

Nicola Wenzel, Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht

Summary

The Protection of Groups in International Law in Tension with the Protection of the Individual

Since the 1990s, intercultural tensions resulting from the coexistence within one State of a dominant society and minorities and/or indigenous peoples have captured public attention and have led to a conceptual shift in international law's approach to the protection of minorities. The previously predominant view according to which respect for individual human rights without discrimination renders a specific regime for the protection of minorities superfluous has been abandoned. Instead, international law has now begun to focus on the protection of minority groups and indigenous peoples as such and has even gone so far as to recognize rights of the minority group or the indigenous people itself (group rights). The emerging system for the protection of minorities and indigenous peoples aims at protecting minorities and indigenous peoples as groups to allow them to decide on their own, free from interference by the dominant society, on their fate and future. The protection of minorities and indigenous peoples through international and even more pronouncedly through national law, however, allows minorities and indigenous peoples to exercise social and even State-like power. The exercise of power by these groups may result in limits on the liberty of the individual.

For this reason skepticism prevails among States and in legal literature with regard to group protection. It is feared that conferring rights that protect minorities and indigenous peoples as such means placing the group above the individual and eroding the protection of individual human rights. The present work deals with the tensions revealed here between the aim of group protection on the one hand and the aim of protecting individuals on the other hand. It demonstrates that although the aim of group protection and the aim of protecting the individual are irreconcilable on a theoretical level, on a practical level, they are not.

The basis for the analysis of the tensions between the aim of group protection and the aim of protecting individuals is the exploration of group protection in current international law in the *first part* of the work.

Tensions arise between individual human rights and those minority rights which aim at protecting minority groups as such (group-protective rights). Contrary to the common assumption within the international community and legal literature that the problem is framed as a conflict between group rights and individual rights, these tensions are not dependent on the bearer of the right in question. Tensions arise because certain rights serve the aim of group protection irrespectively of whether this aim is formally pursued through group rights or through individual rights conferred on the members of the group. The identification of group-protective rights in international law reveals that minorities are protected predominantly through minority-specific individual rights whereas indigenous peoples are recognized as legal subjects and bearers of group rights.

Current international law does not yet recognize for minorities the most far-reaching group-protective right, the right to autonomy. In contrast, there is sufficient proof of State practice and *opinio juris* among States to suggest the existence of a right to autonomy for indigenous peoples in international law. At the same time, on the basis of the concept of consociational democracy, autonomous structures for minorities are increasingly becoming accepted as an efficient way to fulfill international duties with respect to democratic participatory rights. Most likely, at least elements of a right to autonomy for minorities will be inferred from participatory rights contained in regional and universal human rights conventions in the future.

In modern international law, group-protective rights for minorities and indigenous peoples thus coexist with individual human rights. Different patterns of conflicts between these two categories of rights exist. First of all, encroachment on human rights by minorities and indigenous peoples may either affect members of the group or outsiders. There is also a possibility of conflicts between two group-protective rights such as in the case of a minority within the minority, where the group-protective right of the minority may conflict with the group-protective right of the minority within the minority. Finally, a distinction has to be drawn according to the relationship of the parties involved. The parties to the conflict may be on an equal footing as in a relationship between two private persons, or the individual may be subordinated to the group as in the relationship between the State and the individual.

The legal debate on the conflict between group-protective rights and individual human rights is reflected in the philosophical debate on multiculturalism. The *second part* of the work therefore adopts a philo-

sophical perspective and examines whether group-protective rights are compatible with the individualism of liberal theory.

The discussion on group-protective rights for minorities and indigenous peoples is part of the larger problem of dealing with the cultural diversity of modern societies. Minorities and indigenous peoples are so-called constitutive cultural groups which significantly shape the individual's identity. In the context of culturally diverse societies, traditional liberal theory does not meet its own moral standards. Propagating State neutrality in cultural matters, thereby relegating constitutive cultural groups to the cultural marketplace results in a structural disadvantage for these groups and does not sufficiently take into account their importance for the identity of their members.

