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# The Right To Be Different: An Exploratory Proposal For The Creation Of A New Human Right

FAROOQ HASSAN\*

## I. INTRODUCTION

The purpose of this article is to present a new juridical concept within the fabric of existing international human rights law; this new right will be known as the "right to be different." In the spring of 1980, the author was commissioned by The United Nations Educational, Scientific, and Cultural Organization (UNESCO) to undertake a detailed research project to give a definition and concept to the phrase "the right to be different" and suggest possible modalities of implementation at national and international levels. The study was examined in Mexico City by an international conference in August, 1980, in the context of new human rights. This conference of experts observed, *inter alia*, that the right to be different was an important right and should be adopted at the appropriate levels.

Before defining this right, a number of preliminary matters must be analyzed. The discussion preceding the definition will serve as the foundation for a future, more meaningful, and in-depth understanding of the various issues of this matter.

Historically, the world is now in the third generation of human rights. In 1945 the international community in its first generation emphasized civil and political rights. In the second generation, economic and social rights were emphasized. In the present one, an attempt is being made to tackle the complex situations which call for more intricate and sophisticated jurisprudential approaches. These situations have always existed, but were not clearly perceived until recent years.

There is no jurisprudential or political obstacle, *a fortiori*, to the formation of new concepts to safeguard the inherent dignity of human beings. Indeed, while establishing the then most exhaustive

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tabulation of human rights, the Universal Declaration of Human Rights declared in its Preamble the need for "progressive measures, national and international" for the "promotion" and "respect" of fundamental human freedoms.<sup>1</sup> Innumerable statements of this kind have since been echoed in declarations and resolutions of the United Nations, international conferences and seminars, international treaties and by recognized publicists of international and public law. For example, article 2(1) of the International Covenant on Economic, Social, and Cultural Rights states: "Each State party to the present Covenant undertakes . . . to take steps, individually and through international assistance . . . to achieve progressively the full realization of the rights recognized in the present Covenant."<sup>2</sup> The ability, indeed the obligation, to develop new rights or refine existing ones is manifest.

In order to examine the problem which justifies this new endeavor, it is necessary to first explore the state of present law as well as international realities. It will be manifest that despite continuous efforts at both national and international levels by human rights activists since 1945, a peculiar problem remains which has socio-economic as well as political and legal ramifications which lead to injustice, injury, and a denial of dignity. The peoples who suffer are those who are merely "different" from other peoples or groups within a community or a country, and face cultural, social, economic or perhaps even legal discrimination by the dominant group or groups. It would be incomprehensible to future generations why an age which attempted to safeguard even those breeds and species of animals which face extinction did not protect the "different" groups and peoples who are similarly facing "extinction." This is not only important from the point of view of world history, but also important as an immediate concern. "Different" people<sup>3</sup> perpetually face injustice and injury as a result of socio-economic policies and because of the political and legal attitudes and measures of other groups and peoples nationally and transnationally.

### A. The Law

In order to understand the persistence of this problem, it will be

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1. G.A. Res. 217 U.N. Doc. A/810 at 71 (1948).

2. G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) (annex).

3. See *infra* section II.

necessary to first examine the state of international human rights law, and then briefly explore an important aspect of constitutional jurisprudence. The first question is whether, after the progressive codification of human rights law following the UN Charter, there still remains an area within the domain of international law requiring protection. The answer is that while a great deal of needed protection was contained in the Universal Declaration, new areas are emerging. For example, the two Covenants<sup>4</sup> generally reflect the Universal Declaration's provisions, but one new right is recognized by the Covenants: the right of all peoples to self-determination and to freely enjoy their natural wealth and resources. This is a crucial right for it shows that the desirability of having all peoples express their political will has finally been acknowledged by international law. Along with the recognition of the right to self-determination has come an additional awareness which leads to the recognition of a corresponding right, namely, the right to development.

Since the 1960's when the UN ushered in the First Development Decade for all nations, there has come to exist a desire to give respect and aid to peoples who differ both politically and economically.<sup>5</sup> *Pari passu* with these evolutions of political and economic matters comes the thrust for improving and ensuring the growth of social and cultural aspects of different peoples. There is now a clear recognition of the need to broaden the protection given the different peoples of the world. The General Assembly has officially recognized this need to broaden the concept of human rights from the narrower field of economic development to social progress, nationally as well as internationally.<sup>6</sup> In article 2 of the Declaration on Social Progress and Development, the General Assembly proclaimed, "*Social progress and development shall be founded on respect for the dignity and value of human persons and shall ensure the promotion of human rights and social justice.*"<sup>7</sup> Perhaps equally emphatic is the language of the Resolution on International Development Strategy, which states in its Preamble: "The ultimate objective of development must be to bring about *sustained improvement in the*

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4. The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, *supra* note 2.

5. W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* (2d ed. 1971).

6. G.A. Res. 2027, 20 U.N. GAOR, Supp. (No. 14) at 37, U.N. Doc. A/6014 (1966).

7. G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969) (italics added).

*well being of the individual and bestow benefit on all.*"<sup>8</sup> The supplied emphasis in the above two resolutions by implication stresses that the existing list of human rights<sup>9</sup> is insufficient to maintain respect for the dignity and value of the human person and that in order to achieve social justice, a sustained effort to improve the well-being of individuals and to bestow benefits on all peoples is mandated.

The General Assembly resolutions discussed previously undeniably show the realization of the world community that despite tremendous progress, man still has goals to attain. In light of these perceptions it is important that some of the realities of the world situation be examined.

Before turning to these realities, a comment should be made about individual and human rights in western constitutional jurisprudence. Historically, jurisprudence, especially in Roman and common law traditions, has centered on rights belonging to the individual. The individual is normally the center of the law of remedies, both from the point of view of substantive law and adjectival law. It is not surprising, therefore, that constitutional protections speak in terms of the right of persons. It is only recently, in the wake of developments previously discussed that focus has shifted to groups, peoples and communities. The two new rights of importance which must be recognized are first, the right of self-determination and second, the much more complex right of development of different peoples. The refinement in classical outlook and attitudes of constitutional law analysis has come from the field of international law, and should be kept in mind when reviewing the realities of the world community at the present time. This point will be analyzed further when examining the definition and concept of the right being proposed.

### *B. The Realities*

To begin with, attention must be focused on factual situations prevailing in different parts of the world which call for the creation of the new right. It is an indisputable fact of human history that in all societies competition for scarce goods, tangible or intangible, has led to an unequal distribution of power, rewards, status and opportunities. The consequence is a stratified system of group identifica-

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8. G.A. Res. 2626, 25 U.N. GAOR, Supp. (No. 28) at 39, U.N. Doc. A/8028 (1970) (italics added).

9. See *supra* notes 1 & 4.

tion. In this hierarchy, a ranking emerges in which different groups have an obvious unequal position.

The groups or communities which have been at the receiving end of prejudice have primarily been studied in the context of racial discrimination. Racial discrimination in this sense means groups whose status is inferior in sociological terms primarily due to a descent based on biological characteristics. In blunt terms, because of visible physical or genetic characteristics some persons are assigned an inferior status within a given society.<sup>10</sup> Sometimes this pernicious allocation to inferior group status takes place not only on account of somatic factors, but also as a consequence of lifestyle, national or ethnic identity, language, or commonality of beliefs and practices. In all these cases, justification by those who discriminate is always provided.

