right of self-determination, their claim to a say in the distribution of logging concessions would have been easier to establish empirically. *Lansman v. Finland*, Communication No. 511/1992 and *Lansman et al v. Finland*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996).

for this kind of argument, and in so doing it widens the scope for state interference in minority decision-making.

The real argument on behalf of derivative justifications is not that reducing self-determination to a derivative right does not strengthen states' hand with respect to minorities. The real argument is that as a general rule the protection that individuals within the group gain from such a strengthening is worth it. This is the crux of the choice that theories of minority rights confront when they turn to questions about minorities within minorities: at the end of the day, ought one to lay one's bets with the strengthening of states or the strengthening of groups when looking out for individuals' human rights? In suggesting that self-determination is one of the human rights whose promotion must be taken into account, the Draft Declaration makes it much less obvious that the costs of widening states' scope for interference are acceptable. Below, I will give some reasons for thinking that this is a good thing for two reasons: it encourages one to rethink the role of groups in a dignified human life, and it demands that states themselves justify their authority in these terms. For now, it is enough to note that one important difference between basic and derivative views is the willingness to lay one's human rights bets with political authorities other than a state.

Second, whether intended or not, describing indigenous peoples' right to self-determination as less than a general or universal principle has the rhetorical effect of making it appear less important. This is particularly so when the rights that the group would otherwise wield are left in the hands of a state. After all, even though the right to self-determination of peoples that underwrites states' rights to territorial integrity and non-interference is not presented as a human right, that right is treated as one of the basic norms that makes the existing international legal regime possible and worth preserving. So insisting that indigenous self-determination is different in kind from the sort that grounds states' rights does more than simply bolster states' powers to protect minorities within a minority; it establishes states' rights as, if not more fundamental then at the very least *less threatening* to individuals than those of other groups (Falk 1992).

Self-determination as a right of all peoples

The United States, Argentina and Brazil, among others, have repeatedly objected to including a people's right to self-determination in the Draft Declaration on the grounds that indigenous peoples are not peoples under international law and ought not to be given the power to break up states (which power the phrase "right to self-determination" is argued to confer). Some of those objecting have argued that the phrase

“self-determination” should be excised from the document entirely. Others have suggested that it be explicitly distinguished from the general right of peoples to self-determination by attaching a disclaimer to the effect that nothing said about self-determination in the document should be interpreted as meaning that indigenous peoples have a general right of self-determination under international law.

The heart of these objections is that the Draft Declaration’s use of the terms “people” and “self-determination” is confused. “Peoples” (the argument goes) ought to be limited to two types of group: *nation states* and *populations within colonially governed territories*. The right of peoples to self-determination reflects the nature of the type of group to which it belongs: it is a right of independent statehood, grounded in facts about what makes for a state and how best a system in which states exist may promote peace and stability between them (Shaw 1997: 181–2).

On this view, treating self-determination as a *human* right errs on two counts: it ascribes a right to all peoples that ought properly to be restricted to a select few; and it fails to distinguish between the kinds of principles that establish rights for individual persons and the kind of principles that establish rights for groups.¹⁰

Read in this way, the objections of state parties such as the United States and Brazil reflect assumptions about group rights that are also widespread in the philosophical literature on minority rights: that the kind of rights a group may claim depends primarily on the *type* or *kind* it represents; and that one cannot use the same arguments to justify rights for groups that one uses to justify rights for individuals.

