



April 2014

Post-Lecture Discussion

Hurst Hannum

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Hurst Hannum, *Post-Lecture Discussion*, 66 Notre Dame L. Rev. 1495 (1991).

Available at: <http://scholarship.law.nd.edu/ndlr/vol66/iss5/13>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Post-Lecture Discussion

SPEAKER: HURST HANNUM
MODERATOR: GEORGE A. LOPEZ
SPEECH: "CONTEMPORARY DEVELOPMENTS IN THE INTERNATIONAL PROTECTION OF THE RIGHTS OF MINORITIES"
DATE: MARCH 1, 1991

Professor Lopez: I would like us to first address the questions Hurst issued to us at the end of his talk. First, is there any real difference between group rights and individual rights? Second, should there be legally binding norms, and should they be universally binding? The floor is open.

Participant: I would like to address the second question by directing your attention to something which is going on in the Council of Europe, which you could not be aware of since it is not yet public. The Council came out a few weeks ago with a preliminary draft for the European Convention for the Protection of Minorities. That would be, then, the first positive international law convention in that field. It is based on the Copenhagen Document, which you explained to us, and the Charter of Paris of November 1990, and it concerns only what is usually called "internal self-determination." There is even a clear statement that minorities should stay more or less within the state in which they live and that the principle of territorial integrity should be observed. A minority group, for the purposes of the Convention, is a group which is smaller in number than the rest of the nationals of the state, whose members, although nationals of that state, have ethnic, religious, or linguistic features different from those of the rest of the population. These objective criteria are guided by the will to safeguard different cultures, traditions, religions, and languages. This is really drawn from the Copenhagen Document, which is a blend of group rights and individual rights—namely, rights of minorities as groups and of individuals belonging to minority groups. Such rights include the right to existence and, in particular, the right to education in one's mother tongue—the right to use language. There is no provision for the right to political par-

ticipation. There is only a very weak provision stating that states should keep in mind, when looking at the political and administrative structure of the state, that there are minorities.

Maybe the most interesting part of the convention is that there is a control machinery. There will be a committee on the protection of minorities. There will be a reporting system like there is in the United Nations, the success of which will depend upon specific declarations by the various member states. The committee then will be able to draft a report and present it to the Committee of Ministers of the Council of Europe. It will be open for member states of the Council of Europe and other European states.

This brings me back to the answer to your question. I think yes, there should be legally binding norms. However, as regards minorities, I am hesitant to believe that they should work on a universally binding level. For minority protection, even more than for other general human rights, I think that the regional approach is the only viable solution.

Professor Hannum: I think you are right that Europe will adopt something in the near future. I forgot to mention that the Copenhagen meeting recommended that the CSCE states have a conference specifically on minority rights. That conference will be convened in Geneva in July. It is unclear whether they will actually try to draft a convention or declaration at that meeting, but they will might, particularly with this much work having been done by the Council of Europe. I think it is likely that Europe will come up with something. It will be interesting to see whether or not there are differences between eastern and western Europe on this particular issue. In any event, Europe has to be very careful about what it says; even though the proposed convention will be a European regional document, it will be read by minorities all over the world.

There is a fine line between protecting minority rights and encouraging separatism. It does not surprise me that the document is very clear in its rejection of secession. That may be the price that Europeans and the rest of the world will have to pay for any document that addresses the substance of minority concerns. With all respect to Professor Chen, I think that self-determination would be better off forgotten in this context, as opposed to being heralded as the paradigm of human society—even though I agree that, in a nonlegal sense, it is.

Participant: If you are not going to build on self-determination, can you give me some idea of what the organizing principle will be?

Professor Hannum: I am willing to concede, although I do not think it is the case in the real world, that consent of the governed should not be the basic source of legitimacy for the state. But who are "the governed"? If we look at Northern Ireland, for example, who is the state? Which is the legitimate state? If you let me draw the borders, I can create as many legitimate states as you would like.