It cannot be ignored that the factors pointed to previously, emanating as a consequence of genetic and cultural heritage, are part of an individual's personality. In turn, where there is a collection of such individuals, these factors are a part of the *personality* and *identity* of that people. With the progressive development of human rights laws, the point has been reached where these differences must be preserved lest the dominant groups eventually destroy the *differences* of those with inferior group status.<sup>11</sup>

The attack on the differences may come not only from a dominant group within a community but also from transnational sources.<sup>12</sup> For example, when an American thinks of advancement and progress for an Iranian, Kenyan, or an Indian farmer, he will first think of technological factors such as the farmer using a tractor. This arises from purely good motives and springs from his own environment and concept of improvement. But the moment one takes a tractor into a traditionally rural environment, it begins to have a devastating effect on the local people's identity. The West's technological impact will gradually erode a distinct people's centuries-old identity and personality. The right to be different in these situations

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10. See, e.g., HARMANNUS HOETINK, *THE TWO VARIANTS IN CARIBBEAN RACE RELATIONS* (E. Hosiyaas trans. 1967).

11. These various methods are examined later, and are based on the theories presented in K. GLASER & S. POSSONY, *VICTIMS OF POLITICS* (1979).

12. "Attack" in the sense that efforts may be made by others to remove differences. It will be seen in this discussion that, at times, due to different kinds of pressures on motivation, the group may itself take the initiative to remove the differences, but this would not be considered an "attack" in terms of this study.

demands a concerted effort by the legal community to preserve such differences.

## II. A DEFINITION

The realities of the world situation have been sufficiently discussed to now make an attempt to define this new right to be different. Since the defining of this right is an attempt to break new ground, more detailed discussions in the future may be required to introduce new intellectual dimensions. But perhaps more important is the realization by this author that, particularly in the field of law, attempted definitions are too often liable to be confronted with unnecessary lexicographical controversies. A working definition must be developed at this stage in order to intelligently proceed to an examination of the juridical aspects and realities of the proposed new right. A possible definition at this juncture is:

1. All peoples have the right to be different. By virtue of this right legal protection is to be afforded to a people who form a group or a community and who, because of their physical or cultural characteristics, are singled out from others in a society in which they exist, and are the target of prejudicial and unequal treatment and are thus recipients of collective and individual discrimination.
2. The existence of such groups or peoples within a given community implies the corresponding existence of a dominant group or groups or peoples; the latter are forbidden to erode the identity and personality of the dominated group or its people's culture.
3. Full participation in the totality of the life of the community is the right of the dominated group or people. Although this group or people is treated and regarded and regards itself as a group or people apart, there should be no pressure on such a group or people to gradually abandon their distinct identity of "apartness."
4. Transnational encroachments of the same kind, as declared unlawful above, are to be discouraged and progressively stopped.
5. Although the right to remain different is that of a distinct group or people collectively, it is also a right possessed by each and every individual of the group or the people.

A perusal of the above definition will show that the author's aim is to ensure the *preservation* of different groups and peoples. It

is akin to safeguarding endangered identities, cultures, and personalities or different groups and peoples.

It should be noted that in this analysis the term "minority" has been avoided. The term "minority" is bothersome for many reasons.<sup>13</sup> In most cases it has such a strong identification with nationality and ethnic problems<sup>14</sup> that its use may either confuse or misdirect attention to something quite different from that which is sought to be accomplished. What we are concerned with is discrimination which occurs when all members of a group or community are treated in a manner which violates the accepted standards of that community.<sup>15</sup>

The origin of this unjust practice is found in the appearance of heterogeneous societies. This does not go back to the most primitive of times, since homogeneous societies arose very early in the history of man. All members of the community spoke the same language, practiced the same beliefs, and followed the same customs. This began to change a few thousand years ago when, as a result of conquest and migration, different groups and peoples interacted. By means of political processes, larger units arose and the totality of the possessions of the conqueror groups and people began to be considered "superior" and others "inferior." This process has continued and continues today. Accordingly, there is scarcely a society which is without these differences or without groups of peoples which are in some measure disprivileged.<sup>16</sup>

In jurisprudential terms, two important questions must be answered. First, why do the "majority" groups (both governmental and private) feel the need to change or abolish the differences of other less dominant groups or peoples. Motivations do not always follow a consistent pattern and are usually complex rather than simple. One major underlying theme is the undeniable feeling of superiority. This sense of superiority is usually the result of political ascendancy, nationally or transnationally. This feeling is deep-

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13. See generally D. HUGHES & E. HUGHES, *THE ANATOMY OF RACISM* (1974).

14. See R. SCHERMERHORN, *THESE OUR PEOPLE* (1949).

15. Furthermore, because of this bond of commonality, the individual characteristics become largely irrelevant. Attention to these matters is directed by a number of social scientists. See, e.g., L. WIRTH, *THE PROBLEM OF MINORITY GROUPS IN THE SCIENCE OF MAN IN THE WORLD CRISIS* (R. Linton ed. 1945). See generally G. SIMPSON, *RACIAL AND CULTURAL MINORITIES* (4th ed. 1972); J. YINGER, *A MINORITY GROUP IN AMERICAN SOCIETY* 28 (1965).

16. YINGER, *supra* note 15, at 24.



rooted in most societies and is only lessened by the growth of rationality and not merely by education.

The second question to be answered is what are the psychological disadvantages (quite apart from political, legal and economic disadvantages) of the disprivileged group. The member of such a group or people experiences a tension as a result of his *perceived* situation and personal and group aspirations. The tension, e.g., desire to assimilate in the dominant group, produces the gradual erosion of the identity of the individual and eventually of the group. In the absence of pluralistic institutionalized structures the peoples and groups who are "different" face the danger of extinction and the eventual loss of their identity, culture and personality. A well-known Black philosopher wrote in 1897:

One feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife,—this longing to attain self-consciousness manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the old selves to be lost. He would not Africanize America, for America he would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American without being cursed and spit upon.<sup>17</sup>

What is proposed in defining this new right is an international and national change toward greater justice and humanness and the preservation of the rich and varied heritage of man. The differences which separate groups and peoples from each other—evidence of multidimensional, historical, and sociological development of man—are sought to be maintained. In defining this right, safeguarding different values which peoples have toward life and what it offers is similarly sought to be maintained. Moreover, this definition has the goal of keeping the personality of the groups and peoples intact not only from encroachments of more dominant sociological forces nationally but also transnationally.

In this latter onslaught, the chief danger has already been iden-

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17. GLASER & POSSONY, *supra* note 11, at 102 (quoting Dubois, *Striving of the Negro People*, ATL. MONTHLY, Aug. 1897).

tified—namely the threat of the West's culturally technological civilization. The economically weak and politically unstable state of many peoples in the Third World makes the "different" peoples of these areas individually, as a group, and also as a collection of various groups, the prime and sometimes unconscious targets of forces which would destroy their historical identity.

### III. SOME IMPORTANT ILLUSTRATIONS SPECIFYING AREAS REQUIRING PROTECTION

After defining and elaborating some of the right's important jurisprudential, historical and sociological ramifications, illustrations specifying areas which require the protection of this new right will now be examined. Note that this new right is not aimed primarily at the domestic problems of the Third World. It is equally a Western concern, both nationally and internationally.

