

FAIRNESS IN FAIRNESS DISCOURSE

by Thomas M. Franck*

FAIRNESS DISCOURSE

Much of the work of the institutions of the international system has to do with the amelioration and resolution of conflict between states. At a more profound level, it has to do with the allocation and reallocation of goods. This work is carried on in various institutional forums through a discursive process. Our world of states has consolidated to form a community with systemic, systematic interactions and utilitarian regimes. What was an anarchic rabble of states has transformed itself into a society in which participants have a voice and are determined to interact in accordance with recognized norms or principles.

In this newly socialized community, therefore, much of the attempt at interaction is discursive—an interlocutory process of exhortation, expiation, explanation, and exposition in pursuit of an overlapping consensus or in the service of apologia and prophecy.

Most of this discursive interaction in this *zeitgeist* of modern international relations focuses on two advocacy strategies. The first advances a claim of "legitimacy," which is defined as right process. In discourse, legitimacy's considerable weight is due to its incorporation of a widely felt desire for order, consistency, and certainty. In an orderly world, rules are made in accordance with prescribed processes, rules are understood and obeyed, and most violators are punished. However, another part of the advocacy strategy takes the form of claims of "justice." Justice-based claims generally focus on distributive modalities and advance reasons for change in existing entitlements and patterns of distribution. Justice-based claims seek both release from improvident obligations and mitigation of the consequences of wrongdoing or bad choices. They may sacrifice expectations of stability in exchange for a new and better order. It is therefore evident that while claims of legitimacy and justice can be symbiotic, they may also be adversarial.

Legitimacy and justice together constitute fairness, which attempts to reconcile claims of legitimacy with those of distributive justice. Notions of fairness are incorporated in the rule structures applicable to the sea bed, continental shelves and international rivers, the ozone layer, outer space and the moon, Antarctica, and tropical forests. Fairness discourse is necessary for the implementation of international human rights, self-determination, collective security, and free trade. It is a necessary part of decision making in the International Court of Justice, the UN Security Council, and Office of the Secretary-General, as also in the General Agreement on Tariffs and Trade (GATT), International Centre for Settlement of Investment Disputes (ICSID), and Free Trade Agreement (FTA) arbitrations. It is heard in the chambers of the Iran-U.S. Claims Tribunal and in European and American regional human rights courts. It is embedded in the decision-making processes of numerous treaty-based organizations. It is the subject of most discourse in political institutions.

This suggests that attention must be paid to how the discourse is organized: who has a voice and how decisions are reached. While the institutions of international governance are gradually changing shape as their importance increases, two characteristics have remained dominant. First, the discourse tends to give each state an equal voice. Second, it tends to give a voice only to representatives of governments. Since successful fairness discourse is unlikely to be perceived as occurring in forums that are composed

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unfairly, these two characteristics of fairness discourse need to be examined critically to evaluate their own degree of fairness.

EQUAL VOICE IN DISCOURSE

Equality may be the very expression of fairness, or it may be its nemesis.

The notion that each state has an equal voice in the global discourse is formally embodied in Article 2(1) of the UN Charter, which states that the "[o]rganization is based on the principle of the sovereign equality of all its Members." Most international discourse—although not in the Security Council or the Bretton Woods Institutions—operates on this principle: one state, one vote.

This has not always been the guiding principle of the international system. Professor Christoph Schreuer has pointed out that, throughout the Middle Ages, international relations were based on "strongly hierarchical and paralleled religious or secular concepts of coordination and subordination" in which the actors were distributed on a power pyramid culminating in an imperial court. Thus "sovereign co-equal actors with a territorial basis" only became the established order after the 1648 Peace of Westphalia.¹ Thereafter, the decline of the Holy Roman Empire (and subsequently of other empires) and the accompanying rise of nationalism established the notion of a world of sovereign, equal states.

While the Statute of the League of Nations and the Charter of the United Nations have adopted this Westphalian model as the organizing principle of their political organs, the Charter did depart from it sufficiently to give five "permanent members" of the Security Council the extraordinary power to veto proposed resolutions.² Indeed, the very idea that five powerful states should form the permanent core of the principal decision-making body of the organization introduces an element of state inequality.³ Nevertheless, in the UN General Assembly, as in most other international political or diplomatic conferences, each state still has one voice and one vote.

Given the widely varying populations of the different members, this raises basic problems of fairness. That each citizen of Andorra should have four hundred times more vote or "voice" in global discourse than a citizen of the United States, or 1,400 times more than a citizen of China, must raise a question as to the fairness of the fairness discourse that occurs in such a forum. This problem of unfair equality has become much more pressing as a new wave of tribal nationalism swells the ranks of mini-states, all of them claiming equal voice.

