Group Rights versus Individual Rights in the Australian Legal Context

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The statement that only individuals have human rights, and that group rights –whilst being a logical possibility[1]– are impractical on application, is a view that appears to stem from the difficulties encountered when attempting to engender the source of the authority for the right that is enjoyed by the group. This essay will address these issues in the Australian legal environment, rather than in an international context.

On the one hand, group rights are argued by some as being derivative of the desires of the members of the group,[2] and on the other, is the contention that groups can have a moral status inherently in and of themselves as a fundamental right.[3] This essay will argue that whilst group rights are possible, the conversion of these rights into law by democratic process becomes difficult where the group is located within the sovereignty of a larger group. The debate between commentators – such as Dare, Waldron and Sharp– often hinges on the source of the right, and whether it is possible to establish the right from the group's morality alone, or whether that often slender platform of group-based rights will fall through to the traditional view of individual rights of the members of the group, thus negating there having been special rights negotiated by the collective. In essence, the debate hinges on whether groups –that may have a claim to a right– are the monad of that right, and whether the special right given to that group should be authorised by the majority of the whole outside the group or by the group

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[1] J. Waldron, 'Taking group rights carefully' in G. Huscroft & P. Rishworth (eds.), *Litigating rights: perspectives from domestic and international law* (2002) Hart, Oxford, 203.

[2] T. Dare, 'Group rights and constitutional rights' in G. Huscroft & P. Rishworth (eds.), *Litigating rights: perspectives from domestic and international law* (2002) Hart, Oxford, 191.

[3] Ibid.

members themselves. I argue that minority groups will have difficulty finding majority support of their group rights in the wider democratic context.

To begin with, it is important to regard arguments put forward by Dare, Waldron and Sharp on the issue of group rights. Waldron regards the shifting of group rights to the courts (the realm of the Constitution) as a way of gagging the public debate.[4] He argues that the existence of group rights is contentious, and subject to logical review. Waldron's perception lends weight to the argument that the enforcement of minority group rights into law is indeed difficult, and ought not to be a decision left to the courts. Sharp, on the other hand, is adamant that group rights do exist at law.[5] He argues that derivative rights are the only way forward for the legitimisation of such group rights as sought by the Maori people, and that fundamental group rights are 'incoherent…and damaging'.[6] Sharp's point, however, assumes that the existing laws of the majority are a sufficient platform to derive the needs of the minority. Dare, in his middle-ground article, notes the strong points of both Waldron and Sharp's arguments, and includes an analysis of the arguments in light of choice theory and interest theory. Choice theory involves the subscriber to the group right (the group) being able to make decisions and choices about which duties are imposed upon it, whilst interest theory looks to a normative system to impose duties on its members.[7] Dare's arguments are not conclusive. He predominantly sides with Waldron, but aligns his interpretation of Sharp's claim –that fundamental group rights are incoherent– with the reasoning behind the choice theory; namely, that fundamental group rights collapse because they are 'unable to deal with conflict',[8] and since 'within fundamental groups…there is no decision-maker'[9] the failure to have a decisive choice results in necessary incoherence. If incoherence is

[4] Waldron, above n 1, 207.
[5] A. Sharp, 'Should Maori rights be part of the New Zealand Constitution?' in G. Huscroft & P. Rishworth, *Litigating rights: perspectives from domestic and international law* (2002) Hart, Oxford, 222.
[6] Ibid 223.
[7] Dare, above n2, 194.
[8] Dare, above n 2, 191.
[9] Sharp, above n 5, 233.

the result of fundamental groups, it is arguable that successfully enforced group rights are dependent on whether or not a larger entity encompasses the group, and whether the group is a minority or a majority within the encompassing body.

In some instances, the members of a group seeking group rights may experience a loss of enjoyment of individual rights– where the struggle to attain separate group rights results in detrimental outcomes. This clash is arguably due to the individual right being expressed adequately at the law, whilst the group right is, by comparison, only partly compatible with the encompassing sovereign law. One such group is noted by Monique Deveaux in her article *Conflicting equalities? Cultural group rights and sexual equality*.[10] In this article, Deveaux looks at the experience of Canadian indigenous women, who during the development of the Charlottetown Accord wished to maintain their rights to sexual equality under the 1982 Canadian Charter of Rights and Freedoms, but whose wish to do so was ignored by the leaders of the main Aboriginal associations who wanted the indigenous group to enjoy total fundamental rights.[11] Framing Deveaux's Canadian issue in terms of Sharp's contentions might see some support for the thesis against the coherence of fundamental group rights. In this instance, complete disconnection (i.e. a complete lack of derivation) in favour of a fundamental scheme resulted in the group's inability to make decisions based on the choices required by its members. Thus, the group was necessarily at odds with itself, and could –by Waldron's reasoning– be classified as favouring a more interests-based approach. It was not the right to self-determination or choice that gave the indigenous women access to the rights under the Canadian Charter of Rights and Freedoms, but rather, their right to sexual equality as a group (of women) was protected as an interest that 'warrant[ed] especially powerful protection'.[12] Deveaux concludes convincingly that the differences between individual rights and group rights –in the context of the rights of the Aboriginal individual female– were not

[10] M. Deveaux, 'Conflicting equalities? Cultural group rights and sexual equality' (2000) 48 *Political Studies* 522.
[11] Ibid.
[12] Dare, above n 2, 194.

irreconcilable, but required necessary interaction whereby the minority leadership would recognise the individual rights of their members when they attempted to create their own autonomous set of moral principles.