#### *A. Right to Be Different in the Context of Western Hegemony*

The most obvious area in which the right to be different may be useful would be in the preservation of non-Western peoples from technological impact of the Western states and peoples. The rise of Western science and technology brought devastating changes on the peoples and their values who brought it into existence. The values, perceptions, and attitudes toward life itself have undergone massive change since the eighteenth century. Similar kinds of changes will be produced, and are being produced now in areas outside the two regions—Europe and America—which gave birth to this scientific age.

The political and economic might of these regions produced the Age of Imperialism. English and French became world languages. Language, along with other forms of contact, began to provide new and foreign value systems to distant lands. As a result of this continuing process, the "different" people of the world have rapidly lost their different identities. It would not be entirely wrong to say that we are on the threshold of a "universal" culture. The vast economic differences between the rest of the world and Europe and America have caused serious problems of hegemony and corresponding dependency. The object of this new right would be to attempt to safeguard the personalities of the "different" peoples, their values, and identities from Western onslaughts.

Western nations, both at governmental and private levels, are

accomplishing by various kinds of contacts—even though basically in good faith—the annihilation of indigenous values. To a Westerner, progress means the implantation of his system of work, science and attitudes. To him, better life means more roads, factories and buildings. The people—hundreds of millions of them—who live in the great majority of the world have lived for thousands of years “differently.” A transfer of technology, e.g., a tractor in an Indian village, is an example of an act which may change a community’s special identity, culture and indigenous thinking. Local people seeing the obvious mechanical and economic advantages of the tractor, not only attempt to change themselves, but even become ashamed of their traditional cultures. It is this ever-increasing phenomenon which must be stopped. The differences of groups and peoples represent the quintessence of ages of history, civilization and individuality. Removal of differences is wrong. Instead of producing a world civilization, the abstract notion of civilization demands the retention of different peoples.

### *B. Domestic Problem Areas in the West*

The phenomenon of dominant groups eroding weaker groups and peoples is not only a feature of the Third World. It also exhibits itself in serious forms within the political units of Western society. One aspect of Western states’<sup>18</sup> domestic controversies revolves around a demand of a separatist kind (or secession) by numerically smaller groups. But quite apart from this secessionist problem, there are many situations in these countries similar to those in a developing state: prejudice and discrimination against the “inferior” groups and peoples.

As an illustration, take the case of Canada. Politically and philosophically, an important source of disunity has been the evolution of Canadian constitutional ideology by common law lawyers in this century. It is argued by French-speaking Canadians that this evolution by lawyers and courts ignored the importance of constitutional obligations to protect the French language and culture. This pattern of development has not only precluded the existence of fundamental rights, but also of language rights, without which smaller groups of peoples have little confidence in the confederation and the future.<sup>19</sup> In simple terms, the grievance is that the dominant group,

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18. *E.g.*, Canada, Spain and the United Kingdom.

19. There is a great deal of literature on these points. *See, e.g.*, Conklin, *Constitutional*

through its language, law and attitudes, has not given an appropriate place to the non-dominant group or people for almost a hundred years. This results in injustice which is resented by the French-speaking people of Quebec.<sup>20</sup> Accordingly, for controversies of this nature, the new right to be different will ensure that societies, and indeed their legal systems, do not fall into a pattern which not only threatens the weaker group's identity, but becomes the cause of serious political, even international, conflict in the course of time.<sup>21</sup>

The second phase will focus on the more common form of "intervention" against the less fortunate or disprivileged groups or peoples. As would be expected, this is the domain of a major application of the new right to be different. This is the field in which discrimination has traditionally taken place. Within nations, despite a national list of fundamental human freedoms, discrimination and prejudice resulting in various degrees of injustice is frequently heard of in various societies. Needless to say, this is a problem of basic concern to all heterogeneous societies.

### 1. "Disprivileged People Syndrome"

All heterogeneous societies have varying degrees of what might be called the "disprivileged people syndrome." It would be idle utopianism to believe that in a segmented world, inhabited by many different kinds of peoples, mostly involved in severe and perennial competition for prestige, honor, wealth and opportunity, inter-group tension can be completely removed. Thus, social inequality is un-

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*Ideology, Language Rights and Political Disunity in Canada*, 28 U. NEW BRUNSWICK L.J. 39 (1979); Cohen, *The Search for Viable Federalism*, 3 MAN. L.J. 1 (1969); Hogg, *Constitutional Reform in Canada*, 6 YALE STUDIES IN WORLD PUBLIC ORDER 285 (1980); Matas, *Can Quebec be Separate?*, 21 MCGILL L.J. 387 (1975).

20. William Conklin has stated the problem in this way:

I shall suggest that customary constitutional law prior to Confederation demonstrated that political authorities in Canada were obligated to ensure that Francophones and Anglophones be able to understand and express themselves in their own language when their own rights and privileges were at issue. The normative beliefs, as evidenced in institutional history prior to Confederation, imposed serious constitutional obligations which could only have been subsequently met with great difficulty, given the twentieth century constitutional ideology in English-speaking Canada.

Conklin, *supra* note 19, at 40. See also A. Abel, Opinion to Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec Report, Book II (Government of Quebec, 1972).

21. It will be seen that acceptance of the right to be different will not, in fact, support secessionist wars and tendencies; rather, *it will be the pivotal anchor to prevent these tendencies from politically erupting* into dangerous situations.

fortunately the rule of universal application. The hierarchical patterns of various groups are consistently evident. An eminent American social scientist, Melvin Tumin, explains how power differentials of various groups result in social stratification:

[A] society consists of various strata arranged in a hierarchical order based on the amount of power, property, evaluation and psychic gratification that the strata characteristically receive. This is the general picture of a stratified society, and all societies are stratified in this way to some degree. The word "social" is an important qualifier, since the strata consist of *socially defined* statuses that receive *socially prescribed* quotas of power, property, and prestige.

Today, serious expression of discontent with the prevailing modes of distributing goods and services marks the entire world. The discontent is, of course, eloquent testimony to its presence. On one level the nations of the world constitute a worldwide system of stratification: the haves versus the have-nots. And *within every* nation, including all the so-called socialist countries, stratification is also to be found.<sup>22</sup>

One of the major aims of the new right to be different is to stress that the unfortunate groups previously discussed have the right to remain what they *are*, personality-wise. On economic and political fronts, the more the world's civilizations *progress*, the more we can hope for the betterment of the underprivileged. But their stratified underprivileged status is no reason to require that their historical identities be lost.<sup>23</sup> This is a fundamental point which should always guide us in a proper understanding of the matter. If a right to be different is accepted, different peoples will have a sense of dignity, though they may be economically weak, and a pride and a vigor to resist the civilizational intervention by technological forces of the West.

## 2. When In Rome, Do As The Romans Do

This article is not intended to touch on all major cases of intervention by superior groups into the dignity and personality of un-

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22. See M. TUMIN, SOCIAL STRATIFICATIONS: THE FORMS AND FUNCTIONS OF EQUALITY 13, 17 (1967).

23. The resolution and covenants cited, collectively known as the International Bill of Rights, *supra* notes 1 & 4, aim at removing the "stratified" nature of groups. The recently developed right, "the right to development" and the two United Nations Decade of Development have attempted to close the gap in the varying economic levels of peoples.

derprivileged peoples. However, often quoted cases may be pointed to from the United States and the United Kingdom, where this problem has received extensive attention.