The focus on minority rights is in many ways antithetical to the principle of democracy. Why should Italians or Chinese or Catholics have special rights, but not Republicans and Democrats and Socialists? There are many countries in which there is a permanent political minority; it is often territorially dispersed rather than regionally concentrated, but it is as effectively excluded from power as some of the ethnic groups that we are talking about. Unless one is going to assign a very high value to the preservation of a group simply because it exists, focusing on consent of the governed is not going to advance us very far.

I think we have to take the state structure as it exists and work within it. We need not necessarily do so by opposing secession in every instance, but we should at least admit that secession is not a legal concept. The protection of minority rights can be a legal concept, in the same way that the protection of human rights is, in that we can begin to draw narrow lines around issues like education and language. I am optimistic about the future of autonomous and regional arrangements which encourage political development, decentralization, and devolution, without pretending that any group has very many rights just because it is a group.

Participant: You said you had two points. I did not understand the first point, the distinction between the denial of the right to self-determination of nations and, for example, the situation in Yugoslavia and the Baltic republics. There we really have a denial of the right to establish an historic nation which, at this particular time, does not have the state structure it would like to have.

The second point, protection of the minority by nation states, I think you explained pretty well. However, I would like you to expand more, if you can, on the distinction between ethnic groups and national minorities. For me, those are not the same things. I was perfectly happy with the legal provisions explanation that you

gave for ethnic groups, but I did not hear anything on national minorities. Could you please explain that?

Professor Hannum: The concept of "national minorities" seems to me to be something that only Europeans can explain. It is a concept that is very much founded in the last century of European history, and it does seem to include nations, as you call them, with a certain historical and territorial content. It is not necessarily applicable to all ethnic or all cultural or all religious groups. It may be that this is the meaningful distinction: that one can develop a convention or declaration for Europe which will talk about national minorities and may give them a somewhat larger scope of political rights than a universal declaration might, which perhaps could be restricted to ethnic, religious, and linguistic minorities which do not quite rise to the level of nations.

Having said that, I am not at all happy with it. There are probably between 1,000 and 5,000 "nations" in the world. There certainly are at least several hundred indigenous nations in this hemisphere. They are not national minorities, but they certainly are nations, and I think that to pretend we can resolve these conflicts by trying to decide who is a nation and who is a people is really pretty silly. One needs to focus much more specifically on what the group needs to protect itself, and that, I think, is an area where human rights and the formulation of legal obligations is appropriate. The focus should not be on what kind of power the group wants. Lots of groups want power. Unless it is necessary for their cultural survival, an ethnic group has no more right to political power than a political group does.

Participant: I was intrigued by Arthur Rosett's question. You are drawing attention to the contradiction between democracy and protection of minority rights. However, doesn't it beg the question of how one defines democracy? I mean, there are many conceptions of democracy. I make reference in particular to Professor Steiner's remarks when he pointed out that the coalitions in certain groups are excluded from coalitions in systematic ways every time. It seems that one can make an argument that it is consistent with democratic theory to protect their rights, or for some other kinds of mechanisms to protect their rights. There is a participational kind of claim which is hard to ignore and say that it is undemocratic.

Professor Hannum: Well, first you are assuming that a group like Irish Catholics is somehow worthy of recognition and somehow deserves special participation in the state, as opposed to groups like Democrats or Republicans, which simply lose power sometimes and win power sometimes because we switch groups easily. The democratic theory does not posit the existence of minorities—unchanged, immutable minorities—that are permanently excluded from power, unless they are political minorities. For instance, I doubt that communism is going to come to power in the United States. And, in fact, we have actually assured that that will not be the case.

To define the state, you choose your minority and your majority. For example, consider Britain and Ireland. For a long time, the two islands were one state. That is perfectly fine. There is nothing wrong with that. Indonesia consists of hundreds of islands. The state could be each island separately. The states could be Scotland, Wales, England, and Ireland. Northern Ireland could be independent, or it could be part of something else. How can you say that Catholics in Northern Ireland, who have lived in a system that was perfectly democratic for the last seventy years, have any special rights if they are guaranteed not to be discriminated against, but protected. Where does your sense of rights come from?

Participant: Once you start saying “if they are guaranteed not to be discriminated against, but protected,” then that sort of changes the picture.

