

## Reflections on Culture and Cultural Rights

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“Intriguingly,” the editors of Culture and Rights observe, “in the 1980s, at the very moment in which anthropologists were engaged in an intense and wide-ranging critique especially of the more essentialist interpretations of the [culture] concept, to the point of querying its usefulness at all, they found themselves witnessing, often during fieldwork, the increasing prevalence of ‘culture’ as a rhetorical object—often in a highly essentialized form—in contemporary political talk” (3). Just as “we” discover that culture is constructed, fluid, and ever-inventive, “they” begin to articulate demands for rights in terms of a cultural identity asserted to be primordial and fixed.

This historical non-coincidence has been noticed by various parties and has been interpreted in various ways. According to David Scott, the so-called “natives” have every reason to suspect these newfangled anti-essentialist ideas, indispensable though such ideas may seem to Western academic theorists, himself included: “For *whom* is culture partial, unbounded, heterogeneous, hybrid, and so on, the anthropologist or the native?” (101). The new concept of culture as hybrid, heterogeneous, and processual is “merely the most recent way of conceiving and explaining otherness, of putting otherness in its place” (106). It suits “post-cold war North Atlantic liberalism” (107), for it offers a way of playing down “ideological conflicts” (107). As the voice of this “North Atlantic liberalism,” Scott quotes James Tully, who argues (in Scott’s paraphrase) that demands for “cultural survival and recognition” by groups like indigenous peoples make “a *cultural* claim on the domain of the political.” They are aspirations to “appropriate forms of self-government, . . . to govern themselves in ways they deem consonant with their traditions. From the point of view of these struggles, therefore, culture is not separable from politics but is, on the contrary, an ‘irreducible’ aspect of it . . . so far as these struggles are

concerned, the institutions of modern constitutional society are unjust precisely to the extent that they do not enable the political embodiment of cultural traditions.” In pursuit of justice, then, Tully urges constitutional thinkers to give up on “the billiard-ball conception of cultures, nations, and societies” (Tully, 10) that makes any political embodiment of culture seem impossible. In response, Scott argues that the new hegemony of culture produced by the cultural turn, a hegemony he himself “can hardly not-inhabit” (93), has left in place “the moral and epistemological privilege of the West” (93). The West’s liberal political theory now demands a non-billiard-ball version of culture, Scott suggests, because non-Western peoples have recently been coming to the West in large numbers and “making material claims on its institutions and resources” (94). The new version of culture is a way of evading these demands.

Anthropologists Rachel Sieder and Jessica Witchell offer a somewhat different reading. For them, hegemonic North Atlantic liberalism is again getting what it wants, but what it wants out of non-Western peoples—in this case, the indigenous of Guatemala— is, on the contrary, a billiard-ball essentialism. “Indigenous identities in Guatemala are effectively being narrated or codified through dominant legal discourses, specifically those of international human rights law and multiculturalism. This has resulted in the projection of an essentialized, idealized and atemporal indigenous identity, the movement’s leaders often perceiving such essentializing as tactically necessary in order to secure collective rights for indigenous people” (201). Essentialism reflects the world view not of the indigenous themselves but of the reductive, reifying tendencies of the law. “As indigenous struggles interact with dominant discourses, they appear to become more essentialist in response to the reductionist orientation of law. However, while the outcome of these interactions may be to present a seemingly atemporal, fixed notion of collective identity in order to claim rights, this is precisely because of the strategic invocation of rights language rather than any pre-existing ontological ‘culture’” (206). Embracing a “fixed notion of collective identity” may or may not serve the genuine interests of indigenous peoples

or minorities, they argue, but such a notion does serve the interests of human rights discourse and its representatives: “the increased participation of indigenous peoples also acts to legitimize the expansion and reproduction of the international institutions themselves and the legal discourses they produce” (207).