Sometime and somewhere, a concept originated which has since been echoed all over the world: When in Rome, do as the Romans do. What this basically implies is that (1) while in a particular place, it would be prudent to act, behave and live like the majority of the people living there; and (2) since we are speaking of Rome, which was *the* world at a certain time, the innuendo is that it is expedient, in a political and sociological sense, to try to emulate the dominant or superior group or peoples. It is submitted that the ultimate purpose of the new right would be to break the psychological thrust of age old attitudes like that embedded in the famous adage.

In the United States the most well-known controversy has been the treatment of Blacks. In order to bring into focus the theme of this article one can laconically state the quintessence of the writings of authors such as Rev. Ralph Abernathy and Dr. Martin Luther King, Jr.

What is contended by such writers is that despite the protection of individual rights by the Constitution, there persists a prejudice and a violence which causes infinite varieties of pain and anguish to the Blacks simply because they are different from the rest of the population. This violence is the denial of basic access to employment, recreation, living accommodation, education, or police and law enforcement agencies. As a fact, it is known that law is unable to defend such matters unless the psychology of the society is behind it. The spirit of law can usually be violated with impunity.<sup>24</sup>

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24. Abernathy has described this violence as follows:

There is a violence in the land. The violence that is present, and of which I speak, takes on various forms. It is inflicted mainly upon poor and black people. There is the violence of an unjust war perpetuated upon a tiny nation of brown people 10,000 miles away from the United States mainland. There is also the violence of racism, which manifests itself in many forms. The violence is seen in the practice of denying decent human survival of the masses, only to give sums of unnecessary resources to the classes. The violence of racism is seen in police brutality; exploitation of the ghetto, the plantation, the colony, or whatever you choose to call that area where poor and black people struggle to live or exist. Violence is evident in an unjust educational system, which pollutes the mind because it is not honest and truthful; in unemployment, underemployment, poor housing, inadequate medical and dental care, and the many other forms of repression and oppression imposed by the power structure upon the black and poor people. This violence is seen so clearly in our country, the United States of America—the wealthiest and most prosperous of all nations—a nation that preaches one thing and practices another. This the most destructive form of violence.

Lawmakers may have high ideals while forming laws of a constitutional nature. But in the implementation stage, unless the philosophy of the law is shared by the community at large, the spirit of the law can be defeated. This is exactly what has happened in the case of Blacks. To ensure proper sociological trends, therefore, we must continue to make new laws. The proposal to make this right is thus designed to create a general awareness that it is proper to allow people to continue to be different.

Moving to the situation in the United Kingdom, a very large number of social and somatic groups and peoples can be found. Unlike the United States, there is no history of animosity springing from phenomena such as slavery, however, admitted social stigmatization of inferior and superior groups and peoples still exists. Different people find it difficult to survive against sociological violence to their identity. These factors have been recognized by successive British governments and several improvements have taken place; race-oriented laws have been passed to improve race relations and even media like television have started programs in languages which have large numbers of immigrant populations.<sup>25</sup> The following quotation depicts the contemporary situation:

The United Kingdom is thus a country without a strong tradition of open racial discrimination, in which no major group espoused a racist ideology and which some of the colored immigrants regarded as their cultural homeland. Nevertheless, the ethnic conflicts and adjustments which have taken place appear strikingly similar to those in countries which have known a history of slavery and a racist ideology. The problems of ethnic adjustment seem strikingly similar regardless of the disparity of historical background.<sup>26</sup>

The new right will go a long way to achieve justice by allowing different peoples to have their historical identities maintained by law.

#### IV. INTERNATIONAL ILLUSTRATIONS OF DISPRIVILIGED PEOPLE SYNDROME

After examining the impact of the Western countries—both

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R. ABERNATHY, *THE NON-VIOLENT MOVEMENT: THE PAST, PRESENT AND THE FUTURE* 181 (Goldstein ed. 1971).

25. *E.g.*, Hindi and Urdu language programs have been in existence since the early 1960's.

26. HUNT & WALKER, *ETHNIC DYNAMICS: PATTERNS OF INTER-GROUP RELATIONS IN VARIOUS SOCIETIES* 316 (1979).

abroad and domestically on weaker communities and peoples—major areas can be identified where, despite the International Bill of Rights and domestic constitutional provisions, the disprivileged people syndrome exists. In this section, which illustrates some areas of prejudice, certain commonly found causes of this syndrome have been dealt with separately. Within each category, similar causes are discussed. This scheme has been devised to provide an easy understanding of the main types of current prejudices; if a right to be different were present, victimization on the basis of merely being different could be avoided.

#### *A. On the Basis of Nationality*

Ethnicity unites the linguistic-cultural nation; the nation is linked by historical and cultural identity. The same features are shared by a proto-nation—an ethnic group or nation which is struggling for political and cultural self-determination, and has not yet achieved that status. In these cases, shared language is a central indicator.

In all heterogeneous societies disprivileged peoples are not accepted by others possessing similar characteristics, because of the hierarchical struggle for various self-interests. An important case of this kind is the Russian attempt to keep the Mongolian-Asian peoples in such a position as to be unable to challenge the “Russian peoples” of the USSR. A major instrument in this respect is “Russification” by mandatory use of the Russian language. By gradual erosion of identity—abetted by the use of a common language—the personality of the other peoples is being transgressed. An acceptance of the right to be different will aid in safeguarding the difference between the Asian and European components of the Soviet Union. According to a 1970 census, there are 129 million Russians and 113 million non-Russians in the fifteen different republics of the USSR.<sup>27</sup> A number of researchers on this aspect of Russia’s sociological evolution agree that the different groups and peoples are being made to surrender to the dominant culture and identity. The main thrust of this extinction of differences is more particularly aimed at those groups which are more obviously different, e.g., Ukranian Catholics, Armenians, Mongol-Buddhists, Turkish Muslim groups of North Caucasian, Central and Eastern Asiatic regions

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27. See, e.g., *ETHNIC MINORITIES IN THE SOVIET UNION* (E. Goldhagen ed. 1968) (see particularly xi-xiv of *Introduction*).



and Jews.<sup>28</sup> The Russian problem is in many ways more serious than similar problems in the United States or the United Kingdom. National Security Advisor to President Carter, Zbigniew Brzezinski, commented upon the problem as follows: "It is not inconceivable that in the next several decades the nationality [ethnic] problem will become politically more important in the Soviet Union than the racial issue has become in the United States."<sup>29</sup>

In terms of numbers, the problem of ethnically different peoples finding themselves in a disprivileged position is among the most widespread in the world. In recent history some well-known events have only too vividly stressed the fate of the different people. The plight of certain peoples during and following civil wars has been well-documented; they include the Nigerian Civil War concerning the Ibos; the Pakistani Civil War concerning the Bengalis; and the plight of the Biharis at the hands of the Bengalis after the creation of Bangladesh. The Biharis, according to many reports, are facing physical extinction.<sup>30</sup> Moreover, the cases of apartheid in South Africa and of Palestinian problems in Israel have been a center of international conflict since the formation of the UN.

