DAVID MAKINSON

ON ATTRIBUTING RIGHTS TO ALL PEOPLES: SOME LOGICAL QUESTIONS*

I. INTRODUCTION

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Thus begins the first article of the International Covenant on Economic, Social and Cultural Rights – identical with the first article of the International Covenant on Civil and Political Rights – adopted by the General Assembly of the United Nations in 1966. It is an example of a sort of principle that has become more familiar since then, although it is still the only one of its kind to have been explicitly incorporated into the body of an international agreement under the aegis of the United Nations. Putting to one side the substance of the particular right that is attributed (in this instance, to self-determination; in others to development, preservation of cultural identity, compensation for past spoliation, solidarity in times of disaster, etc.) we can find three essential components: the principle assigns a *right* to *peoples* and does so quite *universally*. Correspondingly, as well as substantive questions regarding this or that specific principle, there are also questions of a more general nature. What are the general logical features of principles of this kind? Are there any special difficulties associated with them?

This is not an idle academic exercise. Such rights, attributed to all

* The author wishes to thank Oscar Garibaldi, Richard Hyland, and Thomas Nagel for valuable remarks on an earlier version.

Some of the points of this paper are presented, with more detailed documentation and discussion, in the author's 'Rights of peoples: point of view of a logician', in *The Rights of Peoples*, edited by James Crawford (Oxford University Press, 1988).

The views expressed in this paper are the entire responsibility of the author, and are not to be attributed to Unesco, where the author is currently employed.

Law and Philosophy 8: 53–63, 1989.

peoples, have been the subject of heated polemic in international fora over the last quarter century. Other rights, attributed to certain specific peoples or other collective parties, have also been debated intensely within several countries, notably the United States, Australia, New Zealand and Canada. The latter debates have had some repercussion in philosophical circles; the former, curiously, very little – and none at all among logicians. In the course of what has been essentially a political debate, rights of peoples (and *a fortiori* universal rights of peoples) have sometimes been dismissed as intrinsically meaningless and inherently contradictory. On other occasions they have been hailed as the first of a new generation of human rights, more fundamental than those of individuals that are enshrined in the Universal Declaration of Human Rights of 1948. Evidently, this is a matter that cries out for careful philosophical reflection, and, to begin with, a painstaking logical analysis. The latter, of course, does not exhaust the former, but it is an indispensable part of it.

The concept of a right remains the subject of philosophical discussions that cannot be said to be concluded. For instance, there is disagreement as to how far a moral or legal system may adequately be founded upon rights, and how far a fundamental role should be given to other concepts such as duties, justice, needs, utility, well being, respect, virtues, and so on. But we do not wish to take up those questions here. We are concerned with issues of a more specifically logical nature. To formulate them, a rough conceptual framework is already available. The panoply of logical structures that can be involved in rights relationships of different kinds is fairly well understood since the analytic and classificatory work of Hohfeld (1964), first published in 1913, and its expression in the language of deontic logic by Kanger (1972a, 1972b). See for example Lindahl (1977), chapter 1, for an overview, and my (1986) for a commentary.

Against the background of such an account of rights in general, the problems associated with r.u.p.'s (rights attributed universally to peoples) are of two main forms: those of *indeterminacy* and those of *inconsistency*. As we shall see, the problems are not all unique to r.u.p.'s; some of them arise, in less acute form, for rights of individuals as well. Moreover, as we shall also see, the seriousness of these problems depends upon the role that one envisages r.u.p.'s as playing. They

constitute serious obstacles to the use of r.u.p.'s as legal principles without extensive elaboration, but are less so for the use of r.u.p.'s as *prima facie* moral principles.

II. PROBLEMS OF INDETERMINACY

The first and most obvious problem faced by r.u.p.'s is that there is no reasonably clear and agreed account of what "peoples" are. There is no accepted workable criterion that can serve to distinguish collectivities entitled to the epithet from others. Of course, when one is debating only the rights of a certain specific people, it is not immediately necessary to provide a perfectly general criterion – it will be enough to provide a criterion for when individuals do or do not belong to that particular group, together with an assurance that it, at least, is a "people". But when we are dealing with rights attributed universally, to all peoples, it becomes vital to be able to assign to the latter term a clear demarcation.

It is interesting to observe that the two Covenants of 1966 proclaiming the rights of all peoples to self-determination entirely omit any clarification whatsoever of what is to count as a "people", and what is no more than an ethnic entity, religious community, linguistic body, cultural grouping, or suchlike. There were, indeed, very important political reasons for not doing so. The practical effect of the Covenants at their time of issue was to legitimate the states created in the decolonization process, particularly in Africa, within their preexisting colonial borders; yet the ways in which the colonial powers had drawn those borders, cutting across ethnic, tribal, linguistic, religious, cultural and other traditional divisions, were such that no definition based on criteria of those kinds could possibly be compatible with the boundaries required.