Professor Hannum: That is a big “if.” That is not a minority right, particularly. I mean, that is what I suggested at the very end of my speech—that most of these questions that appear to be minority questions are not. They are basic, old-fashioned, human rights questions.

Participant: I am troubled at your suggestion that the principle of self-determination should be forgotten. It seems to me that when you have the difficulties involved in self-determination, the principle itself certainly has its place. That principle has crystallized expectations and demands of people around the contemporary world. I think what is important is that whenever a particular group invokes the principle of self-determination, one should not take that at face value. That is to say, when a group demands self-

determination, that group may be thinking it would be great if ideally it could make an independent state; or thinking it wants a high degree of autonomy even within the present framework as it has a whole range of demands; or thinking it simply wants language rights or certain financial assistance for educational and religious institutions, and so on. In this regard, I do not think that self-determination should be discarded.

The right of self-determination should be kept for whatever it is; as a matter of fact, some people will interpret it as the right to develop one's political, economic, social, and cultural affairs, both in an external and an internal sense—internal self-determination in the sense of permanent sovereignty. Some people try to distinguish economic sovereignty from noneconomic sovereignty, but I think there is a hazard in invoking terms such as sovereignty. Sovereignty, by definition, is a supreme authority; when the state begins to assert supreme authority in the highly interdependent world, it is an impossibility. Capital-importing countries, developing countries, welcome investment. When the flow of capital comes, they say they are not going to be dominated or influenced by outside capital. But if the outside capital is not forthcoming, they say they are being discriminated against. The realities of interdependence cannot be resolved by the rhetoric of sovereignty, independence, and such, but at each instance it is very important to see what actual demands are made and what interests are at stake.

As observers, we do not take the partisan's advocacy at face value; we simply see how it fits into the picture of how the common interests can be achieved. It seems to me that in today's world there is room for invoking the principle of self-determination, but that principle definitely should not be used to encourage fragmentation and chaos. That is why some of the questioners this morning say that now you are taking so many factors into account in determining viability. On the other hand, the reality of so many groups asserting their particular rights is inherently antithetical to the principle of democracy. If that is the case, I think we have to pause long and hard; it seems to me that when we talk about human dignity, we talk about human rights at the heart of it. This is an area that needs genuine creativity. In a way, I agree that general principles are very difficult to formulate; but on the other hand, some situations call for very special protection. We do not need to talk about autonomy with a whole range of arrangements—it could be religious rights, linguistic rights, and so on, in the particular situation. It seems to me that it is a difficult task,

but all the elements can be harmonized in a way that would serve the common interests.

Professor Hannum: Well, I very much agree with your approach in the sense of looking at real interests as opposed to theory. I would be happy to abandon talking about sovereignty along with abandoning self-determination. On the point of participation, though, I think it is important to recognize what sorts of minority demands we have been discussing. They are not demands for participation in most cases. They are demands for political power, and we may well be sympathetic to them. We may, in some cases, want to encourage them, but they are very different from demands for participation. Part of democracy implies that if you lose, you lose. We have developed a minimum floor of human rights, and we are now trying to expand human rights slightly to include things like language and perhaps education—things that used to be called minority rights.

It is a very large jump from that approach to the development of international guarantees for minority political power, and I think that is really the essence here. It is important that we focus on it and decide whether or not it is something that we want to put forward. I am actually willing to support it once one eliminates secession.

I think that it is time for international lawyers to bite the bullet and say that the era of self-determination, insofar as it implies that independence is at stake, is over. It may still happen. Quebec in Canada may decide to separate, or someone may win a war somewhere and decide to separate. Otherwise, what self-determination means is, perhaps, empowerment; is, perhaps, effective participation; is, perhaps, political power. The only way we are going to put that message across is to state up front that self-determination will stop short of secession for independence. Secession is inherently political and has never been the legal norm.

Participant: I was struck by the fact that you left out two recent documents on indigenous rights.