For example, in *Multicultural Citizenship* Will Kymlicka (1995) distinguishes between national minorities, ethnic minorities and immigrant groups, arguing that the rights that such groupings may claim of a liberal state as a matter of justice vary according to the type they represent, and this move has become common in the literature (Margalit and Raz 1990; Tamir 1993; Kymlicka 1995.) Kymlicka’s distinction is based on (purported) differences in the role different types of group play in organizing individuals’ options and experiences; such differences are argued to make for different impacts on individuals’ capacity for autonomy and it is because of this that the rights that can be generated by membership are argued to vary. Other theorists have typologized groups on slightly

¹⁰ In fact, this reflects both a very conservative view of the international legal conventions governing the terms “peoples” and “self-determination” and a very generous view of the political and legal regimes governing indigenous communities in most parts of the world. For example, it is not at all clear, given the legal and administrative regimes that govern indigenous peoples in Canada, the United States, New Zealand and Australia, that restricting the term “peoples” to populations within a colonized or occupied territory would rule out treating indigenous groups as peoples.

different grounds. For example, James Nickel (1997) sorts groups according to their pragmatic capacity to wield rights; and Leslie Green (1994) sorts them according to the likelihood that promoting them will also promote autonomy. In each of these accounts, groups must *qualify* for rights: they must exhibit specific properties that mark out groups that are potential rights-wielders from those that are not. As with objectors like the United States, then, many theorists of minority rights would likely reject the Draft Declaration's statement of peoples' rights to self-determination as unacceptably vague. Before figuring out whether indigenous peoples may claim a right of self-determination, one must first figure out what *kind* of group an indigenous people is: one must identify what it is to be an indigenous people. Only then can one determine whether such groups are even candidates for rights, let alone whether in the particular case, the potentiality for rights-wielding is actual. On most views, it is only by figuring out what makes something *count* as a people as such that one can figure out whether they have rights and in what those rights consist.

Many theorists of minority rights further argue that at any rate arguments purporting to establish rights for groups as such cannot avail themselves of the same range of justifications that are open to arguments that establish rights for individuals. For it is argued that groups as such may acquire rights only derivatively, in virtue of their instrumental contribution to (more important) individualistic rights. In particular, the interests of groups as such are usually rejected as proper grounds for human rights. Even when groups as such are of a type that may wield rights, it is often argued that their rights must always (except, perhaps, in extreme or special circumstances) give way when they come into conflict with the rights of an individual internal to them (Buchanan 1993; Kymlicka 1995; Jones 1999). Like conservative interpretations of international law, then, many discussions of minority rights argue that questions about the moral entitlements of individuals ought to be treated separately from questions about the entitlements of groups.¹¹

These concerns about the Draft Declaration's treatment of self-determination are important. Yet to fully appreciate the nature of the disagreement between the Draft Declaration and its critics, one must pay closer attention to what the document is actually doing. Conservative approaches to international law suggest that the Draft Declaration is problematic because of its broadened conception of peoples and its multiplication of potential candidates for statehood. But in fact, the document's use of the terms "peoples" and "self-determination" is not as big

¹¹ But whereas most minority rights theorists would argue that the moral claims of individuals must be treated first so that it may serve as a foundation for one's consideration of the legal entitlements of collectivities, most conservative interpretations of international law would reverse that priority.

a departure from existing international practice as its critics suggest.¹² The Draft Declaration's real innovation is that it shifts the basis on which states themselves claim political authority in the international sphere. Its motivation for this shift is instructive for theories of minority rights.

The Draft Declaration suggests that indigenous peoples, national, ethnic, and linguistic minorities and other sub-state groupings have independent status under international law and that this is so for the same reasons that states have their status: because it is a constitutive element of showing respect for the individuals that comprise them. In this, the real worry that the Draft Declaration seems to raise is not that its conception of peoples and self-determination is *confused* but rather that its conception is *impractical*. Figuring out who peoples are does not seem to be a problem so much as figuring out how the system can be stable with so many of them claiming rights to decide for themselves the rules and political institutions that apply.

However, a doomsday scenario of widespread instability as existing political systems are broken up by a plethora of indigenous mini-states is not plausible.¹³ International tribunals and organizations have historically taken a very conservative approach to attempts to dismember a pre-existing state, in part out of respect for the principles of territorial integrity and collective security;¹⁴ and many of the representatives of indigenous

¹² For example, the increasing importance of international human rights law has established individual persons as subjects of international law in addition to states. And regardless of whether they count as colonized populations, there is a widespread international legal practice of describing indigenous groupings as "peoples." On this see Brownlie 1998: ch. XXV; Shaw 1997: 182–4.

