Confronting Discrimination and Inequality in China

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INTRODUCTION

The rights of minorities are an arena that is becoming perhaps the principal battleground for human rights in the 21st century.

Recent history would seem to offer a stunning paradox: that the federal state may not be the best form of human governance for societies with multi-ethnic populations. The former Soviet Bloc had nine states, six of which were unitary states while three were federal in structure. With the unification of Germany, the six unitary states are now five, but the three federal states, Yugoslavia, the Soviet Union, and Czechoslovakia are now 22 independent states, perhaps 23 if we include Kosovo. Most of these newly independent states were forged by minorities who did not feel that their rights were sufficiently protected by the federal structures in which they previously existed.

At first sight, facts such as these do not bode well for the notion that federations are particularly good structures for the protection of minority rights. Yet, the orthodox thesis is that it is federations rather than unitary states that can best protect minorities across diverse populations or across large territories.

Perhaps this view is outdated and should be replaced with the thesis that it is only multi-ethnic societies, whether federations or not, that develop the appropriate constitutional and legal frameworks on the substantive equality rights of minorities, together with an appropriate method of balancing individual and collective rights, that can hope to remain united and avoid the human rights catastrophes that we see today in so many multi-ethnic societies.

More controversially, I suggest that the protection of such minority rights is even more important than instituting the procedural elements of democracy in a multi-ethnic society, as the tragedy unfolding in Iraq demonstrates. In another tragic example, Sri Lanka, a democratic multi-ethnic state, has stood accused of violating the human rights and equality rights of its Tamil and other minorities and found itself in a seemingly intractable civil war that has left more than 64,000 dead. Similarly, other
formally democratic multi-ethnic states, such as Indonesia and Russia, are, in practice, refusing to go down the road of an effective constitutional and legal framework that respects the substantive equality of their minorities – with similar disastrous human rights consequences.

The future for authoritarian non-democratic multi-ethnic states is even bleaker. We only have to look at the genocidal carnage in Sudan to understand this horrible future.

**WHAT DOES SUBSTANTIVE EQUALITY MEAN IN THE CONTEXT OF MINORITY RIGHTS?**

I suggest that the core of what substantive equality means for minority groups is the recognition that identical treatment of minorities with the treatment of the dominant population can lead to a sense of oppression that can fuel civil conflict. Substantive equality, I suggest, would involve treating all groups in a multi-ethnic society with equal concern and respect, which often requires differential treatment to respect their human dignity; formal equality would promote identical treatment of all minorities, regions, and citizens.

Canada could provide a global template, albeit one that is not perfect, of an appropriate striving to attain the foundational value of substantive equality for its minorities and indigenous populations within a multi-ethnic federation. This being said, it must also be accepted that Canada has been far from perfect in treating its minorities and indigenous populations with substantive equality during the course of its history.

Canada is both a very new country, less than 200 years old, and also a very old country, since its first inhabitants, the Aboriginal peoples of Canada, have lived here from time immemorial. We have, in comparison to many European nations, a very diverse population. Over one-third of Canadians can trace their origins from France and they are concentrated in the province of Quebec, where they form a powerful majority. However, over a million francophones live outside Quebec in minority linguistic communities spread across the country. Increasingly, Canadian society is becoming a mirror of the global society as we welcome immigration from all over the world. Our major cities – Toronto, Montreal and Vancouver – in the near future will have a majority non-European population in origin, creating calls by racial and ethnic minorities for collective rights to non-discrimination and equality.

The foundational Act of the Canadian state, the *British North America Act*, is replete with provisions related to diversity. However, what is particularly interesting about the evolution of the Canadian Constitution is that it contains critical provisions that sometimes allow differential treatment (asymmetrical) and sometimes identical treatment (symmetrical) for minorities, intended to allow differences to flourish.
Examples include the guarantee of 75 seats for Quebec in the Canadian Parliament (Section 37), a critical asymmetrical provision; the entrenchment of the provinces symmetrical jurisdiction over property and civil rights in Section 92(13), a critical symmetrical provision that allows differences between the provinces to flourish; the protection of denominational schools in Ontario and Quebec (Section 93), and the official use of English and French in the Canadian and Quebec legislatures (Section 133), both important asymmetrical provisions. Likewise the maintenance of the civil law system in Quebec is another example of asymmetrical federalism entrenched in the constitutional history of the country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions.7

Leading American federalism theorists such as the late William H. Riker8 have argued that it is only symmetrical federalism that is truly compatible with democratic federalism. However, where multi-ethnic nations have large and historically settled national ethnic, linguistic, or religious minorities, an insistence on symmetrical federalism or constitutional frameworks would be a denial of the substantial equality of these minorities. Absolute symmetrical federalism and formal equality can often lead to the assumption of uniformity where it does not exist, and could lead to the coercive institutions of the federal state imposing uniformity and assimilation, an imposition national minorities will naturally resist. The result can be disastrous, as we have seen in the case of the former Yugoslavia.