It should also be noted that since the voting of the Covenants, very little jurisprudence has grown up around specific cases that could serve to clarify the concept in a piecemeal and cumulative way. This is essentially so because the Covenants were adopted in advance of any internationally accepted organ with power to *enforce* them, that is, to render judgment on contested cases and require execution of that judgment by states. Such an organ is still lacking today. For this

reason, the lack of a clear initial account of what is to count as a "people" is very much more serious than similar obscurities in central terms of national legal systems. As bare texts, the latter may also be extremely vague. But with the passage of time, the accumulation of enforced (and hence authoritative) judgments by the courts tends to render matters more explicit. Since there are no such mechanisms on the international level, the process of acquiring content through cases has not been able to get moving. At that level, therefore, the language of "peoples" and their rights remains one of broad intention and rhetoric only.

Of course, there is always a temptation to try to resolve the matter by giving a *normative* definition of what is to count as a "people". For example, one might define a people as any collectivity whose degree of cohesion and sense of distinctness are "sufficiently strong to merit" the right of self-determination. Clearly, however, this will not do, for it renders both the concept of a "people" and the right to self-determination entirely circular. In order to ascertain, for example, whether the Tamils of Sri Lanka have the right to self-determination, one must first determine whether or not they form a "people"; in order to do that, one must first ascertain whether their sense of distinctiveness is sufficient for them to have a right to determine themselves, and so on without end.

To summarize, the first and most obvious logical difficulty with r.u.p.'s – the absence of any indication of which collectivities are peoples – remains a quarter of a century after the adoption of the Covenants one of the most serious difficulties, as a result of the absence of any mechanism to fill the gap in an authoritative manner, either by general stipulation or by the accumulation of case judgments.

There are also indeterminacies in r.u.p.'s that are of a rather more subtle form that may be quite tolerable in a principle of a moral kind, but which create severe difficulties for the incorporation of r.u.p.'s in any code that could be described as legal. As has for long been recognized by moral philosophers, an agent may bear an obligation to assist a certain category of parties in some way, without there being any rule available for determining specific beneficiaries in any particular circumstances. The duty of charity or alms-giving has often been taken in this manner. Such a lack of specification of beneficiaries

is not necessarily a defect in a moral norm, where that is understood as a guide to behaviour that functions by shaping our general attitudes. But it does create problems for any norm that is offered as part of a legal code, understood as an instrument for the resolution of specific disputes in a routine manner. Because of the absence of any parties with a claim that they, in particular, should be assisted, such principles are usually difficult to verify and enforce. This kind of situation can arise not only for individual agents, but also for collective ones, and in the case of r.u.p.'s tends to be rather common. For example, article 2 of the International Covenant on Economic, Social and Cultural Rights imposes an obligation on each state party to provide economic assistance. But without any rule for determining the beneficiaries in any particular case, such an obligation, or right of those unspecified beneficiaries, remains at the level of a statement of general intention, an accepted moral point of view, rather than an operative legal principle.

The dual phenomenon of lack of specification of the bearers of an obligation is perhaps even more serious for principles advanced as rights, whether of individuals or of collective entities. It is one thing for a party to have a right or claim that a certain sort of thing be done, and quite another to specify who, in any particular case, bears the obligation to meet the claim or satisfy the right by seeing that the action is performed. The former without the latter is incomplete. Again, this kind of incompleteness may be quite tolerable for moral norms serving to orient our attitudes in a general manner. But for a system of law such incompleteness is severely debilitating. Because of the absence of any specifiable party upon whom responsibility falls, there is no way of determining who has done as he should; there is only a way of determining who has been rightly or wrongly done by. The law remains helpless to enforce or punish; it can only lament. For this reason jurists are particularly loath to accept such claims, without specifiable addressees, as part of a truly legal code.

This last phenomenon arises both for human rights as ordinarily understood, that is, rights attributed universally to human individuals, and r.u.p.'s (rights attributed universally to peoples). A salient example of the former is the rule that "everyone has the right to a nationality" expressed in article 15 of the Universal Declaration of Human Rights

of 1948. In the case of the latter, the phenomenon manifests itself in some widely mooted rights of peoples referred to as "solidarity rights". For example, the rights of each people to development/assistance in times of crisis/participation in the common heritage of mankind all involve diffuse claims, i.e. claims with indeterminate bearers of the obligations to meet them.