¹³ Of course, to say that a right to self-determination *need* not imply a right to set up an independent state does not mean that self-determination *does* not imply such a right. It might turn out that the realities of negotiating with a modern state are such that it must be in principle possible for a group to claim a state of its own for that group to successfully negotiate any measure of autonomy. If this is true, then the (basic) right of self-determination will imply a (derivative) right to set up an independent state. Or it might turn out that the specific circumstances and history of most indigenous groups is such that having the option of establishing an independent state is necessary for indigenous groups to successfully negotiate any measure of autonomy. In this case the basic right of self-determination will imply that most indigenous peoples have a particular claim to an independent state. There is also a third possibility: that the right to an independent state is implied by something apart from or in addition to the right to self-determination, such as the right to equality before the law.

¹⁴ For example, the United Nations 1970 Declaration on Friendly Relations seems to rule out an unconditional right to unilateral secession. See United Nations, Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, General Assembly resolution 2625, 24 October 1970. Its implications for indigenous self-determination are discussed in Anaya 1996 ch. 3. For an interesting discussion of the right to unilateral secession see Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 184 R.C.S. 217.

peoples have stated over and over again that they do not plan to demand an independent state (Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32, 3 March 1995, UN Doc E/CN.4/1997/102(1996); 15 December 1997, UN Doc E/CN.4/1998/106; 20 January 1999, UN Doc E/CN/1999/82, Pritchard 2001 at IV: A). In this they generally bear out Ian Brownlie's observation that, in practice, claiming a right of self-determination is not necessarily a first step to secession or statehood (Brownlie 1992).

In fact, most states already exhibit overlapping jurisdictions and multiple sites of governance that are not mutually exclusive and in whose dealings with one another no one party may claim the final say. Moreover, international human rights norms already compel states to answer to someone outside their borders for behavior and policy within it. In short, self-determining indigenous peoples do not *create* an international system in which states comprise multiple and overlapping levels of governance; such a system already exists.

However, as it stands, the internal messiness of the international system's units (states) tends to be glossed over or ignored in discussions of the operation and foundations of international legal principles (Kingsbury 1992). So the Draft Declaration does imply an important change: that the international system should explicitly recognize that political authority within a state may be multiply located, and not necessarily organized in hierarchical tiers, each subsuming the level below it. It treats states' internal messiness as not only normal but also desirable insofar as it seeks to protect one source of that messiness (indigenous self-determination).

This is where the document's real innovation lies. In equating self-determination with setting up an independent state, conservative approaches to international law make self-determination seem like something that only a select number of groups may have by *reducing* it to the bundle of rights traditionally associated with independent statehood. Political autonomy *within* or *in concert with* an existing state suggests something much more radical, however: it suggests that governing authorities may have substantial positive obligations to a group of persons within their jurisdiction without the compensation of exclusive authority over the individuals that group contains.

In both treating self-determination as a human right and insisting that it is the same right that appears elsewhere in the international legal canon, the Draft Declaration grounds the legal standing of *states* as well as that of sub-state groupings in considerations of human dignity. The Draft Declaration's inclusion of self-determination in the list of basic rights provides indigenous groups more scope for limiting the behavior of states in part by recognizing the importance of participation in an indigenous

people. But it also, and perhaps more significantly, provides greater scope by *deflating* the rights that states themselves may claim.

Self-determination as a human right

The Draft Declaration also offers an alternative conception of the role of the interests of collectivities in securing human dignity. Its conception of the relationship between individuals and groups makes it plausible to think that certain interests of groups as such are important enough to ground basic rights. This is the significance of the document's treating self-determination of peoples as a *human* right and as a right that is of basic and not only derivative importance.