Asymmetrical constitutional provisions in multi-ethnic federations are especially important in order to promote the essential features of cultural self-determination of such minorities; these features can include language, education, culture, religion and, as in the case of Canada, the legal traditions and systems. Asymmetrical provisions are essential in order to protect against the “nationalizing” tendencies of the dominant population in a multi-ethnic federation through effective participation by national minorities in decision making at the central level and at the highest political levels; these may be asymmetrical in proportion to the minorities’ percentage of the federation’s population.9 This is the chief rationale of providing a permanent 75 seats to Quebec, regardless of what percentage of the Canadian population the Quebec population comprises. It also accounts for the fact that three of our Supreme Court of Canada judges must be from Quebec, as well as the tradition of ensuring regional and national minority representation in the governing party’s federal cabinet.

To reiterate, substantive equality differs from formal equality in that it recognizes that identical treatment can lead to discriminatory treatment of minorities and impose uniformity and coercive assimilation that would threaten their existence.10 Democratic multi-ethnic federal states such as India11 and Canada, and some would add Spain,12 have learned that asymmetrical federalism has been critical to the survival of their countries.
The dilemma of how to fit minority rights within a constitutional framework that respects both individual and collective rights is being confronted in theory and practice by Canadians and within the Canadian constitutional framework. Will Kymlicka argues that "group specific" rights are compatible with liberal tenets that uphold the supremacy of individual rights. The fundamental premise of these theorists (and I include myself in this group) is that it is because the rights and liberties of individual citizens include the right to associate that most such rights have a group related or specific dimension; thus, belonging to a minority based on common cultural, linguistic, or religious heritage is indeed an important factor of identity and indeed of human dignity for most of its members. Where individuals thus freely associate, no central or state government or majority, however large, may deny the right of such groups to cultural self-determination, within the limits of the supremacy of individual and universal rights and the rule of law.\textsuperscript{11}

Some of the collective rights of the growing diversity of Canadian society have been guaranteed in the Canadian Charter of Rights and Freedoms, entrenched in the Constitution in 1982.\textsuperscript{14} In the Constitution, Canada recognizes the collective rights of Aboriginal people. Through court decisions and provisions of the original Constitution and the Charter of Rights, it recognizes the collective rights of linguistic minorities and, in the case of Quebec, of a linguistic majority in one province that wishes to preserve its language within a predominantly English-speaking continent.

The wording of some of the provisions in the Canadian Constitution and Charter, which recognize collective rights, pose some interesting dilemmas to those steeped in the classical liberalism of the American legal tradition. In what follows I shall briefly discuss one example, section 23(3) of the Charter.

Section 23(3) of the Canadian Charter of Rights and Freedoms entrenches minority linguistic education rights of French-speaking minorities outside Quebec and English-speaking minorities within Quebec where numbers warrant. The Section states:

The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision of them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants the right to have them receive that instruction in minority language educational facilities provided out of public funds.

This is a curious type of right to be found in a constitutional document in a western liberal democracy, where the exercise of the right is contingent on the number
of people who wish to exercise it! Imagine a similarly contingent right related to freedom of speech. This entrenchment of linguistic rights in Canada points to the fact that collective rights require an examination of the sociological, economic and cultural backgrounds from which they arise. The Supreme Court of Canada demonstrated this necessity in *Arsenault-Cameron v. P.E.I.* handing down an excellent example of the need for a socio-economic context of the human rights framework for protection of minority rights.

In this case, the individual francophone parents entitled to have their children schooled in French under Section 23 of the *Charter* sought to have their children schooled at the primary level in a school located in their local community of Summerside, Prince Edward Island. The provincial Minister of Education insisted that such minority language education could be provided at an existing French language school, approximately 57 minutes away by school transportation services. The Supreme Court ruled, in a judgment delivered by Mr. Justice Bastarache, a former academic expert on linguistic rights, and Mr. Justice Major, that Section 23 was not meant to uphold the status quo by adopting a formal vision of equality where the majority and minority language groups were treated alike. The Court held that the purpose of Section 23 was to remedy past injustices and provide minority language communities with equal access to high quality education in circumstances where community development is enhanced. The reference to “where numbers warrant” in the section must take into account community development, even where the numbers in the Summerside area were between 49 and 155.