Professor Hannum: Not to cut you off, but I did leave those out consciously, and we are going to talk about them a bit later. I should say in passing that I do think they are very relevant, even though indigenous peoples and minorities have been kept separate in the discussion. Indigenous peoples have been much more suc-

cessful at a much lower level, I think, in advancing a whole set of rights that may well be relevant for minorities. It is related, but I think that for this session we need to pass on it.

Participant: I just wanted to respond to your question about whether there is any real difference between group rights and individual rights. If individual rights are adequately protected, then minorities will have less of a need to call for group rights. But that is a big "if." It seems to me that the real problem with individual rights is that they always get set up against the greater good of something else: the greater good of society, or the greater good of the dominant group. Invariably, the rights of groups who do not constitute the greater group are neglected. Such groups want greater respect for their rights. They want some trump over the greater good. It seems to me that this is very much what ethnic minorities are saying in the United States. They say that although they are individuals like everybody else in the United States, they just do not count in the greater collective. They want to articulate their rights in a way so that they do count, and, therefore, they want to be recognized as a group.

Professor Hannum: I think that is right. I want to reiterate my point by noting that I have not yet heard an explanation of why blacks, Hispanics, Catholics, or anybody else who is out of power and who does not have effective access to power is any more important, is any more significant, deserves any more trump, than I do. I have not voted for a President who has won for a long time now. There are many people in this country who believe in socialism, or social democracy, and meaningful economic reforms in health care, and this and that. They are a long way from coming into power, and I do not know why a group that shares certain objective characteristics (if one can enforce equality and nondiscrimination, and that is a big "if," as that is very important) is deserving of more respect than other groups that are effectively excluded from power.

Participant: You have presented a very interesting idea by answering some questions. However, I cannot agree with the idea that there are nations of the first sort, second sort, third sort, and fourth sort. You see, I cannot accept the idea of inequality of nations and ethnic groups. From my point of view, absolutely all people and all ethnic groups, at least in their rights, are equal—and this is

not dependent upon whether or not they were fast enough to catch the train of sovereignty. That is why I cannot accept the idea that the train of secession, in principle, is over, because fairly recently one state seceded in a very original way. I mean, East Germany seceded from itself. It seceded back to Germany.

The problem is that society can be divided on very different bases. Society can be divided into plumbers, Republicans, professors, communists, and so on. I think that one criterion can still be introduced, and perhaps it will help us both find a common ground—namely, compromise. I think this right of self-determination is not only the right to get some professional, cultural, religious, and ethnic representation, but it is the right to acquire political representation. There is little difference between different ethnic minorities and different territories, where perhaps the right to secede may be denied.

I think that the right of self-determination in Europe really belongs to the nations at least in one place—in their ethnic territory of their national motherland. The Slovaks or Slovenians who come to the United States cannot claim self-determination in Massachusetts or Minnesota. Still, I guess that Slovaks and Slovenians have the right to have their political, economic, and ethnic rights protected in one very small place in the world—in their own motherland, where they have lived for thousands of years. That is what makes Slovaks different from carpenters, who can work in the Soviet Union, in America, or anywhere else. If we introduce this criterion, then at least the potential right to self-determine in the way a group really pleases exists.

Professor Hannum: I certainly agree with you that all nations should have equal rights. What I disagree with is your assumption that nations, however you define them, ever at any time in history have enjoyed the legal right to independent statehood. That simply never has been true. Maybe I am being overly positivistic, but it simply is not the case. There are nations whose territories overlap. It is very odd that when a nation claims a territory it seems to be the territory that it had at its greatest height of power. It could have been three centuries ago, but nevertheless they claim it as theirs. They say it is what they want. Armenians and Kurds have shared the same territory for centuries. Which is the homeland? Do you dot it around here and there? Maybe Basques have satisfied their desires for self-determination, and maybe they have not. I am willing, as is Professor Chen, to discuss in a political context

whether one particular claim for political power is more persuasive than some other one. But to pretend that there is a norm of international law, or that there should be, saying that all nations have the right to a state, flies in the face of several thousands of years of history, and certainly flies in the face of the law as it is today. Maybe this is not the way it should be, but I do not think there can be any debate that this is the way it is.

Professor Lopez: Please join me in thanking Hurst for an excellent presentation.