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THE CANADIAN CONSTITUTION AND CHARTER OF RIGHTS AND FREEDOMS: A GLOBAL TEMPLATE FOR MINORITY RIGHTS?

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INTRODUCTION

Permit me to begin by stating that there could be no greater honour for me than to receive this Award named after someone who has profoundly affected my professional and personal life. Walter Tarnopolsky's visions of human rights as a prime catalyst for justice in the world motivated much of my efforts at the Human Rights Centre that he established at the University of Ottawa and which I had the privilege of leading as its 6th Director for eight years. In the all too precious few times that I had the chance to exchange ideas with him and from his rich intellectual legacy I realized that he was a person who was truly felt that gross human rights abuses against some, was an injustice against all of humanity. His activities against the apartheid regime in South Africa exemplified this. He offered up the ultimate sacrifice, his own life, in pursuit of this noble vision.

I was also deeply impressed with his desire to reconcile the rights of the individual with the prevention of assaults on the collective rights of a minority group in which the individual may have developed his or her unique personhood. This, I am convinced was one of the sources of his intense interest in anti-discrimination law and practice.

The rights of minorities are an arena that is becoming perhaps the principal battle ground for human rights in the 21st Century.

Recent history would seem to offer up a stunning paradox that federal states 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 minority rights were sufficiently protected by the federal structures they previously existed in.

At first sight, this does not bode well for federations being 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 multiethnic societies, whether federations or not, that develop the appropriate constitutional and legal frameworks on the substantive equality rights of its 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 multiethnic societies.

More controversially, I suggest the protection of such minority rights is even more important than instituting the procedural elements of democracy in a multiethnic 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 multiethnic 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 its 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 EQUALTIY MEAN IN THE CONTEXT OF MINORITY RIGHTS?

I suggest that at the core of what substantive equality means for minority groups is the acceptance that treating minorities identically in all respects with the dominant population can lead to the sense of oppression that can fuel civil conflict. Substantive equality, I suggest, would promote treating all groups in a multiethnic society with equal concern and respect which often requires differential treatment, while 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 appropriate striving to attain the foundational value of substantive equality for its minorities and indigenous populations within a multiethnic federation. This being said, it must also be accepted that we have been far from perfect in treating our minorities and indigenous populations with substantive equality during the course of our 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 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 Toronto, welcome immigration from all over the world. Our major cities in the near future will have a majority Montreal, and Vancouver non-European population in origin, creating calls by racial and ethnic minorities for collective rights to equality.

Improvise: re how diversity (and betrayals of it at certain times) is entrenched in

Canada's history from the Royal Proclamation of 1763, to the Quebec Act of 1774, to the partnership between Brown and Lafontaine, MacDonald and George Etienne Cartier. Relate how Nova Scotia and Newfoundland were also keen to protect their own distinct identities and resisted Confederation for that reason.

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 constitutional provisions that are sometimes asymmetrical and sometimes symmetrical provisions that 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 La w 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.

Leading American federalism theorists such as the late William H. Riker 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 such uniformity and assimilation. The result can be disastrous, as we have seen in the case of the former Yugoslavia.

Asymmetrical constitutional provisions in multi-ethnic federations is especially important to promote the essential features of cultural self-determination of such minorities in areas such as language, education, culture, religion and, as in the case of Canada, the legal traditions and systems. Effective participation in decision making at the central level which may be asymmetrical to the proportion of the minorities' percentage of the federation's population is essential to protect against the "nationalizing" tendencies of the dominant population in a multi-ethnic federation. 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.

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 the existence of such minorities. Democratic multiethnic federal states such as India and Canada, and some would add Spain, 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 developed in theory and practice by Canadians and within the Canadian constitutional framework. Will Kymlicka argues that "group specific" rights are compatible with liberal fundamental 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 members of such minorities. 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 wit hin the limits of the supremacy of individual and universal rights and the Rule of Law.

This being said, the biggest challenge still remains how to adjudicate between collective and individual rights where they clash. Again, the Canadian constitutional order is "hunching" out a theoretical and practical framework for the human rights framework of individual and collective rights which could also be a global template. Again, given our imperfect track record, we must always offer up our model with the greatest of humility as only a starting point for discussion.

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 our Constitution in 1982. In the Constitution, we recognize the collective rights of our Aboriginal people. Through court decisions and provisions of the original *Constitution and the Charter of Rights*, we recognize the collective rights of our linguistic minorities and in the case of Quebec, a linguistic majority 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 for those who are steeped in classical liberalism in the American legal tradition. In what follows I briefly discuss one example, namely, 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 the 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, P.E.I. 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, the 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 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 of Canada, to work out a legal framework for the adjudication between collective and individual rights.

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.)* 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 as a just way to deal with cultural self-determination while respecting the human rights of all the province's citizens.

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 as "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect... ."44 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.45

There can be no better conclusion as to what are the fundamental values that must underpin multiethnic states if minority rights are to be protected. There can also be no better description of the legacy of Walter Tarnopolsky and the challenge to spread this

vision that these two giants of Canadian jurisprudence posed for themselves and for all those of us who care about justice and human rights. Thank you so much for honoring me with this Award.