Jane Cowan, one of the editors of Culture and Rights, proposes in her contribution to that volume a third view that overlaps with both of these while putting the emphasis closer to where we think it deserves to be put. Like Sieder and Witchell rather than Scott, Cowan holds that “the view of a minority as a ‘natural’ ethnic unit prevails as common sense within international human rights discourse” (168). For Cowan it is this discourse, rather than postmodern or constructionist anthropology, that truly represents the hegemonic West. Showing how a Macedonian minority identity has in fact been constructed in contemporary Greece, Cowan too sees a dangerous complicity between human rights discourse and sub-national collectivities modeling themselves on, and thus destabilizing, the nation-state. Like Scott, she stresses the continuity with an earlier imperial history: “the alliance between this [the Macedonian minority rights] movement and the international human rights community looks just like another version of an old Balkan story in which the cunning client cultivates the powerful and morally righteous foreign patron and persuades him to meddle in local affairs that he does not understand” (169).

Unlike the others, however, Cowan assigns an explicit and positive role to at least one section of “the international human rights community”: those observers, like herself, who refuse to naturalize “an archipelago of a world composed of discrete, bounded islands of culture” (153). She can do so because she sees the members of the minority as themselves ambivalent about entering into such a view. What if, she asks, the process of constructing a Macedonian minority happens among people who “identify themselves today as ‘Greeks’” (154)? In part because of a history of Greek intolerance for minorities, but not entirely for this reason, many of those who call themselves *dopii* or Macedonians “appear disinclined to choose once and for all, to be *either*

Greek *or* Macedonian, a member of the majority *or* a member of the minority. Rather, such a person lives a life in which being *dopia* or Macedonian is salient at some moments, but not at others; she usually thinks of herself as ‘Greek’ yet sometimes speaks of ‘the Greeks’ as if the category did not include herself” (171). Given the “ambiguity of a minority rights discourse” which “must *deny* ambiguity and *fix* difference,” yet does so in defense of a cultural identity “whose denial brings both suffering and indignation,” Cowan concludes as follows: “I find the only tenable position for the engaged scholar to be a paradoxical one: to support the demands for recognition of the Macedonian minority, but as a category *chosen* rather than *imposed* (whether explicitly or de facto); yet at the same time, to problematize, rather than celebrate, its project, and to query its emancipatory aura, examining the exclusions and cultural disenfranchisements it creates from within. I feel obliged to stress the profound ambiguities and potential dangers of mechanisms which entrench and harden such identities, and which, even when meant to contest claims of national homogeneity, lock us ever more tightly into precisely the same national logic of purity, authenticity, and fixity” (171).

In our view, Cowan has it more or less right— not right in some universal or atemporal way, but right enough in today’s context. As Cowan suggests, too much is at stake in minority and indigenous assertions of their cultural identity, at stake materially as well as spiritually, for the academic critic to begrudge due recognition on the grounds of some sort of theoretical incorrectness. Such judgment could be charged with succumbing to its own faulty logic of “purity, authenticity, and fixity.” On the other hand, like Cowan we too believe that the state is not always the bad guy in the human rights story, that the indigenous or minority group claiming its rights is not always the good guy, and that claims to cultural rights cannot be properly understood or defended therefore without nuanced and nimble attention to the particularities of time and place. One way in which we would like to extend Cowan’s argument is precisely with reference to these particularities: by specifying the moment in the development of human rights

discourse in which demands for cultural rights are currently being formulated. In this way taking sides around these rights can perhaps come to seem less like facing a universal philosophical dilemma (as Cowan makes it seem) and more like making a reasoned, situated political choice. By gesturing at what is happening today in the United Nations system under the heading of cultural rights, we would also like to suggest that the two branches of “Western” or “international” discourse that Cowan quietly and questionably separates off from each other— a reifying discourse of international law and a de-reifying discourse of anthropology— are not as far apart as she seems to assume, but share some of the same commitments and capacities to produce and defend a non-essentialized version of culture. There is more suppleness in the law than she allows, and suppleness of just the sort she seems to want. And we would suggest, in dialogue with David Scott, that the turn to culture in the new or constructionist sense is not simply a way of avoiding “ideological conflict” and direct political confrontation. It is also a way of making what Scott calls “material claims,” and a way that seems more likely to win international assent than some of the other tactics currently in play.