In a clear expression of the fact that Canada has taken a different liberal democratic route from the United States, the Court held that focusing on the individual right to instruction at the expense of the linguistic and collective rights of the minority community effectively restricts the collective rights of the minority community.

Protection of minorities has been confirmed as one of four foundational principles of Canadian federalism by the Supreme Court in its landmark ruling on the right of Quebec to unilaterally secede from Canada, in the *Reference re. Secession of Quebec* decision. But the *Charter* and Canadian society also recognize the equal value of civil and political rights based on the dignity of the individual human being. I suggest that through Section 1 of the *Charter* a mandate was given by the Parliament of Canada to the judiciary, in particular the Supreme Court, to work out a legal framework for the adjudication between collective and individual rights. Section 1 of the Charter allows governments in Canada to sometimes infringe rights if they can demonstrate that such infringements are reasonable limits demonstrably justified in a free and democratic society.

During the relatively brief period of the existence of the Canadian *Charter*, there have been cases where, I suggest, the Supreme Court met well the challenge of creating
this uniquely Canadian framework of collective and individual rights adjudication. The landmark decision of the Canadian Supreme Court in *Ford v. Quebec (A.G.)*[^19] is, I suggest, one such example. In this case, five businesses operated by English-speaking Quebeckers sought a declaration that sections 58 and 69 of the Quebec Charter of the French Language infringed the individual right of free expression as they required exclusive use of French on exterior commercial signs. The Court held that this was too heavy an infringement of the individual right of free expression and so struck down the law. The Court even suggested a different legislative scheme that would be constitutionally acceptable. The Court suggested that requiring the predominant display of the French language, even its marked predominance, would be proportional to the legitimate goal of promoting and maintaining a French "visage linguistique" in Quebec. Ultimately, even a subsequently elected separatist government in Quebec accepted this suggestion by the Court to be a just way to deal with cultural self-determination while respecting the human rights of all the province's citizens.[^19]

In the rather complex interpretations of Section 1, it should never be forgotten that one of the most pre-eminent jurists in Canadian history, Chief Justice Dickson, in *R. v. Oakes*, focused upon the final words of Section 1 as they were seen to be "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect [...]."[^26] Chief Justice Dickson argued that because Canada is a free and democratic society, the courts must be guided in interpreting Section 1 by the values inherent in concepts such as,

- respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.^[41^]

There can be no better conclusion as to what constitutes the fundamental values that must underpin multi-ethnic states if minority rights are to be protected.

**What is the relevant knowledge that China could learn from this Canadian experience?**

First, while minorities are only approximately nine percent of China's population, that accounts for over 110 million people and the numbers are growing. The territories where most minorities live contain most of China's natural resources. While official China often talks of the grim struggle with separatist or "splittist" forces, in the long run the strength of China's territorial integrity will, in my view, depend in large measure upon how the PRC government enhances ethnic relations and minority rights.

While many in China would argue that the constitutional and legal structure of minority rights in China, including the provisions for limited autonomy and ethnic
self-rule, together with the proliferation of preferential policies, do benefit minorities, some experts within and outside China point out three critical weaknesses:

First, the law and Constitution of China have yet to provide unquestionable genuine autonomy to minority areas. Such autonomy involves fewer powers than are minimally required to ensure cultural self-determination. The PRC Constitution refers to regional autonomy for minorities living in compact communities who are free to "preserve or reform their own ways and customs" (Article 4). The Law on Regional Autonomy (LRA) that implements the Constitution both sets out and also restricts such autonomy. Such autonomy must be "under unified state leadership" and under the principle of "democratic centralism"; in other words, under CPC discipline. In addition, all self-governing organs of minorities must implement the laws and policies of the state (Article 4). Under Article 118 of the Constitution and Article 19 of the LRA, autonomous area laws and regulations that govern the exercise of autonomy must be approved by higher bodies. Those of the five autonomous regions, Inner Mongolia, Xinjiang, Guangxi, Ningxia and Tibet, must be approved by the National People's Congress of China (NPCSC).