In naming self-determination as a human right the Draft Declaration firmly fixes the interests of indigenous *peoples* as well as those of persons as the grounding of basic rights. In this, it elevates the interests of groups as such in a way that makes many political theorists and philosophers uncomfortable. There is a widespread worry that properly speaking a human right ought not to be grounded in the interests of groups *per se*, only in those of individual persons (even if such persons may sometimes have to use the fiction of a group to effectively claim their rights.) After all, the whole point of human rights is supposed to be to protect individuals against predatory behavior. And people have again and again shown themselves most likely to behave predatorily when acting in and on behalf of groups.

There are two separate concerns here. One is that if commitment to human rights means anything, it must mean that there are limits on the actions and decisions that institutions and institutional actors may pursue.¹⁵ Allowing the interests of groups as such to ground human rights seems to commit one to treating collective actors as inviolable and entitled to the same independence of judgement with respect to their subparts that is usually accorded to individual persons. Grounding rights in groups' interests seems straightforwardly to conflict with respecting the individuals that make them up.

This concern can be defused by recognizing the difference between groups (irreducibly collective subjects) and the entities or persons acting on a group's behalf. That a human rights document's language recognizes collective subjects is not to say that the document implies that the specific organizations and institutional actors who will in many cases wield the

¹⁵ This is particularly apparent in the way rights-based approaches are often characterized by contrasting them with utilitarian or communitarian views. See for example Donnelly 1985, especially ch. 4; Howard 1995.

rights of those subjects cannot be understood as proxies. It is possible to deny that *particular actors* may wield a right on a group's behalf without denying that there is a right to be wielded. This, in effect, was the reasoning behind denying membership of international organizations to South Africa during the latter years of apartheid. The massive and consistent violation of human rights within the state, in combination with its exclusion of the majority of the population from a say in the workings of government were taken to make it so implausible that those who claimed to speak on behalf of South Africa's population actually did so that it was incompatible with a commitment to principle of self-determination to accredit members of the South African government as legitimately representing South Africa (Casesse 1995: ch. 5).

So just as an individual person and the legal actor that claims to speak on her behalf may not be the same, so a collective subject and the organization that may legitimately claim to speak on its behalf may be different. Being able to claim that one speaks on behalf of a group requires that one demonstrate that the right kind of relationship obtains between the actor or institutions that claim to express the group's decisions and the actual persons who make up the group. So in the same way that the state may fail to be a legitimate spokesperson for members of a minority because its internal structures disempower or marginalize them, so the minority must have structures that allow the participation of each member and each member must participate in a way that leaves room for and facilitates the participation of everyone else, at the risk of losing their legitimacy. The question of whether there are interests that persons have in concert with others (as part of a collective subject) that are of sufficient importance to establish rights that have an internal as well as external dimension, and the question of whether and under what circumstance one may legitimately interfere with the internally directed choices of those who act on behalf of a group are distinct.¹⁶

¹⁶ James Nickel (1997) has argued that groups which do not exhibit both the capacity to form goals, deliberate, choose, intend, act and carry out evaluations of action (what he calls "effective agency"), and a clear identity are fatally deficient as right holders. However, Nickel explicitly rejects the suggestion that no actual group could meet this criteria and points out several ways in which groups which at the present time fail to exhibit effective agency and clear identity can develop these later on. Thus that some groups may fail to be plausible candidates for the bearing of group rights in no way undermines the plausibility of claims by others. Moreover, his reasons for accepting the thesis that groups failing to exhibit effective agency and clear identity are fatally deficient draws heavily on problems which arise were such a group to attempt to *exercise* any rights attributed to it. So Nickel's argument would not exclude a group from *basic* rights without the further claim that one may not distinguish between having and exercising a right with groups in the way that is regularly done in cases of persons incapacitated by age, unconsciousness or mental incompetence. In contrast, Allen Buchanan (1993)

The heart of the issue is a different worry: that the interests persons have as part of a collective subject – as part and only as part of a group – are just not sufficiently important to establish human rights on their own account. After all, rights imply constraints not just on institutional actors like states but on other individuals. The worry is that imposing constraints on individual persons – especially individuals within the group – requires much more to be at stake than the interests that individuals typically have as part of a group can muster.