Not all misfortunes of this category receive notoriety. Among those gathering less international attention are the Nagas in North-east India, the Dravidian States in South India, the Chinese in Malaysia, the Asians in East Africa (Idi Amin's treatment of Asians in Uganda did become an international problem, but without a civil war), the tension between the Tutsi and Hutu in Rwanda, the Arab-Negro problem in the Sudan, and many massive tribal conflicts in Zaire, Burundi, Mauritania, Chad, Somalia and Kenya. In the mar-

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28. The major nationality groups in the USSR are:

Armenians	3,559,151	Latvian	1,429,844
Azerbaijani	4,379,939	Lithuanian	2,664,944
Bashkir	1,239,681	Moldavian	2,697,994
Byelorussian	9,051,775	Mordanianian	1,262,670
Chechen	612,674	Polish	1,667,523
Chuvash	1,694,351	Russian (Great)	129,015,140
Estonian	1,007,356	Tadzhik	2,135,883
Georgian	3,235,300	Tatar	5,930,670
German	1,846,317	Turkmenian	1,525,284
Jewish	2,150,707	Ukrainian	40,753,246
Kazakh	5,298,818	Usbek	9,195,093
Kirghiz	1,452,222		

1971 DEMOGRAPHIC Y.B. 504-05 (U.N.) (population census statistics of USSR).

29. Brezinski, *Forward* to V. CHORNOVIL, *THE CHRONICLE PAPERS* (1968).

30. See, e.g., B. WHITAKER, *THE BIHARIS IN BANGLADESH* (Minority Rights Groups Rep. No. 11 1972).

gin is a fairly broad, but not exhaustive, chart showing some important groups and peoples who have been placed, in some form, in this disprivileged people syndrome.<sup>31</sup> Cases previously mentioned are omitted.

### *B. On the Basis of Race*

Nationality or ethnicity may be the most widespread basis of discrimination, but social stratification on the basis of race certainly triggers more emotion. In today's liberal and intellectual climate among educated classes racial prejudice generates a more immediate rebuke than one based on nationality, religion or language. Two points should be kept in mind. First, race, as a term, has both a

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<u>Countries and Regions</u>	<u>Disprivileged Peoples</u>
Afghanistan	Baluchis Pathans Sindhis
Algeria	Berbers, including Kabyls
Australia	Aborigines
Burma	Indians
Canada	French-speaking American Indians
Cyprus	Turks
Czechoslovakia	Germans
Europe	Romani (Gypsies)
Fiji	Indians
Indonesia	Japanese
Iran	Kurds Baluchis
Iraq	Kurds
Israel	Arabs
Japan	Ainu Burakumin
Northern Ireland	Masai
Philippines	Catholics Indians Muslims
Poland	Germans Jews
South America	Indians (tribal)
Spain	Basques
Sri Lanka (Ceylon)	Tamils
Uganda	Acholi Langi
Yugoslavia	Croats Moslems
Zanzibar	Turks Arabs

This list is illustrative of the worldwide nature of this type of discrimination. Nationality appears to be a prime cause leading to a lesser status in almost all heterogeneous communities.

biological and sociological usage; the present concern is with sociological usage. Second, members of a separate race may also constitute a separate nationality; thus within a heterogeneous state, they *may* be subjected to double punishment: discrimination on the basis of nationality as well as race.

In a scientific sense the entire population of the world belongs to a single species: *Homo sapiens*. The species *Homo sapiens* is polytypic. Our single species is subdivided into five or six major racial groups. According to the studies of some scientists, e.g., Eickstedt, there are six subgroups or races of *Homo sapiens*, namely:

- |                 |                               |
|-----------------|-------------------------------|
| (i) Europids    | (iv) Negrids                  |
| (ii) Mongolids  | (v) Khoisanids                |
| (iii) Indianids | (vi) Australids <sup>32</sup> |

According to Coon, there are five races:

- |                 |                 |
|-----------------|-----------------|
| (i) Caucasoids  | (iv) Capoids    |
| (ii) Mongoloids | (v) Australoids |
| (iii) Congoids  |                 |

Each group can further be divided into anthropological types. While the predominant features of nationality and ethnicity are similarity of historical, cultural, social and religious background,<sup>33</sup> the main criteria in classifying races are basically physical: hair, skin, eye-shape, profiles and so on.

While racial prejudice arouses more immediate reaction, prejudice on the basis of nationality creates an impact on a larger scale. For example, statistics show that mortality since World War II (as a result of genocide, civil wars, war killings and maneuvers) on the basis of ethnicity and nationality is thousands of times greater than mortality resulting from racial clashes. By one account, since 1960 the combined deaths of people in the U.S.A., UK and South Africa as a result of racial clashes is approximately 600; hundreds of thousands world-wide will die as a result of ethnic conflicts.<sup>34</sup>

The social significance attached by all heterogeneous societies to physical and somatic appearance is apparent. Beginning with childhood, throughout school, then in employment and marriage,

32. See Eickstedt, *Geschichte der anthropologischen Nomenclatur und Klassifikation (unter Benennung der Erforschung von Sudasien) II Teil, 2; Hälfte, Die jüngere Erforschungsgeschichte der Sudasien* 6 ZEITSCHRIFT FÜR RASSENKUNDE 151-210 (1937).

33. See generally B. BERRY, RACE AND ETHNIC RELATIONS 46-47 (3d ed. 1965).

34. See generally Cherne, *Into a Dark Bottomless Hole*, 32 FREEDOM 10-14 (1975).

one has to live with discrimination if one is of a race within the disprivileged people syndrome.

The peoples who are disprivileged within this category are found—unfortunately—all over the world. By all accounts the largest measure of somatic difference is between Europids and Negrids; in all places where these two come together, e.g., Europe and America, one sees the extent of prejudice. Similar prejudices may also be seen when groups of different races meet in Africa, the Middle East, Asia, the Soviet Union and Latin America.

### *C. On the Basis of Language and Religion*

The third major basis of discrimination is in language and religion. Indeed, as previously noted, an erosion of a separate and distinct people occurs with the suppression of its language. An eminent American political scientist emphatically points out that in multilingual societies, modernization intensifies group struggles and brings language issues into the spotlight. Moreover, in education, industry, and urbanization language becomes of supreme importance; it is usually the means of competition. In recognition of this, constitutions of many multilingual states guarantee languages, e.g., India, Yugoslavia, the USSR and Switzerland. But even these measures do not obviate prejudice. Despite legal provisions—which are only for major ethnolinguistic groups—strife and denial is still seen.<sup>35</sup>

For example, in India, because of motivations of nationalism, Hindi is the official language of the Federation. But this has met serious challenges from the southern states of the Union. One compromise in 1967 was to retain English as a second official language. The interesting thing is that in India, English is not really a major ethnic language.<sup>36</sup> Similar problems exist in other areas of India which, like the Soviet Union, provides a leading example of a large multilingual state. But the problem is not restricted to large states; it is found in smaller countries, e.g., Malaysia, Pakistan, Indonesia, Ethiopia and Sri Lanka. In another context, we have examined Canada; the case of Quebec is a major illustration of this kind in a Western country, indicating that this problem may arise anywhere in the world.

Analogous to language is religion, which becomes important

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35. See *POLITICS AND SOCIETY* (E. Nordinger ed. 1970).

36. See, e.g., 122 *THE TIMES OF INDIA* (Bombay) (May 3, 1961).

when group interaction produces competition. Examples are the minorities in Northern Ireland, Israel, Sudan, Thailand and the Philippines. A major historical event was the creation of Pakistan and India from the undivided Indian subcontinent by the British in 1947. In the name of religious differences, hundreds of thousands of people were killed or made refugees. A current important conflict during the past decade can be seen in Lebanon between Christians and Moslems.