A further form of indeterminacy, which arises with acuteness for some canvassed rights of peoples, is that of the open-ended nature of the commitments called for. This manifests itself with particular clarity in two examples: the right of all peoples to development and to compensation for past exploitation, slavery or other massive historic injury. In the latter case, for instance, there is no sense in speaking of "full compensation": no amount of compensation to people today can alleviate the sufferings of their ancestors, even if it can alter the condition of the descendants. So long as the relevant texts proclaim the right in vague and general terms, leaving quite untouched the question of the upper bounds to what may reasonably be required under them, we are dealing once more with principles of a broad moral nature only.

III. PROBLEMS OF CONSISTENCY

An analysis of rights in the tradition of Hohfeld as protected permissions (i.e., permissions to do a certain sort of thing, assorted with a prohibition on interference by others), or more radically as claims (obligations on the part of others to do certain sorts of thing for the benefit of the right-holder), quickly reveals the potentialities for conflict between conceivable rights, be they of individuals or collectivities. Indeed, for each such right there is evidently another incompatible with it. From a practical point of view, however, the important question is how often these potentialities reveal themselves among widely canvassed or internationally recognized r.u.p.'s. The short answer is "quite often". To bring this out we have to look more closely at specific examples of such norms than we have done so far. We give two illustrations.

Example (*1*): The r.u.p. of self-determination, with which this paper

opened. Inconsistency arises here in two main ways, plus a third in potentiality.

First, there is a direct, explicit, and well-known contradiction between the right of each people to political self-determination and the likewise internationally recognized texts prohibiting secession. For example, the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) article 6, proclaims bluntly that

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

Whenever we find a situation where a "people" forms a minority or dominated segment within a country, or is spread between the territories of several countries, and wishes to establish its own political identity, the one principle consecrates its right to do so, while the other rejects it. Already within these two internationally accepted texts we have a head-on contradiction.

Legal commentators have explored a variety of ideas seeking to eliminate or at least mitigate the contradiction. Perhaps the most successful among these is that presented, for example, by Nettheim (1988). Under his approach the conflict is mitigated by a radical reinterpretation of the notion of self-determination so that it admits of a wide range of degrees, the lesser of which need not necessarily disrupt very much a preexisting territorial integrity or national unity. The right to self-determination is correspondingly reinterpreted as a right of each people (indeed each community that feels strongly on the matter) to *some* degree of self-determination, perhaps a very minor one. This, of course, is quite different from what was evidently intended by the 1966 Covenants, and very much weakens and broadens their content. But if such a shift is deemed acceptable, it does provide a coherent way out of the impasse.

Second, inconsistency also arises between the r.u.p. of self-determination and some widely accepted rights attributed universally to human individuals (r.u.i.'s). This does not stem from the initial formulation cited at the beginning of this paper, but rather from its

continuation in the same article of the 1966 Covenants: "By virtue of that right they [peoples] freely determine their political status". That is to say, the right to self-determination, as formulated in the internationally authoritative text, incorporates a "right to choose" – the right of each people to choose its political status.

Now rights to choose, unless hedged with qualifications, are extremely powerful principles. They permit not only that a certain sort of action may be carried out, but also that it may be carried out in whatever form the agent chooses. Insofar as the agent may well choose to do so in a manner that violates other mooted rights, we have an immediate conflict that can be resolved only by imposing restrictions, qualifications, or a hierarchy upon the norms – which goes well beyond the normative material currently available.

This kind of conflict has already wreaked havoc in connection with certain rights to choose that were clumsily incorporated into the Universal Declaration of Human Rights of 1948. Article 26 provides that "parents have a prior right to choose the kind of education that shall be given to their children". Yet the education given by parents to their daughters, for example, may be highly discriminatory, in direct conflict with other r.u.i.'s enunciated in the 1948 Declaration and elsewhere.

Returning to the example of self-determination, it is clear that in so far as a "people" (or its supposed representatives) may choose a political status and regime that denies certain rights of individuals (such as those concerning liberty of thought and expression, rights to strike, work and freedom of movement) its action is legitimated by the one norm and castigated by others.

Third, there is even a potential for internal inconsistency within the r.u.p. of self-determination itself. A potential – for it arises not from the 1966 text itself but rather from a natural interpretative elaboration of it. In so far as the right is glossed as providing that each people has the right to self-determination on the territory with which, historically, it has been most closely associated (where else, after all?), then evidently various distinct "peoples" will be endowed with the right to self-determination on the same parcel of territory. Such rights are jointly unrealizable, unless the notion of self-determination is extensively diluted in the manner discussed earlier.