Yet it is possible to conceive of interests persons have as part of a group that can justify imposing constraints on a group's own members without reducing to individualistic ones and without ignoring potential dissent or divergence by an internal minority. Consider, for example, cases of communal ownership of land, or cultural resources. In such cases, recognizing a right of the group as an irreducible collective, to make decisions about land use, or to determine when rituals may be performed, or how symbols and techniques may be used, involves placing constraints on the behavior of individuals within a group as well as outside of it. The group's right to determine land use may mean that I am not permitted to plant potatoes in my back yard, even though I desperately want to. The reasons that my fellow group members give me for restricting the use of potato growing may not make sense to me. Or they may make sense as a general prohibition, but not (I believe) in this particular instance. Unless the group's right can be conceived as legitimately placing restriction on persons within the group as well as those outside of it, my fellow group members will have difficulty preventing me from ignoring their proscription. But intuitively, it seems that my reasons for wanting the capacity to ignore that proscription on potato growing matter a lot to whether I ought in fact to be able to get away with doing so. If my reasons for wanting to ignore the proscription do not reflect a very important interest, capacity or activity of mine, it seems hard to justify curtailing the capacity of my fellow group members to pursue an activity that is very important to each of them (deciding in common how land we all own is to be used).

This example illustrates how the ability to make communal decisions about an aspect of life *and to make those decisions stick* can be very important to individuals. Recognizing this possibility – that who has a say in decisions that affect communal organization and resources can have identifiable effects on the material options open to a person – points up a crucial assumption about group integrity that underwrites the worry about

has argued that not only can one distinguish between having and exercising rights with groups, but that such a distinction is necessary if one is to make sense of group rights at all (see Buchanan 1993; Nickel 1997).

groups' interests outlined above: that their impact on a person's day-to-day life is simply not as tangible or specific as the impact of individualistic interests.

In fact, however, interests one has as part of a collective subject can have as important an impact as interests one has on one's own. For example, one of the reasons that self-determination of peoples is so important to indigenous groups is that the state and status of a people is reflected in the lives of its members in very specific and tangible ways. Some of the most destructive effects of governmental violations of the rights of indigenous persons are the devastation of the community's infrastructure and demographic base, which undermines their ability to effectively organize the day-to-day conduct of their communal life (Report on the Situation of Human Rights in Brazil 1996: ch. VI; Report on the Situation of Human Rights in Ecuador 1996: ch. IX; Report on the Situation of Human Rights in Colombia 1999: ch. X at F). In addition, there is considerable evidence that a particular group's social status and its overlap in membership with other groups can make a difference to how easy it is for members to engage in social reform or political activity and to the likelihood that such engagements will succeed (Eschen, Kirk and Pinard 1971; Tilly 1987; Jenkins 1983; Navarro 1989).

Moreover, many of the harms that people experience are directed toward them by *outsiders* who have power at their disposal, and perceive a group with whom they are associated as hateful, threatening or inconvenient, and those outsiders have sufficient power at their disposal to make life problematic for the group.¹⁷ In such a context, intra-group dependencies (and the vulnerabilities that accompany them) are often intensified, and liability to predation from fellow group members may be perceived as the lesser of two evils or the price of protection from the risks of a hostile social environment (Narayan 2002). These harms are not psychological, they are physical, economic or political; and the primary source of the problem does not lie in the beliefs or sense of self of members of the minority, it lies in the beliefs and *actions* of those who identify with the nation or people of the state.

In particular, many harms result from persons in a dominant group failing or refusing to believe that members of a minority *have* interests of their own, in separation of the dominant group's or are *capable* of identifying or pursuing interests without dominant tutelage. The wrongs in such cases are not vague or difficult to trace; and the structures, identity or

¹⁷ For example, Marilyn Frye (1983) and Catherine MacKinnon (1989) (among others) have pointed out that social and political structures often use physical features of individuals, such as their sex role, to mark them out for oppression (i.e. diminishing, exploitative or immobilizing treatment). See Frye 1983: ch. 3; MacKinnon 1989.

activities of the targeted individual's people are only incidentally involved in an explanation of the problem.