Further comment on the necessary interaction between individual rights and group rights brings to light more issues of the individual right leading to a submissive surrender to the group right. In their article *Indigenous peoples and multicultural citizenship: bridging collective individual rights*[13] Holder and Corntassel point out that the existence of the oppressing power defining the group often necessitates 'the need for collective solutions and protective devices that can be wielded as a collectivity'.[14] On this thesis, it is arguable that the initial reason for the need of group rights is simply because the majority has allocated a moral space for that group right to exist; such is the case with affirmative action in the United States,[15] or the land rights of Aboriginal and Torres Strait Islanders in Australia. Holder and Corntassel disagree with Waldron, and interpret his views as holding that individual psychology trumps the context of the collective; they conclude that it 'may be a mistake to regard such conflicts in terms of "collectivities" versus "individuals"',[16] and that instead we ought to recognise that 'it is the type of interest which each individual negotiates that may be characterized in collectivist or individualist terms'.[17] On the other hand, I argue that a collective of individuals negotiating rights in the Australian democratic context requires a popular majority to succeed, which can create difficulty where a minority group seeks collective rights that are unsupported by the larger collective of the population outside the group.

Similarly to Waldron, Joel Oestreich discusses the issue of group rights in opposition to individual rights. In his work *Liberal theory and minority*

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[13] C. Holder & J. Corntassel, 'Indigenous peoples and multicultural citizenship: bridging collective and individual rights' (2002) 24 *Human Rights Quarterly* 126.
[14] Ibid.
[15] See *Hopwood v Texas* 78 F.3d 932 (5th Cir. 1996).
[16] Ibid 150.
[17] Holder & Corntassel, 'Indigenous peoples and multicultural citizenship: bridging collective and individual rights' (2002) 24 *Human Rights Quarterly* 126, 150.

group rights,[18] Oestreich makes a compelling case for Will Kymlicka's argument that group rights are a necessary implication of the individual in society: for the individual to enjoy choice as an individual, they must accept the rights of collectivities, or else 'stand lost and confused before a set of social roles, unable to relate them to their own lives, and therefore unable to choose'.[19] In his concluding arguments, Oestreich points out a major failing of his own article and his other analyses of group rights: that some groups feel that their rights impose duties on people across borders and into the international sphere– a diasporic effect of group rights. This notion lends support to my argument that group rights are dependent on the wider body outside the group giving legal effect to that group right– an argument raising questions of how a group right is to be engendered without an overarching authority. This argument is perhaps the basis on which Sharp concludes: that group rights that endeavour to be fundamental in character are 'incoherent'.[20]

A practical example of how group rights might be provisionally protected (under the interest-based theory) is demonstrated in Robert Weber's working paper *Individual rights and group rights in the European Union's approach to minority languages*.[21] In this work, Weber describes the practical process of protecting group rights in speaking a certain language. Firstly, he deals with group rights by firmly stating that they are 'entitlements or privileges, dispensed by the sovereign, to individuals by virtue of their membership to a community'.[22] This reduction of group rights to the confines of a sovereign is in direct conflict with Oestreich's acknowledgement (above) that some groups may assert rights internationally. For example, we may ask what Weber would make of group rights asserted by the Jewish diaspora in the

[18] J. Oestreich, 'Liberal theory and minority group rights' (1999) 21(1) *Human Rights Quarterly* 108.
[19] Ibid 117.
[20] Sharp, 'Should Maori rights be part of the New Zealand Constitution?' in G. Huscroft & P. Rishworth (eds.), *Litigating rights: perspectives from domestic and international law* (2002), 223.
[21] R. Weber, 'Individual rights and group rights in the European Union's approach to minority languages' (Working paper No 1593, The Berkeley Electronic Press Legal Series, 2006)
[22] Ibid 28.

international sense. Therefore it is arguable (just as Waldron asserts) that group rights are logically possible, but their realisation depends on the context of the encompassing body. Weber's reasoning concludes with an uncompelling outcome-based approach to providing protection for individual rights in the context of the group; a system that attempts to 'protect individuals belonging to the group rather than protecting the group as such'.[23] This effort to portray the traditional view of individual rights as trumping the contentious issue of group rights is a notion that halts at the end of a one way street leading to individual rights, where an individual can claim a group right, but a group will have difficulty going the other way in claiming an inherent individual right as a monad.