In order to get a quick fix on the actual state of human rights discourse, consider Colin Samson’s statement in his contribution to the Culture and Rights volume that the Innu of Canada “have not been decolonized.” Neither, Samson goes on, have other tribal and indigenous peoples. If the relations of such peoples with the states in which they reside can only be described as “colonial” (227), as Samson argues, the only solution would seem to be to allow them to exercise at long last the right of self-determination.

This is a compelling indictment of undeniable injustice. In the name of the right of self-determination, cultural identity in the old billiard-ball sense is mobilized here in order to make just the sort of “material claims” that Scott fears will not be put forward by culture in the new and revised sense. Indeed, these claims seem to include all the material perquisites of national sovereignty. But that is just the problem. Whether such claims are just or not in some abstract or

absolute sense, how much chance do they have of being recognized at this point in history? And what would happen if they were?

The history of the right of self-determination is relevant here. Self-determination was not mentioned in the Universal Declaration of Human Rights in 1948. Many of the drafters of 1948 had been colonial powers, and it is no surprise that they were not eager to recognize such a right. Self-determination was first recognized as a right in the International Covenant on Civil and Political Rights of 1966. By 1966, of course, decolonization was in the process of adding to the roster of states an ever-increasing number of former colonies, and self-determination could therefore get a much better hearing. After the end of the Cold War, there was of course another wave of declarations of national independence. But what is happening in the name of self-determination at present? The answer is: not much. With two specific exceptions, Palestine and the Western Sahara, self-determination is understood internationally as a right that has already been granted to all legitimate claimants. If it has not been translated into sovereignty by existing nation-states, the consensus is, in effect, that there is no such right. Groups like Human Rights Watch and Amnesty International will not touch issues of self-determination.

The grounds for this consensus are not legal. There is no strictly legal reason why the right of self-determination could not also be taken to apply to groups within existing states, and sometimes overlapping more than one, which were never granted political sovereignty. The law itself does not specify the size or nature of the group that is the proper bearer of the right to self-determination. But if taken to apply to groups *within* states, it would of course subvert the right to self-determination of the states themselves. In this sense it is an incoherent right. And it is likely to remain so. From the point of view of existing states, however recent and arbitrary their own establishment, it is no wonder there has been so much resistance to the project of defining terms like “indigenous,” “minority,” or “people”— though, it should be added, there has also been at least some willingness on the part of states to deal with the relevant problems in the

absence of any strict definition. To define any of these collectivities would seem to entail extending to them the right of self-determination and the claim to sovereignty. In practical terms, this would mean, in Samson's words, questioning "the legitimacy of the states themselves" (226). The likely result would be sanctioning secession. There is a strong case to be made that this would be a terrible mistake, from a human rights perspective among others. (It is this case that is missing from Cowan's invocation of the "old Balkan story": how new contenders for statehood not only use the power of righteous foreign patrons, but— this is what Cowan omits— use it against others who either already enjoy statehood or are also contending for it, and whose counter-claims are left out.) In its relations with indigenous peoples and with Quebec, Canada is of course no different from many other states, more recent and more fragile, which also achieved self-determination only because self-determination was denied to other claimants within and across their present borders. In order for all peoples to achieve self-determination, there would have to be an agreement as to who is and who isn't a people. But the only means of producing such an agreement, capable of arresting the infinite regress to ever smaller groups, would seem to be violence on an almost unimaginable scale. For how else could the map of the world be redrawn so that the claims of these peoples were no longer overlapping and therefore no longer rivalrous? One does not have to be a strong defender of existing states to conclude that re-opening these questions around the world would be a recipe for massive and multiple catastrophe. And this threat strikes just as surely at the former colonies from which the language of anti-colonialism is borrowed.