#### *D. On the Basis of Culture*

The final major reason for discrimination discussed herein is culture.<sup>37</sup> Prejudice of this type assumes two main forms. First, there may be direct discrimination against individuals. Second, there may be an attempt to deny the entire group or peoples equal opportunity to maintain or develop its culture. (The newly advocated right to development does not directly deal with this matter. It is concerned with providing assistance to different peoples by international and intergovernmental efforts.<sup>38</sup>) The peculiar feature of an attack on the culture of a weaker group is not the attempt to abolish it altogether (as in the case of language), but rather to advance the position of the dominant culture. It should be added that an important article of the Covenant on Economic, Social and Cultural Rights does not aim at providing redress when the dominant culture is attempting this advancement. Thus, the right to be different is a new event for this particular area and will provide protection in a hitherto unprotected field.<sup>39</sup> Indeed, a perusal of the

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37. Already discussed are what the author considers to be the four primary bases of discrimination. Other categories are omitted since any discussion of all of them would unnecessarily extend the scope and length of this article. For the same reason a discussion of the details or specific patterns of discrimination leading to disprivileged people syndrome have been omitted.

38. See, e.g., Schacter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976).

39. G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). Article 15 of this Covenant states:

1. The States Parties to the present Covenant recognize the right of everyone;
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Covenant will show that its purposes differ, as manifest in article 15.

Instances of cultural discrimination generally coincide with one or more of the previously mentioned categories. However, apart from the disprivileged status of entire peoples, prejudice takes place against individuals, families and groups of families. This prejudice produces extraordinary tension in this era of migration of large numbers of peoples into different countries who seek improved economic conditions. In the majority of cases, cultural discrimination against the individual is affected by many, even innumerable, members of the host or dominant groups. For example, when an African or Asian engineer comes with his family to work in Europe, he brings with him his own lifestyle, values and perceptions. But in subtle or not so subtle ways he and his family are subjected to cultural invasion of the host peoples' cultural norms. The right to be different will provide protection against that invasion; it is founded on a realization that all peoples and individuals have the right to be different. Important examples of this type of discrimination of peoples—as opposed to individuals or families—take place in many parts of the world: Russia, Europe, U.S., between Turkish and Greek people in Cyprus, between Oriental and European Jews in Israel, in the struggle between northern and southern people of the Sudan, or between American and local Blacks in Liberia.

#### V. CONSEQUENCES OF INTER-GROUP CONFLICT IN HETEROGENEOUS SOCIETIES

Before leaving the substantive part of this discussion and moving to the conclusions, a word may be said about the consequences of inter-group competition phenomena in heterogeneous societies. This will demonstrate the vital importance of this right and demonstrate the need to prevent the annihilation of the differences between different peoples which are a part of the world's heritage.

In any society inhabited by different groups, friction takes place. As a result of this friction two things usually occur. Either the dominant group will reject groups different from itself, or it will accept them in a qualified sense. Total acceptance without social qualification is rare.

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3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
  4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

According to Milton Gordon's classification, the following reactions result:<sup>40</sup>

- (i) Extermination—*most extreme*
- (ii) Expulsion
- (iii) Exclusion
- (iv) Transmuting Pot
- (v) Melting Pot—*least extreme*

The words suggest that the most extreme reaction occurs when the dominant group is bent upon the extermination of the lesser group. Expulsion is less extreme than that. It is followed by exclusion, which means de facto exclusion, through a lesser sociological status. The fourth reaction in this descending scale is called "transmuting pot." Here the aim of the dominant group is to force the members of the lesser groups to disassociate themselves from their specific ethnic and cultural characteristics and associate themselves with those of the group itself. "When in Rome, do as the Romans do" is a classic example of this trend. In the nineteenth century, Lord MacCauley made a similar scheme for producing a brand and class of Indians when he wanted "Indians by birth, Englishmen by education."

The least extreme reaction in the melting pot theory is said to be typical of the United States. It envisages the blending of all cultures and people—with slight favoritism of the host people's identity—by producing a new product. In America the Anglo-Saxon peoples merged with other immigrants to produce an American People. However, as in the case of melting metals, the one with greatest quantity will emerge as the dominant component of the alloy produced. In America, "the American People" is obviously more Anglo-Saxon than part of the innumerable other immigrant components.

Considered above are the reactions which reject inferior groups. Sometimes a qualified acceptance takes place. In heterogeneous societies, there is basically a two-tier consequence: (i) cultural pluralism, or (ii) partition. In the case of cultural pluralism, the theory is that the society accepts diversity. However, this is usually technically true in the law, but not in fact. The USSR is supposed to be an example of this phenomenon. A better example is that of Ca-

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40. Gordon, *Assimilation in America: Theory and Reality*, 90 DAEDALUS J. AM. ACAD. ARTS & SCI. 263 (1961). Gordon's chart applies to America, but the characteristics of the analysis have general application.

nada or perhaps Yugoslavia. Partition has been said to be like divorce; people just agree to live separately by some form of political compromise. Switzerland is the best example of this. However, many partitions are not harmonious and result in bloody clashes and civil wars.

The root cause is a failure to accept different peoples. Once this is recognized, it will produce—in time—a better psychological and cultural environment. The right to be different is thus of crucial significance in alleviating the difficulties identified in the preceding section.

## VI. LEGAL PRINCIPLES AND NORMS OBLIGING US TO DEVELOP THE RIGHT TO BE DIFFERENT

The jurisprudential basis for moving into the future with this new human right has been previously formulated. After examining the substantive part of the problem some legal principles and norms will be examined which place an obligation on society to create this proposed right.

These goals, which permeated legal thought after the formation of the UN, have demonstrated a legal obligation to develop this field. Most of the contemporary deliberations taking place are for a new international strategy. In Resolution 32/174, paragraph 2, the General Assembly decided to convene a special seminar in 1980 to:

Assess the progress made in the *various forums of the U.N. System* in the establishment of new economic order and, on the basis of that *assessment to take appropriate action for the promotion of the development of developing countries*, and international co-operation including the *adoption of new international development strategy for the 1980's*.

During the course of the First Development Decade<sup>41</sup> no special mention was made of human rights, but that was rectified and emphasis refocused in 1965 by another Resolution which acknowledged the need for special attention, at both national and transnational levels, for the promotion of and respect for human rights within the strategy for development.<sup>42</sup> Similarly, the International Conference on Human Rights in Tehran in 1968 acknowledged the “profound connection” between economic development

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41. G.A. Res. 1710, 16 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5100 (1962).

42. *Supra* note 6.



and human rights.<sup>43</sup> Again, while ushering in the Second Development Decade, the General Assembly recognized: The success of international development activities will depend in large measure . . . on the elimination of colonialism, racial discrimination, apartheid . . . and on the promotion of equal political, economic, social and cultural rights for all members of the society.<sup>44</sup>

The right to be different appears to be significant in this third generation of conceiving new legal rights to combat existing and lingering injustices. Two other community (as opposed to individual) rights, self-determination and development, have only been accepted in the past fifteen years. This new right is a part of the same general approach and attitudes of enlightened international thinking.

None of the existing human rights approach the problems which have been highlighted here. The International Covenant on Economic, Social and Cultural Rights, discussed earlier, differs in focus. Another important treaty, the Convention on the Elimination of All Forms of Racial Discrimination, has a similarly broad message, but only for racial problems.<sup>45</sup> For example, article 1(1) defines racial discrimination as: "Any discrimination, exclusion, restriction or preference based on race [or] color." But in article 1(2) the Convention makes it clear that exclusions or restrictions can be made by states between citizens and noncitizens.