Example (*2*): Our second example of a r.u.p. giving rise to inconsistencies is the right to development in some of its more influential versions, which similarly involve a "right to choose". In particular, the 1978 UN Declaration on the Preparation of Societies for Life in Peace provides that all peoples have the right to development and "to determine the road of their development". Innocently nebulous as this might appear, such a principle, if read as saying anything at all, accords a right to choose that gives rise to the same conflicts as in the case of choice of political status.

IV. RIGHTS AS ABSOLUTE

The language of "rights" tends to sharpen contradictions rather than resolve them. For it is part of the historical legacy of affective charge in the notion, since the time of the Declaration of the Rights of Man and the Citizen of 1789, that a right is something "absolute" which, when it exists, is valid on all occasions, without any regard for exceptional circumstances, counterbalancing considerations, competing interests, evident practical consequences, or suchlike. Rights are conceived as providing binary input to the scales of justice.

It was this implicit association that so incensed critics such as Bentham, Burke and Marx, notwithstanding their very different political philosophies, in texts that have recently been made conveniently available by Waldron (1987). On the other hand, this association is an aspect that is *entirely absent* from the analytic classification of rights relations as carried out by Hohfeld. As a result, those who have assimilated the technical relationships distinguished in Hohfeld's work tend to forget the associations that are still pervasive in popular, political, and, indeed, many philosophical employments of the term.

Now conflicts between general normative principles are resolvable when they are advanced as considerations to be balanced alongside others, as defeasible rules, or as *prima facie* judgments. But when the language used carries associations in the public arena of absoluteness and inalienability, and of validity in all circumstances regardless of special features, then the resolution of conflict presents an acute problem. By virtue of the generality of their manifesto-like formulations, rights tend to give rise to contradictions; by virtue of the

absolutist nature of their deployment, the contradictions are not readily resolved. For this reason, the language of rights tends to give rise to confusing double standards. In moments of exalted declaration, a rights principle is conceived as indefeasible; in everyday life exceptions are constantly admitted.

These reflections help illuminate our final example of r.u.p.'s: the right of all peoples to a cultural identity. This right has been much discussed in international fora without ever receiving a generally recognized formulation. But it is clear that the process of transforming it from a vague declaration of sympathy to a rule of international law is fraught with difficulties. For in the first place, there is the unpleasant but inescapable fact that in many cultures there are elements of the traditional culture that clash with various widely recognized individual human rights, for example, the Universal Declaration. The custom of female excision is a notorious example. Indeed, it may be true to say that all cultures traditionally involve, to some degree, some such elements. To consecrate the perpetuation of all such practices in unqualified form leads directly to inconsistency with r.u.i.'s. In the second place, on almost any eventual reading of the term "people", the world will not be divided up neatly into geographically disjointed peoples. There will be communities living within the same countries, towns, and villages, intermingled in such a way that the unrestrained encouragement of the expression of the cultural identity of any one among them will inevitably restrict that of the others, whose rights – whether as a "people" or "minority" or other kind of grouping – also need to be respected. In so far as the behaviour of a minority group is strikingly different from that of the dominant one whether in language, diet, dress, religious practices, sexual behaviour, or value priorities, it tends to be perceived by the dominant group as a potential threat to its own way of life.

There is no easy way out here, no simple formula to write into a code of international law that will solve all problems, least of all one written in terms only of "peoples" and omitting consideration of cultural units not honoured with the title. Indeed, simplistic formulas of that kind could well exacerbate violations of the ideals they seek to express, just as has been the case for self-determination. One may ask whether the language of rights, with its historical associations of the

absolute and uncompromising, with its abstraction from all question of balancing competing interests, is at all suitable for guiding the adjustments and compromises needed in any realization of the ideal of the preservation of cultural identities.

Les Etangs B2,
La Ronce,
92410 Ville d'Avray,
FRANCE

REFERENCES

Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays* (ed. W. W. Cook, New Haven: Yale University Press, 1964).

Kanger, Stig, 'Law and logic' *Theoria* **38** (1972), 105–32.

Kanger, Stig and Helle Kanger, 'Rights and Parliamentarism' *Theoria* **32** (1966), 85–115; reprinted with corrections in R. E. Olsen and A. M. Paul eds, *Contemporary Philosophy in Scandinavia* (Baltimore: John Hopkins, 1972).

Lindahl, Lars, *Position and Change: A Study in Law and Logic* (Dordrecht: Reidel, 1977).

Makinson, David, 'On the Formal Representation of Rights Relations: Remarks on the Work of Stig Kanger and Lars Lindahl' *The Journal of Philosophical Logic* **15** (1986), 403–25.

Nettheim, '"Peoples" and "Populations": indigenous peoples and the rights of peoples', in James Crawford (ed.), *Rights of Peoples* (Oxford University Press, 1988).

Waldron, Jeremy (ed.), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987).