Group-protective rights may be morally grounded in liberal theory. According to liberal multiculturalism, the continued existence of constitutive cultural groups constitutes a fundamental interest of their members because belonging to the group is essential for the realization of individual autonomy. Confronted with the problem of human rights violations by constitutive cultural groups, however, many authors adopt an "either – or" approach and confer absolute precedence either to group protection or to the protection of the individual. This kind of approach is not convincing because it does not allow for an equilibrium on the practical level between the two equally legitimate moral claims. A preferable approach would overcome the theoretical dichotomy and create an equilibrium between group-protective rights and individual human rights by balancing these rights in each specific case so as to ensure that both are implemented as far as possible. This solution alone does justice to the call of group members for "my rights in my culture". Taking this claim into consideration, a number of guidelines have to be observed when balancing group-protective rights and individual rights: Severe human rights violations constitute the absolute limit to the exercise of group-protective rights. The possibility to leave the group has to be ensured. Although an exit possibility alone does not provide sufficient protection for the individual, such a possibility has to be taken into account in the balancing process and may result in accepting to a certain extent the encroachment on human rights. Minorities and indigenous peoples may not be compelled to comply with national human rights standards which are strongly shaped by the majority culture. Rather, the culturally neutral universal rights contained in international human rights conventions constitute the standard by which minorities and indigenous peoples have to abide. In addition, a group's contention that the exercise of an individual right endangers the group's cultural

identity has to be critically reviewed in each case. In this context, the existence of cultural dissent within the group is to be taken into consideration. Finally, particular importance is to be attached to freedom of expression and participatory rights which are preconditions for cultural dissent and, as a consequence, for the change of the group from within.

One particularly relevant example of the tensions between group-protective rights and individual rights involves conflicts between autonomy rights for minorities and indigenous peoples and individual human rights that arise in national legal orders. As the exercise of autonomous functions by minorities and indigenous peoples is characterized by a relationship of subordination between the group and the individual, the conflict between group protection and the protection of the individual becomes particularly evident. Therefore, the *third part* of the work explores in a comparative manner how the US-American legal order deals with human rights violations by Indian tribes and how the Canadian legal order deals with human rights violations by Quebec. This comparative review reveals that liberal societies are not ready to accept a radical cutback in the protection of human rights. In the long run, restricting the self-administration rights of minorities and indigenous peoples through a catalogue of fundamental rights which may be enforced in court is more conducive to the aim of group protection. Then, on the individual's initiative, an equilibrium between autonomy rights and individual human rights may be brought about. This model applies the balancing approach endorsed in the second part of the work in real-life conditions. It comes along with a certain heterogeneity of human rights on the State's territory as the culturally-biased understanding of individual human rights of the dominant society is not forced upon the minority or the indigenous people. Rather, minorities and indigenous peoples may develop their own understanding of human rights on the basis of the universal rights contained in international human rights conventions.

Another insight gained from the comparative legal analysis is the fact that liberal societies attach great importance to the enforcement of human rights in courts. It is not considered sufficient that human rights can only be enforced before the courts of the minority or the indigenous people itself. Rather, a review at a superior level is deemed necessary. National courts which are influenced by the majority culture, however, cannot fulfill this role. This is particularly true in case of a great cultural disparity between the dominant society and the minority or the indigenous people. In close consultation with the concerned groups, a review mechanism has to be developed that involves a neutral authority

reviewing the judgment of courts of the minority or the indigenous people. Such a neutral authority could be a court, the members of which are chosen according to the principle of equal representation among the dominant society and the minority or the indigenous people concerned. Another option would be to skip the national level and to transfer the review of tribal court judgments to the international level.