It should be clearly understood that none of the current international treaties, though having the same philosophical approach and aiming at similar goals, discuss any right of the nature or scope now being proposed. But the foundation, in the intellectual, legal and philosophical sense, comes from numerous international trends, the most important of which have been referred to herein. A formidable statement showing the will of the international community can be seen in another historic landmark: the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States.<sup>46</sup> This Declaration, *inter alia*, proclaims the duty of the States to cooperate with one another in order to promote *international economic stability* and progress and the *general*

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43. *Final Act of the International Conference of Human Rights*, U.N. Doc. A/CONF. 32/41.

44. *Supra* note 8.

45. Partly for such emphasis, it was earlier stressed that the word "minority" was being avoided for purposes of this article.

46. G.A. Res. 2625, 22 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

*welfare* of nations. It is submitted that for these three goals the acceptance of this right is important. Philosophically, it is a part of this new international trend, embedded in a major declaration.

## VII. FINAL DEFINITION AND CONCEPT

Following Professor Hart's methodology, a preliminary definition and examination of the substance of this new right was conducted. The major characteristics have been identified. The quintessence of this concept is the mandate of all States to allow peoples to remain as they *are*; that is, different from each other. The right mainly applies to a large number of people, a group, or peoples, but can equally apply to an individual or a family or a group of families in surroundings different from their own.

With this concept in mind, it is further submitted that the preliminary definition is now *adopted, in toto*, as the final definition of this pioneer attempt.

### (H). MODALITIES OF INTERNATIONAL AND NATIONAL IMPLEMENTATION

From the point of view of positive jurisprudence this presents the most challenging aspect of this proposal. This is particularly true at the national level on account of more complex sociological factors and certain aspects of constitutional jurisprudence.

#### *A. International*

If precedent or empiricism is any guide, there are three systems in international human rights law concerned with enforcement and implementation. Starting with the most effective in terms of implementation is the European System.<sup>47</sup> The European Commission and Court of Human Rights have built an impressive system. Somewhat less efficient is the system envisaged in petitions and complaints by the UN System. The UN System is more prolonged; the substance of grievance must be a persistent denial and should be gross. In any case, this System mostly is of an investigatory nature. Thus, it is not really contentious, as under the European System. The least effective in terms of machinery is the reporting system, e.g., in the International Covenant on Economic, Social and Cul-

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47. It is unnecessary to examine details, e.g., state petitions, individual petitions, etc., at this juncture.

tural Rights.<sup>48</sup>

This right, being more in line with sociological norms, thus deals with the kinds of problems dealt with by the Economic, Social, and Cultural Rights Covenant. Since this right aims at changing longsettled sociological attitudes, prudence and wisdom demand a careful and slower start. It would be hasty to think in terms of petitions as envisaged in the Optional Protocol to the Civil and Political Rights Covenant.

Moreover, the violation of this right is really less by states and more by sociologically dominant groups within states. Accordingly, it is recommended that a reporting system along the lines advocated by article 16 of the Covenant on Economic, Social and Cultural Rights be instituted.

The text of an international treaty incorporating this right should read:

1. The States Parties to the Present Covenant undertake to submit in conformity with this part of the Covenant which reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

As the basis in a great majority of cases is sociological action, and not state action, against disprivileged peoples. The dissemination of this right is thus of highest significance. A proclamation along the lines of that in the Preamble of the Universal Declaration demanding "sustained education and teaching by states of this new right" within these territories should be provided. These two points, it is submitted, should be the main process of international enforcement machinery.

### *B. National*

For reasons previously stated, the implementation of the new right at national levels poses tougher questions. Two reasons merit special mention. The main difficulty is that, while individuals may be disprivileged, the real beneficiaries of this right would be groups and peoples. Both Roman and Anglo-Saxon systems of jurisprudence (as applied in most places today) generally do not conceive of groups in contentious litigation, and so the rights are bestowed upon individuals. To create a right on the pattern advocated demands a different approach.<sup>49</sup>

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48. *See supra* note 4, at arts. 16-25.

49. It may be mentioned that there is a publication under the name of the right being

Another difficulty is the coexistence of this right with constitutional law provisions relating to "the equal protection of the laws." *Ex hypothesi*, if there is a bill of rights, which most written constitutions have, then giving more protection to a disprivileged people violates the equal protection clause. To solve this problem, a number of constitutions, e.g., Pakistan and India, provide the acceptance of what has been called "reverse discrimination." Indeed, an important international treaty provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . to ensure . . . equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>50</sup>

This provision thus allows reverse discrimination in favor of the disprivileged peoples.

One country with a long history on such matters is the United States. Although in America this problem has been dealt with mostly in connection with racial matters and controversies, the nature of the problem can still be clearly perceived. The equal protection clause of the fourteenth amendment has been at the center of this controversy. The United States Supreme Court has held that when the survival of a small religious community is threatened by a general law, the state, unless its interests are quite important, must make an exception from the general law for the religious community.<sup>51</sup>

The Supreme Court in other cases has approved measures that protect women from the impact of past employment discrimination,<sup>52</sup> that give armed services veterans a civil service advantage in compensation for the time lost from the job market,<sup>53</sup> and that provide specific remedies for past racial discrimination in the operation

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proposed in this study: N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1979), however this work deals with criminal law and the position of different kinds of delinquents.

50. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 1(4), 660 U.N.T.S. 195.

51. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

52. *Califano v. Webster*, 430 U.S. 313 (1977).

53. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

of the public schools.<sup>54</sup> But in a recent landmark case, *Regents of the University of California v. Bakke*,<sup>55</sup> the Supreme Court held that reverse discrimination practiced by the University of California in favor of disadvantaged students, by which Bakke was denied admission, was a violation of the equal protection clause of the fourteenth amendment.

So when attempting to devise a national implementation scheme we must keep these matters in mind. In this article it is not possible to examine all types of cases, nor the constitutional practices of all countries. However, based on the above analysis, the following suggestions are made:<sup>56</sup>

(1) Subsequent to the making of this new right at the international level all states should undertake under the treaty to create local committees to examine their domestic constitutional law.

(2) The mandate of these local committees should be to incorporate the basic points of the definition of the right to be different in the fabric of local law.

(3) As far as practicable, effort should be made to allow group actions. The aim of the remedial law so devised would not be the punishment of the offenders, but rather the protection of the disprivileged.

(4) For such protection, it may be considered feasible to have a conciliation or arbitration procedure rather than a court determination by contentious litigation.

(5) These conciliation committees should be composed of the senior leaders of various disprivileged peoples and dominant groups. Furthermore, these committees should include persons of recognized competence in the international human rights field.

(6) The procedures to be adopted should be left to the various committees in different countries.

(7) All countries party to this new Convention should, under their international obligations, report to the international body<sup>57</sup> as suggested earlier and the results of the cases should each be brought before the conciliation committees.

It will be seen that in the proposed implementation machinery

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54. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

55. 438 U.S. 265 (1978).

56. In any case, indigenous solutions by local experts based on local situations are preferable to ready-made imported legal solutions.