Since the 1980s, a Draft Declaration on the Rights of Indigenous Peoples has been in preparation by the Commission on Human Rights. It is widely considered to be at an impasse. For the project of extending the right of self-determination to indigenous peoples— which is only part of the Draft Declaration, but an important part— is generally perceived to entail exactly the consequences that Samson welcomes: questioning the legitimacy of the states in which those

peoples reside. These states include some of those former colonies that fought for and benefitted from the right to self-determination when it was first introduced in the decade of the 1960s and after. Former colonies are in no hurry to see themselves delegitimated and dismembered-- a goal that many would associate with US-backed globalization as well as US-backed human rights language. There is no internationally-acknowledged right to secession, nor is one likely to emerge. Indeed, the resistance to the Draft Declaration by today's numerous member-states is uncannily reminiscent of the original skepticism with regard to group rights by a much smaller number of states in 1948.

And yet the present consequences of ancestral and continuing injustice against indigenous peoples and minorities are pervasive and peremptory. The rights and interests of these groups desperately need defending. What then is to be done?

Our proposal is to explore what has been done, and what can yet be done, in the name of cultural rights. Based on careful study of how cultural rights have been dealt with by international instruments and the practice of UN treaty bodies, we would propose that cultural rights offer an alternative and too often underutilized foundation for defending and extending group rights, and in particular a ground for possible resolution of conflicts over indigenous rights that cannot be resolved in terms of self-determination. That is, cultural rights can do much of the work that indigenous people want out of the right to self-determination, but without posing the same threat to existing nation-states. Thus they point toward the possibility of breaking the logjam over the Draft Declaration and reaching an agreement in which all parties will benefit. Here what has already been achieved for the cultural rights of minorities, which have not articulated their claims in terms of self-determination, can perhaps lead the way. Cultural rights have this potential precisely because, as David Scott suggests, the concept of culture on which they are based is not simply or exclusively the old "billiard ball" concept whose implied goal seems to be nothing less than full political sovereignty-- and yet because, pulling back from this

exacting demand, it also does, *pace* Scott, allow “material claims” to be made. Cultural rights are of profound political significance both because they have to do with identity, and because they are a means of attaining economic and political objectives that cannot be attained more directly.

Like self-determination, the term “cultural rights” goes unmentioned in the Universal Declaration of Human Rights of 1948. Its absence can be attributed to various factors: a desire to avoid the lurking dangers of cultural relativism, a perception of culture as on the one hand too vague and fluid a concept to serve as the basis for rights, on the other a luxury that could wait until more urgent matters are attended to. Most important again, however, was the association between cultural rights and an array of group identities which, if accorded rights, seemed to threaten the integrity of existing borders. In 1948, before the era of de-colonization was well under way, the relevant borders were those of empires as well as nation-states, and resistance to group rights on the part of the United States and the European colonial powers was continuous with their resistance to the struggle of colonies for self-determination. Some of what have since come to be called cultural rights— for example, the right to speak your own language and to participate in religious rituals together with other members of your community— literally make no sense except as group rights. Thus these rights-to-be appear in the Universal Declaration only in the form of one individual right, Article 27’s right to “participate” in the cultural life of “the” community. There is no recognition of group rights or of rights pertaining to a minority culture as distinct from that of the majority.

Again like the right to self-determination, cultural rights were officially acknowledged for the first time in 1966. Thanks to decolonization, it would seem, the moment had finally come both for self-determination and for cultural rights. Yet cultural rights did not rise in tandem with self-determination. Indeed, there is a real question as to how far cultural rights have risen at all. By comparison with civil and political rights, cultural rights have received very little attention

either from the United Nations and international treaty bodies or from public opinion. After 1966, as Cold War battles raged between civil and political rights and economic and social rights, cultural rights continued to be neglected. The first significant steps occurred only after the end of the Cold War, when the North/South divide made culture central to the contention over human rights.