The *fourth part* of the work turns back to international law. It draws a picture of current international law's approach to dealing with conflicts between group-protective rights and individual human rights by examining separately the international system for the protection of human rights on the one hand and international instruments for the protection of minorities and indigenous peoples on the other hand. Minorities and indigenous peoples are not directly bound by international human rights. On the basis of universal and regional human rights conventions, however, States have the obligation to protect individuals from human rights violations by minorities or indigenous peoples. International instruments for the protection of minorities and indigenous peoples for their part provide the possibility for States to interfere with group-protective rights to protect individual human rights. Thus, States are not confronted with two contradicting international legal obligations. The tensions between the aim of group protection and the aim of protecting individuals do not, as a consequence, result in a conflict of norms in international law.

Current international law, however, favors individual rights at the expense of group protection in both substantive and procedural issues. The majority of group-protective instruments provide for an absolute precedence of individual rights over group-protective rights. Minorities and indigenous peoples are not protected against States encroaching upon their group-protective rights to fully enforce individual human rights without balancing them with the group-protective rights. International human rights conventions, on the other hand, contain only very limited obligations for States to act with due consideration for the aim of group protection. Current international law does not even prevent States from relying on a theoretical danger for individual human rights as an argument for not conferring group-protective rights at all. This preferential treatment for individual human rights is reinforced through a procedural imbalance. Whereas individual human rights are endowed with a certain enforceability and may be invoked before international bodies, group-protective rights are not. In a nutshell, current international law does not ensure that in each specific case, on the individual's initiative, a balance is struck between the aim of group pro-

tection and the aim of protecting the individual. On the contrary, international law establishes the possibility for far-reaching interferences with group-protective rights by States.

In light of these deficiencies, current international law must be amended to include norms that ensure that an adequate balance is struck between the aim of group protection and the aim of protecting individuals. On the one hand, this presupposes a procedural safeguard for group-protective rights. On the other hand, as regards group-protective rights prevalent in the private sphere, it must be made clear that they are on the same level as individual human rights and that, in case of conflict, both sets of rights must be balanced in each specific case, so as to ensure that each is implemented as far as possible. In case minorities and indigenous peoples exercise autonomous functions, they have to become parties to international human rights conventions and the enforceability of individual rights before an international body has to be ensured. The principle of subsidiarity and the institution of the margin of appreciation, both firmly anchored in international human rights law, allow the consideration of minorities' and indigenous peoples' special need for protection in the balancing process and facilitate the attainment of an equilibrium between the aim of group protection and the aim of protecting individuals.

Binding autonomous minorities and indigenous peoples to the international human rights conventions goes hand in hand with States' waiving their right to interfere with their activities on human rights grounds. At first sight this seems to be incompatible with the human rights obligations of States. An analogy to the decisions of the European Commission of Human Rights and the European Court of Human Rights on the responsibility of States with regard to human rights violations by international organizations to which they are parties, however, reveals that the responsibility of minorities and indigenous peoples under the human rights treaties and the ensuing bar on State interventions are compatible with States' human rights obligations. According to the European Commission and the European Court of Human Rights, States that transfer part of their sovereign power to international organizations and waive any possibility of control continue to comply with their international human rights obligations if the international organization provides for an equivalent human rights protection. Insofar as minorities and indigenous peoples are bound to respect international human rights and insofar as these are enforceable before international bodies, there exists a system for the protection of human rights that is equivalent to the protection afforded by States. States thus comply with the obligations

resulting from international human rights conventions even if they waive their power of intervention with regard to the internal affairs of autonomous minorities or indigenous peoples.

The present work demonstrates that the recognition of group-protective rights does not fundamentally call into question individual human rights. The skepticism prevalent among States and in legal literature is unfounded. If the tensions between group-protective rights and individual human rights are openly addressed and acknowledged and if provisions for resolving the conflict are included in the international group-protective instruments, individual human rights will no longer be able to be used as an excuse for not providing minorities and indigenous peoples with the international protection they need when they see their cultural existence threatened.