57. This international body should be the E.C.O.S.O.C., and reports to be submitted through the Secretary-General.

emphasis is placed on a sociological and legal format. This is because the author believes this is as much a sociological problem as a legal one. In the example given earlier dealing with inter-group action within a society, the different types of attacks or attitudes the dominant group can have toward a disprivileged people were noted. One method is to assimilate the different group within itself, or largely within itself. Sometimes this attack is not even necessary, as individuals in this disprivileged group think it to their advantage to integrate.

The psychological advantage and result of this new right would be to even prevent such tendencies. By stressing the fact that people can be different and should maintain their differences, we would improve a centuries old sociological phenomenon of human history. The paramount aim of this is as much a change in sociological and psychological attitudes of people the world-over as providing new juridical concepts in the field of international human rights.

This new right has a complex sociological factor. For this reason, apart from procedure and precedent, its protection should assume this quasi-legal or conciliation system, to allow the participation of not only lawyers but group leaders on the plane of sociological and anthropological needs of different societies at different times. In due course, with the growth of precedent and a new jurisprudence connected with this right, it is possible to improve upon the basic machinery being suggested here. Evolution is a sure sign of matured legal doctrines.

After examining the jurisprudential foundations and roots of this new right and formulating a formal definition, some of the specific cases (by way of example) where the recipients of this right will benefit may be identified. In all heterogeneous societies the impact of the dominant group's impact in destroying the disprivileged peoples' identity will be stopped or minimized by this new right, especially in the following cases, by:

- (1) allowing them the official use of their languages in at least their geographical area, and generally by giving it more prominence;
- (2) allowing them to maintain their own heritage and norms with respect to dress, eating practices and social habits, and in discouraging trends which tend to force the disprivileged people to adopt the dominant peoples' identity. The aim is thus to foster a varied society and not a uniform one;
- (3) allowing and encouraging the traditional educational

practices, background and learning systems of the disprivileged people; also their names, modes of address, manner of greetings, etc.;

(4) encouraging social acceptance of people who are different, particularly in public places, educational institutions and places of employment; also encouraging their participation in public and civil affairs;

(5) countering the formidable influence of Western technology on the nascent states (in terms of industry) by encouraging educational programs to counter the influence of powerful media; also to encourage their culture by mass media institutions;

(6) directing a progressive thrust in educational institutions at all levels, for courses and classes emphasizing the history and background of different peoples of that community;

(7) allowing the religious or other practices—festivals, daily practices and observances—to become more widely known, at least by state-run media;

(8) on the lines of the affirmative action program in the US, working toward a broader representation in places of employment, universities, etc.;

(9) disseminating state run programs emphasizing that there are different kinds of peoples, each possessing its own identity; and

(10) international dissemination of the type described in (9) above.

These are only a few cases, aimed at allowing people to preserve *what they have*. In all its forms, prejudice is hard to pinpoint, but still is clearly felt by its targets. It is hoped that this right will make inroads in the *totality* of that prejudice.

### VIII. INDIVIDUAL'S RIGHT TO BE DIFFERENT

The previous discussion, though primarily dealing with peoples' right to be different, also appertains indirectly to an individual's right to be different. Jurisprudentially, in the previous analysis, it was noted that the right to be different, though basically a collective right, is also an individual right. Indeed, a group being a large collection of separate individuals, *ex hypothesi*, all that has been said earlier would apply here; nevertheless, this section deals with this point in greater depth.

In realistic terms, when we speak of the "disprivileged peoples syndrome," what we are saying is that when a person differs from

the majority, and interacts in a given society, he or she faces the difficulties outlined earlier. In other words, in practical terms the discrimination of the nature discussed here is usually, though not always, against an individual. He or she suffers because he or she is linked to a disprivileged group or people.

The same results are perceived if the individual is not a member of a minority or disprivileged group, but simply follows a behavioral pattern which is different from the one followed by the community. Here, instead of dominated and dominant groups, the focus is on the individual—without any connection with an accepted group and the majority; the suffering in either case is similar in being singled out from the rest of the community. Nevertheless, it must be remembered that while the kind of consequences are similar, their extent may differ. For example, a deviant member of a society who racially or ethnically belongs to a dominant group will not face the same extent of prejudice or discrimination which would be faced by a deviant member of a racial minority community.

Thus, discrimination against an individual can occur because she or he is different by:

- (1) belonging to a disprivileged group; or
- (2) being deviant in appearance, belief or manner.

The individual dimension of this problem can have these different sources, but the two are clearly distinguishable. As this article is directed at different peoples, the 'deviant' mentioned in (2) above is not the individual which this new right seeks to protect.<sup>58</sup>

After stating these preliminary points, the issue is: In the case of the individual (mentioned in (1) above) who is different, *which* characteristics have to be protected, and *why*.

To begin with, the major implication in the question is that despite every effort, no legal system, national or international, can protect every kind of difference. Furthermore, while expanding the international and national protection of human rights, we must remember that the aim is to protect new human oriented rights and not every manifest or hidden individual interest.<sup>59</sup> Once that is admitted, we should stress that, by and large, existing differences

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58. The limited scope of this article is not intended to deal with the many complex legal and sociological questions which deal with the conflict which can arise sometimes between group's rights and individual's rights. See, e.g., GLASER & POSSONY, *supra* note 11, at 328.

59. Vasak, *Are New Human Rights Needed?*, 12 HUMAN RIGHTS J. (Aug.-Sept. 1979).



should be preserved. At a minimum, these differences should not be the occasion of invidious discrimination by the government.

The major reason for protecting the individual's right in this context is the one discussed in the main study: if not protected, the individual group which is different will eventually be affected and changed.

The characteristics of the different or deviant person, which have to be protected, especially within a traditional constitutional law field, may now be examined. This field broadly covers personal actions in social, political and religious matters. Efforts have been made to include as much as possible of the private domain in the protected category.<sup>60</sup> Until recently, private matters were considered the concerns of the society and the state.

This is the major area where the individual who is different will benefit. Since the concepts of private and public are connected with social norms, an acceptance of this right to be different may cause changes in society's thinking. In this broad category of private behavior the real aim is to remove societal traits impinging on this right. Once again it is too early to give a precise list of such behaviors which should or should not be protected since every society will provide a different answer.

In addition to this major area where new protection is needed, two general categories exist. First, if the individual's characteristics resulting in differences stem from group-linked causes, then his or her protection is necessary.

Second, the category of characteristics (i.e., disprivileged group-linked characteristics) should, at a minimum, not subject the individual to invidious discrimination by states. Some of the cases of this type have been mentioned previously, e.g., race or ethnic problems and their lack of protection in the USSR or South Africa. An additional instance is immigration. Immigration laws have been criticized for discriminating against individuals belonging to certain groups or nationalities. This problem is acute in countries where economic benefits are available for people of poorer countries. Countries such as the U.S. or Australia, made up through continuous immigration, are heterogeneous in various respects. However, Australia is usually criticized for, in effect, attempting to keep a pro-Western white bias in immigration policies. A recent book quotes an Australian Minister of Immigration as saying: "[i]t is cardinal

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60. *E.g.*, sexual practices.

with us that Australia, though attracting different people, should basically remain a substantially homogeneous society."<sup>61</sup>

#### IX. CONCLUSION

In this condensed and short article an attempt has been made to point out some major problem areas where an individual's right to be different will have meaningful consequences. It may, however, be reiterated that only some specific issues have been emphasized; the foundations and doctrine of this right is contained in the main study.

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61. YETMAN & STEELE, MAJORITY AND MINORITY RELATIONS 256 (1972).