Two impulses have propelled this relatively sudden interest. On the one hand, cultural rights have been put on the table by representatives of countries of the global South like Cuba and Iran. In a gesture consistent with those countries' previous positions, differences of national culture, which they describe as rights, are mobilized so as to undermine the universality of rights. Instead of setting culture *against* rights, however, the Iranian initiative entitled "Dialogue Among Civilizations" tried out the innovative proposition that culture could be seen as itself a right: a right possessed by nations, and thus a right that in effect subverted other rights. A 2002 Cuban Initiative on cultural rights, arguing that all local cultures must be protected against globalization, was again formulated so as to present cultural rights as rights *belonging to the nation-state*. On the other hand, interest in cultural rights has also emerged out of movements on behalf of indigenous peoples and minorities, groups understood to be *sub-national* or *trans-national*, in other words not congruent with presently-existing states.

In short, these two vectors of interest in cultural rights contradict each other. As with the right of self-determination, they collide over the proper *scale* or *object* to which the category should be applied— that is, over what entity should be the proper bearer of cultural rights. One assigns cultural rights to nations, seeking thereby to protect small nations from larger and more powerful ones. The other assigns cultural rights to indigenous peoples and minorities, seeking to defend them against the nations— against small as well as large nations— within which they are located.

Unless and until it becomes possible for states to be bearers of rights— something for

which there is currently no basis in international law— there will be no dilemma here, legally speaking. (Note, however, the similar and scary confusion that characterizes recent European efforts to get human rights language applied to terrorist actions, which are rightly crimes, not human rights violations.) But politically speaking, both of these motives for interest in cultural rights are obviously worthy of serious consideration; both impulses, however contradictory, will have to be taken into account by anyone seeking to extend respect for rights into more of a rights-abusing world. And one might argue indeed that here, as elsewhere, the opposition between law and politics cannot be sustained. For the politics of scale enters into the law not just by means of a refusal to get a given law on the books (as with the Draft Declaration) but also by refusals or studied indeterminacies of definition within the law, whether the definition of the proper bearer of rights or for that matter the definition of culture. Marc Manganaro, in Culture, 1922: The Emergence of a Concept, suggests that for the humanities, “it is precisely the multifariousness of the concept, its capacity for ambiguity, slippage, and transfer, that makes” culture “institutionally productive” (2). On the other hand, Margaret Wilson observes in Culture, Rights, and Cultural Rights: Perspectives from the South Pacific that “giving definition to cultural rights is necessary for legal enforceability” (13). In fact the ability to work without definition, which we associate more readily with the humanities than with the law, belongs to the legal process more broadly conceived, and indeed is sometimes a successful legal strategy for dealing with historical contradiction. International human rights norms are nothing but what is being said and done— by treaties, state practices, and jurisprudence. It’s a slowly developing normativity, not one that can be extracted from pre-existing universal principles. The law has not defined culture, and yet norms of cultural rights have been developing.

If culture is not a billiard ball with a well-defined border, if a culture can overlap with, permeate, and be permeated by other cultures, then the demand for cultural recognition cannot be expressed as a demand for sovereignty. Asking for cultural rights will involve asking for less

than self-determination, which does aim at sovereignty. And “cultural autonomy,” a concept developed by Van der Stoep, former high commissioner on national minorities of the OSCE, asks for considerably less than so-called “territorial autonomy.” Yet it is arguable that national minorities have achieved more recognition for their rights at the international level than the indigenous have, and this in large part because they have not spoken in the name of self-determination. These achievements or acquisitions include a European treaty and an international declaration. Both specify cultural rights. Indeed, many of the gains that the indigenous have made were possible only because, there being no UN declaration or treaty on indigenous people in force and the ILO convention being of limited scope and ratified by few states, the Human Rights Committee has made clever and creative use of the minority-related Article 18 of the Covenant on Civil and Political Rights in order to call attention to the rights of the indigenous.

Consider some further examples of this sort of effort. In 1994 the Human Rights Committee adopted a General Comment on Article 27 of the International Covenant on Civil and Political Rights. Article 27 provides that “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The Committee underlines that the enjoyment of these rights “does not prejudice the sovereignty and territorial integrity of a state party. At the same time, one or other aspect of the rights of individuals protected under that article— for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.” This article, which also covers the rights of non-citizens, migrant workers, and even visitors, has already been used to stop the granting of leases for oil and gas exploration and timber development on indigenous land in Canada and to

defend Maori fishing rights in New Zealand as well as Sami practicing reindeer husbandry in Finland, who were threatened by logging interests. These cultural rights have an immediate material pay-off. Interestingly, they also incorporate what I have called a politics of scale. In the Finnish case, the court managed, for better or worse, to specify scale as a zone of indeterminacy. Accumulations and their limits matter: “a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of rights under Article 27.” Included in the decision was also a warning to the State party to bear in mind that “though different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of the Sami people to enjoy their own culture.”