A major academic figure in the area of group rights and individual rights is Will Kymlicka. He has written many articles about minority rights –too many to be observed here– but one convincing argument that Kymlicka raises involves the discussion of group rights in competition with individual rights. In his article with Ruth Marin, *Liberalism and Minority Rights: An interview*,[24] Kymlicka flags a major issue with the debate: the distinction between group rights that seek to impose prohibitive rights on its members (internal rights) or group rights that seek to gain special consideration and advantage over the interests of the larger dominating society (external rights).[25] The internal/external group rights distinction is extremely relevant to this essay's argument that the minority group right depends on the popular support of the body encompassing the group, since –as Kymlicka points out– internal rights provide stability, whereas external rights 'help protect the group from the impact of external pressures'.[26] Kymlicka demonstrates that internal group rights are a threat to individual rights, as they can (and do) entail a group 'legally restrict[ing] the freedom of their own members'.[27] If we are to protect individual rights above all else (as Kymlicka seems to assume), then internal group rights can

[23] Weber, above n 21.
[24] W. Kymlicka & R. Marin, 'Liberalism and minority rights: an interview' (1999) 12(2) *Ratio Juris* 133.
[25] Ibid. 137.
[26] Ibid.
[27] Ibid.

create conflict via fundamental group rights, such as those described by Deveaux above. Kymlicka concludes with a very strong but simple point regarding external group rights, namely, that they are: 'entirely consistent with liberal norms'.[28] Here, the reference to liberal norms is taken to be a reference to advocacy of individual rights.

Kymlicka admits there are certain cases where external group rights are inconsistent with individual rights, and lists Apartheid in South Africa as one such example, where 20% of the population demanded 87% of the land resources.[29] In this light, my argument that the minority group right is dependent on the support of the encompassing body outside it may be challenged. But these instances are rare indeed, and Kymlicka concludes the discussion of the problems of individual rights juxtaposed with group rights by stating that: 'internal restrictions are almost inherently in conflict with liberal democratic norms [whilst] external protections are not'.[30] In citing this divide, Kymlicka creates a platform from which to better reconcile the traditional notion of individual rights with the contentious issue of group rights. Essentially, we might evaluate Kymlicka's succeeding –where Dare, Waldron and Sharp fought over views or merely exposed questions– in defining a purposive base for recognising group rights. By way of process: an encompassing population must firstly ask itself what the particular outcome of the group right will be. Do the rights intend to assist in preserving a minority in the face of the status quo? If the answer is yes, then the encompassing society might adequately provide some sort of recognition of the group right –in law– in order to achieve this goal. If, however, the request for group rights has the effect of limiting the existing individual rights enjoyed by the rest of the population for certain members of the particular group, then the differences between the group and the wider populous are irreconcilable and the encompassing sovereign (or law making body) cannot condone the group right, for fear of putting its own rule of law in jeopardy. In this way, the group right is dependent on the democratic support of the encompassing population outside it.

[28] Ibid.
[29] Ibid.
[30] Ibid.

Here it is relevant to identify how Kymlicka –whilst admitting small faults in his arguments about external/internal group rights– convincingly promotes a balanced working model of group rights in tandem with individual rights. We might analyse the strength of this model through a comparison with Waldron and Sharp. The main area, for example, where Waldron arguably falls short is where he makes assumptions about the methodology of group rights ('Claims of right are always asserted in peremptory tones').[31] But if we look to Kymlicka's distinction between external and internal claims to group rights, we might see that group rights are not always asserted in dictatorial ways. For example, one only has to look to a hypothetical instance where a European majority of Australians could advocate and endorse some group right to indigenous Australians, to show that the majority's claim of minority right does not necessarily reduce discussion or group freedoms: in fact, it arguably serves to enhance discussion and preserve the minority's rights. Sharp's claims may be relevant in this regard with his assertion that fundamental group rights are destined for failure –perhaps here they are best compared with Kymlicka's internal context– but this is certainly no basis for Sharp to preclude any sort of Maori claim to group rights, as he does at the conclusion of his article.[32] Where Kymlicka pulls few political punches, Waldron and Sharp's articles are full of them.[33] We note that Waldron concludes that by placing the assessment of group rights in the hands of the Australian courts, the Australian public loses its chance in the Parliament to have rights at the fore.[34] We also note that Sharp precludes any kind of group right for the Maori people on the assumption that it will be fundamental in nature. It is the habit of commentators to politicise the methodology of group rights on these issues that results in critics such as Dare producing unconvincing conclusions full of questions.

Beyond such theoretical discussions above, we might observe commentators who advocate recognition of the reality of suffering due

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[31] Waldron, above n 1, 220.