While bodies like the UN General Assembly manifest the unfairness of a discursive process in which ever smaller and more numerous mini-states have the power to determine (or undermine) discursive outcomes, the present international system actually perpetuates and accelerates the efferent tendencies that may eventually lead to a United Nations of two thousand member states. More power has, perforce, flowed toward the new centers of the international system: to the Security Council (collective security), the Bretton Woods Institutions (monetary and fiscal stability), the GATT (economies of scale), and other international and regional regimes. As a consequence many of the classic rationales for the multi-ethnic state (e.g., mutual defense, markets, access to resources) have withered, allowing secessionism a freer rein. And as more

¹ See Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT'L L. 447 (1993).

² See UN CHARTER Art. 27(3).

³ See UN CHARTER Art. 23(1).

power has flowed to the anonymous bureaucratic and diplomatic institutions of international organizations, so has increased the clamor of individuals for meaningful participation in the decisions affecting their lives. This too has reinforced the move to create small, tightly knit tribal states in which the individual can find voice and meaning. It is both clear and paradoxical that the inevitable centripetal trend in global governance has unleashed a centrifugal countertrend. This miniaturization of statehood is bound to affect the global discourse if the forums persist in adhering to the Westphalian principle. A forum of two thousand voices, each representing a government, cannot engage in an intelligible fairness discourse, nor can it expect to arrive at an overlapping consensus on common values or norms. In such a body, the capacity to act would either dissipate or flow underground to a diplomatic cabal or bureaucratic mandarins.

In sum, the centripetal trend in tackling international problems is generating a centrifugal reaction that threatens to make discourse difficult, if not impossible. In that context, the principle of state equality, long a legal fiction, must be seen as wrong—first because it encourages secessionism which, in turn, makes fairness discourse more cacophonous, and second because it is an unfair organizing principle that infects the fairness discourse with a fundamental flaw of unfairness.

SINGLE VOICE IN DISCOURSE

A second characteristic of the predominant modality in the organization of global discourse is that voice and vote are reserved exclusively for governments. This is both manifestly unfair and, ultimately, destructive of discourse.

For example, there are at least fifty states in which an indigenous minority has identified itself: Hmong, Inuit, Lap, Sorb, Maori, etc. Nowhere do these indigenous peoples form a majority. Taken together, however, they form a constituency larger than the respective populations of half the states represented at the United Nations. They share many interests in cultural, environmental, human rights, and resource issues. Yet the global system as now constituted affords them little opportunity to be heard in the forums of fairness discourse. Such silencing is likely to produce alienation and, ultimately, secession. Again, the system promotes fragmentation, for only by creating their own independent states will these peoples be rewarded with voice and vote.

It is not just fragmentation, this dysfunctional by-product of the Westphalian system, but the exclusion of so many voices that undermines the fairness of the fairness discourse as currently constituted. This basic unfairness has not gone unnoticed. Already, the equal and exclusive role of states (i.e., governments) in the global and regional forums is being challenged. NGOs, with increasing militance, are elbowing their way into international negotiations, either representing transnational interests of their own at the conference margins or advising the representatives of small nations without the resources to research and staff their own participation in the multifarious activities of the international conferencing system.

It is not only the meek who are protesting and demanding entry. In various forums of discourse the more powerful states also have found ways to circumvent the Westphalian principle of equality by capitalizing on their real inequality. They trade favors for votes (usually in the form of perfectly legitimate development assistance), and they make their disproportionate institutional financial contributions conditional on the outcome of decisions in which they have a special interest. Larger, wealthier states are also able to staff the forums of discourse in ways that give them an advantage over the understaffed, smaller, poorer participants. These palliatives go only a very little way,

however, to mitigate the unfairness of formal equality and do not help at all the unrepresented minorities within states that lack voice in a purely state-centered system.

RETHINKING DISCURSIVE FORUM AND STRUCTURE

The utilitarian aspect of fairness is that it pulls toward voluntary compliance. If a decision has been reached by a discursive synthesis of legitimacy and justice, it is more likely to be implemented and less likely to be disobeyed. As the pull toward compliance is strengthened, the cost of violations rises. Powerful or fanatical states may still choose to act counter-normatively but must then pay a higher price if the norm violated is widely perceived as fair. Whether a norm is so perceived will depend in part on how it was enacted. That, in turn, depends on the fairness of the discursive process through which it was developed, adopted, and applied.

It may not happen tomorrow, but if the international system is to survive a serious fairness deficit, it must create a forum in which people rather than governments are directly represented. Such a democratically representative forum would alleviate the problems of both formal state equality and minority voicelessness. It would therefore increase the perceived fairness of the system and, coincidentally, might even retard the slide into a community paralyzed by the prolixity of two thousand participating states.