Material claims are often pressed in the name of a right to the cultural heritage. Against the opposition of most member states, some indigenous are claiming protection for their “intangible cultural heritage”— for example, the assertion of intellectual property rights to dances, stories, and so on. Under this heading the Draft Declaration moves in the direction of offering the indigenous veto power over any knowledge of any kind that concerns them. Here the threat is perhaps most palpable that international human rights discourse will indeed help reify cultural identity, just as Cowan and Sieder and Witchell charge, colluding in the creation of billiard balls out of more fluid and amorphous processes. Yet there are also many indigenous activists who refuse this self-reification by which their culture could become merely something to preserve, not a power of fresh creation. In Guatemala, a new generation of Mayan intellectuals have occasionally disagreed with the teaching of indigenous languages, opting for Spanish as the language that would benefit the integration of indigenous persons into the economy, especially in areas where the indigenous communities live in or close to cities. And aside from a misguided effort by UNESCO to draft a convention on “intangible cultural heritage,” the UN human rights system seems to be resisting this initiative, in part because of the infringement on other rights that might result from censoring and otherwise limiting the circulation of ideas.

This observation can be rephrased. It is not merely the new anthropology that rejects the “freezing” of cultural process as heritage; international law does the same. It hesitates to reify that which seems resistant to reification. Since cultures are in perpetual movement through time, it asks, what are the limits of state intervention in favor of a culture? Should the state “stop the clock”? Is the state for example obliged to save a dying culture or sub-culture when the participants in that culture are changing their attitude towards tradition? Should the state, say, promote folklore at schools when society is indifferent to it?

Culture’s perpetual movement in time can also be seen in the discourse of human rights itself. Looking at the jurisprudence of the Committee on Economic, Social, and Cultural Rights, one sees that limitations to individual cultural rights may be considered only in a moment of danger to the survival and welfare of a minority or indigenous people. We say “moment” because, according to the general principles of human rights law, such limitations must be temporary and can only be justified for as long as the danger to the group’s survival or welfare exists. Of course the latter is a matter of judgment and the practice of international bodies is not eloquent or fully consistent on this subject, but the acknowledgment of temporality is clear. As it is when human rights law demands so-called positive obligations, or what Americans term affirmative action. Such measures are explicitly intended to be restricted to a limited time of need. And this is the best guarantee that they will not produce the sort of reified identities discussed for example by Wendy Brown.

David Scott speaks of culture as expressing “the double aspiration of people to be free and to be rooted, without compromising either to universalism or to nativism” (96). We have been suggesting that in its attention to cultural rights, the UN human rights system, like contemporary constructionist anthropology, has been striving at least intermittently to realize this double aspiration, to combine rootedness with freedom. As everyone knows, freedom is risky. In addition to the risks Scott mentions, understanding culture to mean creativity as well as

heritage carries with it the risk of assimilation to a more powerful majority culture. That is one of the risks even when cultural rights play a much-needed role in the peace process, in Guatemala or elsewhere. But there are dangers in any appeal to cultural rights. The point to stress in conclusion is the opportunities, which match and, we believe, outweigh these dangers. If the Kosovars had been both allowed to teach the Albanian language in school and had been given the resources to do so, we might not have had to debate whether NATO's "humanitarian intervention" was just another example of Western imperialism. Cultural rights like the right to education and the right to cultural participation have a real-world political strength. They make "material claims," and claims that have a reasonable chance of being satisfied. They stake out a zone in which it is possible for some quantity of power to change hands. They merit something better than cynicism, whether directed at the new anthropological view of culture or at international human rights discourse.

## Notes