[32] Sharp, 'Should Maori rights be part of the New Zealand Constitution?' in G. Huscroft & P. Rishworth (eds.), *Litigating rights: perspectives from domestic and international law* (2002), 239.

[33] Sharp's 'Prescription' at Ibid 238.

[34] Waldron, above n. 1, 206 (cf 'gag' via constitutionalisation).

to a lack of group rights. One such advocate is William Felice, who in his paper *The case for collective rights: the reality of group suffering*[35] describes a methodology for using historical examples of collective suffering to demonstrate the need for group rights to be recognised in 'a normative framework of values that links the concerns of individuals and groups around the world'.[36] The initial problem with this contention is that one person's perception of an appropriate value, or norms, may not be the same perception shared by another person across the other side of the world. Felice provides an outline of many instances of oppression due to the failure of group rights. One such example of this is the plight of African Americans, who 'do not enjoy the same rights as whites in the United States',[37] to the point where 60,000 preventable deaths occur each year amongst the black population of that country. Another example of using historical observation to develop human rights is the production of the 1993 Vienna Declaration and Programme of Action, of which Felice states: 'instead of dismissing gender- based violence as incidental to the horrors of war…governments recognized it as a human rights violation'.[38] Felice exposes a historical methodology in order to advocate the acceptance of group rights as a global standard– a widely used method of dealing with group rights juxtaposed with individual rights. I would argue, however, that whilst it is important to observe history and empirical data, it is also important to recognise that groups and the rights they seek are bound to be unique, contemporary, and variable. It is therefore impossible to make an example of one unique group and their desire for certain rights, and demonstrate how their particular rights are homogenous in a normative global context.

In an Australian legal context, group rights are often generated by native claims to land. One case where sovereignty –and subsequent group right– was to be proven was *Yorta Yorta v Victoria*.[39] The Yorta Yorta people –whose traditional laws required that they continually

[35] W. Felice, 'The case for collective human rights: the reality of group suffering' (1996) 10 *Ethics & International Affairs* 47.
[36] Ibid 61.
[37] Ibid 50.
[38] Ibid. 52.
[39] (2002) 214 CLR 422.

look after their native land– claimed native title over territory on the New South Wales and Victorian borders. Their claim could only be processed if it fitted the secondary rules of the sovereign, namely, the *Native Title Act 1993* (Cth) s223(1)(a)– a provision that made the claim reliant on the continued operation of traditions prior to and during the sovereign's radical acquisition of Australia. The claim failed on the grounds that the traditions were not upheld over time. Notably, Gleeson CJ, Gummow and Hayne JJ stated that: 'any...attempt to revive adherence to the tenets of that former system cannot and will not reconstitute…traditional laws and customs'.[40] Here we see the historical approach (that Felice uses) as a methodology to establish group rights; that is to say, if history shows some form of continuous active right, then that right will continue. The main problem with this methodology in establishing group rights is –Waldron might agree– that it patently fails to bring the issue to the public fore, and references it to the vague authority of the past. I argue that such land title claims would be best processed in light of whose individual rights the land claim *currently* adversely affects, and whether that right is outweighed by the *current* group right: essentially a Kymlickian balancing of external and internal group right factors in the contemporary environment.

In conclusion, the academic discourse on the tradition of individual rights and contentious group rights is extremely diverse, and suffers from political bias and a lack of common purpose and definition. Dare's inconclusive climax that 'broader issues remain'[41] is an understatement; in fact, the multiplicity of definitions of group rights and the confusion surrounding the interactions between group and individual rights serves to create a vast array of discourse on the issue– which is unhelpful when attempting to reconcile the two. Waldron's goal to find out whether group rights are practically recognisable is arguably side-tracked by the reappearing thread that insists that group rights are logical, but unknown and out of the public eye. It seems that no amount of case examples or numbered logic helps to clear this problem. Sharp's article is similarly directed by political objectives, so much so that it concludes with a manifesto to the New Zealand parliament. Both

[40] Ibid [47].
[41] Dare, above n 2, 202.

Waldron and Sharp make reference to case studies, but as is the case with the commentator Felice, historical references to past failures in establishing practical recognition of group rights serve little purpose in demonstrating how group rights and individual rights might be reconciled beyond the *current* tradition. I conclude that locating the dependence of group rights on the acquiescence of the wider encompassing populous is the best starting point for these arguments. To this end, academics such as Will Kymlicka have proven the most successful in advancing the reconciliation of the group right with the wider society's individual rights, through a sensible –and barely political– analysis and atomisation of what we mean by group rights, and how group rights relate to individual rights in the context of the population outside the group. It is clear that in many observable instances, and in the context of the status quo, individual rights are the monad of rights, and that as long as groups are made up of individuals, it will remain extremely difficult to enforce minority group rights against the backdrop of a larger society.

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