This is why the Draft Declaration's treatment of self-determination is so important for the document's primary goal: discouraging the abuse to which indigenous persons in many parts of the world are currently subject. Over and over again, one of the first steps in denying that indigenous persons have rights at all has been to deny that persons who are indigenous are capable of making decisions for themselves. Hostility to self-determination for indigenous peoples and violations of rights to physical security, political participation, equality before the law and other basic rights of indigenous persons tend, as an empirical matter, to go hand in hand.¹⁸ It is hard to imagine a state that consistently respects the rights of all the individuals within its borders without respecting the rights of the peoples of which those persons are members. Justifications for oppression of persons in collections usually mirror justifications for their oppression as individuals.¹⁹

Conclusion

Self-determination secures a group in its capacity to determine *as a group* the terms and circumstances under which the common life of those within it will unfold. Decisions about the terms on which individuals may enter and exit a community, the responsibilities they incur by continued participation, the uses to which they may put cultural artefacts and culturally significant resources have effects for everyone within a community and not just those to whom those decisions are applied in a specific instance. Consequently, it is misleading to describe what is at issue in peoples' rights like self-determination as whether one ought to protect groups from the power of the majority at the price of allowing them to constrain their own members.

¹⁸ For example, in Canada and the United States, policies regarding the removal of indigenous children to residential schools and non-indigenous adoptive families (which in themselves constituted violations of a number of human rights) were *driven* by a desire to end the existence of independently functioning indigenous communities. Similarly, the motivation for attempts by many state legislatures in the United States to eliminate Indian gaming by rewriting state gambling laws is a desire to curb the independent political and economic power that some of communities which operate gaming facilities have been able to develop, and to divert some of the economic revenue that such communities generate into state coffers for the benefit of non-indigenous citizens.

¹⁹ This is in large part why treaty-monitoring bodies such as the CERD, the HRC and the Inter-American Commission regularly demand that state parties include information on the status and treatment of communities as well as individuals in their periodic reports on the implementation of their treaty obligations and why organizations such as the ILO, UNESCO and the OAS in the Protocol of San Salvador include collectivities as well as individual persons as potential victims of human rights violations.

What is really at issue in discussions of self-determination is when a state's preventing a group from making decisions independently or interfering with their capacity to make their decisions stick constitutes a violation of the human rights of the individuals involved in that decision-making. This suggests a slightly different framing of the issue of minorities within minorities than the standard group-versus-individual: under what circumstances does the impact of a person's actions on his fellow group members justify giving them a say in how that person conducts himself? A central issue in constructing institutions that embody one's answers to these questions is what kind of role one assigns to states versus other political authorities.

As a human rights document, the Draft Declaration is stronger for including self-determination on the list of basic rights. Reading the human right of indigenous peoples to self-determination as a particular case of the general principle in international law that all peoples have the right to self-determination suggests that the legal norms that govern states' obligations to one another and the legal norms that govern states' obligations to persons as such should be read as mutually informing one another: that the norms that govern behavior towards persons are neither completely separate from the norms that govern relations between peoples, nor completely reducible to them. This is not a new suggestion. (Right to self-determination: General recom. XXI: 1996; Vienna Declaration and Programme of Action: 1993 at 20.) But the wording of many human rights documents makes the connection between peoples and persons easy to ignore. The Draft Declaration names peoples explicitly as the subjects of human rights, and treats self-determination as one of the basic rights.

Perhaps the most important innovation of the document is its framing of the role of group interests in securing human dignity. The Draft Declaration departs from the assumption that living parts of their lives in common ties persons together in patterns of inter-dependence and shared vulnerability that have to be recognized in accounts of their human rights. Peoples' rights of self-determination need not be conceived as competitors with human rights once this is recognized. Rights of self-determination put the rights of states in their proper perspective: as rights which may themselves be justified in terms of the human rights of those within their jurisdiction.