Ameliorating the Problem of Formal State Equality

A forum in which the participants represented persons rather than governments would establish some correlation between population and representation. That, in itself, is a coherent and just principle of representation. While it might be necessary to prescribe a maximum and minimum number of representatives per state, at least initially, the introduction of some degree of representation by population would enhance significantly the fairness of the institutional process.

Perhaps of equal importance is the opportunity that such a systemic reform would provide for institutionalizing the democratic entitlement and certifying the authenticity of the link between people and their representatives in the fairness discourse. The palpable fairness of the discursive decisions reached by such a forum would far exceed that of the traditional forum in which large populations are voiceless or underrepresented, tiny populations greatly overrepresented, and a significant proportion of the representatives are not chosen by those for whom they purport to speak.

A third advantage of representational reform is that it would begin to create a popular political constituency with a direct stake in international organizations. As these institutions become more important in resolving global and regional problems, they will need to deploy larger proportions of each nation's discretionary revenues. As long as the global forums are perceived as remote, faceless bureaucracies or elite diplomatic enclaves, it will remain difficult to achieve a political momentum necessary to secure appropriate funding and other support for their activities. When, however, persons participate as individuals in freely choosing those who engage in the allocation of goods through an open global political discourse, the compliance pull of the outcomes is likely to increase.

Ameliorating the Problem of Single Voice in a State-Centered System

In almost all existing international forums of governance, each state representative represents a government. Minorities within the state, be they political, ethnic, social, or cultural, whether weak or powerful, have no voice of their own in such forums. The

single voice of each state in these bodies thus belies the complex reality of multiple interests contained within national boundaries.

Popularly elected members of a forum are likely to give voice to minorities and to propel their representatives to join with representatives from other states to press for common interests. That, at least, has been the experience of the elected Parliament of the European Community. Democratic election, in addition to legitimizing the decisions taken by the forum, would create a constructive alternative for minorities seeking a voice, one that may be more attractive than the unsatisfactory options of voicelessness or independent mini-statehood.

Perhaps most important, direct elections would create the opportunity for a global politic that mobilizes interest aggregations along transnational lines and within which narrow parochial interests could be modulated. The European Parliament seems to be demonstrating this in practice, as Socialists, Liberals, and Christian Democrats form their transnational parliamentary groups. In the global system, too, a fairness discourse must be opened in which personal values and interests other than a "national interest" can make themselves heard and in which alliances are formed on bases other than genes and flags.

A MODEST PROPOSAL

Governments, pressed uncomfortably on the one side by the requisites of globalism and on the other by the fervor of tribal revivalism, are not about to go gentle into that good night, nor join the shades of Nineveh and Tyre. Creating an elected international forum may appear to them as a further act of self-immolation. They should be encouraged to think again. Governments with vision must confront the unpleasant realization that essential international institutions are facing imminent breakdown caused by widespread dissatisfaction with both what they do and how they do it. The increasingly heard charges of illegitimacy, injustice, and unfairness must be addressed.

The discontent can only be addressed if the process itself is rethought and opened up. This can be done without a radical shock to what is as yet a state-centered system. For example, the General Assembly of the United Nations, as part of inevitable reform of the UN system, could be transformed into a bicameral forum in which the one chamber is constituted as at present, retaining the Westphalian "one state, one voice" principle, and the other is directly elected in accordance with universal suffrage and on the basis of a negotiated allocation of seats corresponding generally, if not absolutely, to population. One chamber would thus give a voice to governments and the other to people. Resolutions on important matters, which have hitherto required a two-thirds majority in accordance with UN Charter Article 18(2), might require instead a simple majority of both chambers.

Since the Assembly in almost all matters can only recommend action without obligating the members, and since the consent of the chamber based on traditional state equality would be a prerequisite for the passage of important resolutions, little actual power would be transferred from governments to popular representatives at this state of reform. But for the first time the world's people would become actively involved in the process of allocating goods and the prevention of conflict. This would begin to alter the way persons everywhere relate to the project of global governance. It is on the ethos of the international community, not on the allocation of political power, that such reform would have its primary impact. But it is on that ethos, on the perception of systemic fairness, that the growth and effectiveness of the legal and institutional system depends.

Institutions have a life of their own, withering or flowering in accordance with dynamics the operation of which are difficult to predict. Who knows whether, once established, the directly elected chamber would gradually subsume the powers of the traditional state-appointed "upper house." Who knows what energies would be released to the use of the UN system if representation were directly contested in popular elections that created an open global discussion on questions of values and policies transcending national boundaries? Who knows what would happen locally if the people of China⁴ became accustomed to exercising a secret franchise conducted in accordance with transnational democratic standards?

I do not expect action in this direction tomorrow. I do not necessarily expect any action precisely in this direction. However, in view of the evident unfairness of the status quo and its consequent stasis, I do at least expect a reasonable counter offer.

⁴ or Florida?