Second, the policies and laws do not allow for sufficient economic autonomy to meet the challenge of bridging the gap between the Han majority and the various minorities. There is a large and growing income disparity between minorities and the Han majority population. There is a twenty to one wealth gap between the rapidly developing coastal areas and the minority northwestern provinces and within the minority areas there is a wage gap between the minority group peasants and the majority Han peasants. Some call this an "ethnic psychological imbalance" which can threaten the unity of the country.

Third, there is insufficient protection against encroachment of cultural self-determination by the Han majority. In particular, minority leaders accepted by the Chinese government as legitimate representatives, such as a Xinjiang Governor, Abulahat Abdurixit and an NPC Vice-Chair, Tomur Dawarnat, have argued strenuously against unlimited migration of those from the Han majority to minority areas. These leaders have voiced opposition to the plan to move 100,000 people, mostly from the Han majority, from the Three Gorges Dam site area to Xinjiang. Such cultural encroachment is also worsened by what some leading Chinese scholars call the affront to the dignity of minority peoples by the discriminatory attitudes of the Han majority (and Han minorities in autonomous areas), who regard many minorities as backwards and uncivilized in culture and education.

In conclusion, both Canada and China have struggled with the evolution of minority rights in their multi-ethnic societies. In Canada, our constitutional, legal and societal evolution has come to recognize that minority rights constitute a central part of Canadian identity, unity and our competitive advantage in a global economy. In China, I suggest that much of the constitutional, legal and societal evolution of minority rights that occurred in the 1980s was premised on a planned economy, in which minority
rights and preferences were regarded as part of the centrally-organized development of the state. Today, with globalization making non-minority areas of China such as the Special Economic Zones (SEZs) more autonomous than the autonomous regions themselves, with all of the attendant economic and social development benefits, some have suggested that it may be time to contemplate offering the minority autonomous regions the status of special cultural zones (SCZs), in which there could be permissible divergence from the unified leadership of the Party. This could, in time, be the solution not only to the problem of separatist movements, but also generate a competitive advantage to China in the global economy as demonstrated by the example of Canada.

ENDNOTES

1 See A. Stephan, “Federalism and Democracy: Beyond the U.S. Model,” (1999) 10 Journal of Democracy 4, p. 19-34. For an excellent analysis of how federal structures in the Former Republic of Yugoslavia (FRY) did or did not contribute to its breakup, see S. Malesevic, “Ethnicity and Federalism in Communist Yugoslavia and its Successor States” in Yash Ghai, ed., Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States (Cambridge: Cambridge University Press, 2000), p. 147. The author’s thesis is that regarding the value of federal arrangements for the maintenance of multi-ethnic societies, “A great deal depends on the historical, political and social conditions of the particular society. What is crucial is the way in which the agreement between the constituent units is reached.”

2 See Neelan Tiruchelvam, “The Politics of Federalism and Diversity in Sri Lanka,” in Yash Ghai, op. cit., p. 198. The author, a friend and colleague, was a moderate Tamil scholar and jurist who paid with his life for his belief that constitutional reform in the direction of regional autonomy could resolve Sri Lanka’s ethnic conflict. He was killed by a suicide bomber on 29 July 1999.

3 The annual reports of Amnesty International and Human Rights Watch continue to condemn the gross human rights violations and lack of effective democratic institutions in both countries, see online: Amnesty International <http://www.amnesty.org>, Human Rights Watch <http://www.hrw.org>.


6 For details of Canada’s demographics, see Census, 1996, online: Statistics Canada http://www.statcan.ca/Daily/English/050322/d050322b.htm. Eventually demands for equality by these groups may lead to a push for representation in elected bodies as an extension of the principle of federalism that regions should be represented in national institutions, see Kymlicka, op. cit., p. 137.

7 For the landmark text which discusses and analyzes how the division of powers under the Constitution Act, 1867 allows for asymmetry, even while symmetry predominates, see G-A. Beaudoin, La Constitution du Canada : institutions, partage des pouvoirs, droits et libertés (Montréal: Wilson & Lafleur, 1990).


See A. Stephan, *op. cit.*, p. 53.

While not a classic federal state, Spain, through its autonomous communities, demonstrates some of the features of asymmetrical federalism, see Conversi, *op. cit.*, 122.


Ibid.


Ibid., p. 22-23.

Ibid., p. 5.

Ibid., p. 6, 15-21.

Ibid., p. 39.