

Minorités linguistiques et société Linguistic Minorities and Society



A New Deal for OLMC's? Three Challenges

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Numéro 1, 2012

Quelle autonomie et quelle reconnaissance pour les communautés de langue officielle en situation minoritaire ?

What Autonomy and Recognition for Official Language Minorities?

URI : <https://id.erudit.org/iderudit/1009218ar>

DOI : <https://doi.org/10.7202/1009218ar>

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Éditeur(s)

Institut canadien de recherche sur les minorités linguistiques / Canadian Institute for Research on Linguistic Minorities

ISSN

1927-8632 (numérique)

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Citer cet article

Kymlicka, W. (2012). A New Deal for OLMC's? Three Challenges. *Minorités linguistiques et société / Linguistic Minorities and Society*, (1), 248–258.
<https://doi.org/10.7202/1009218ar>

Résumé de l'article

Même si le Canada est largement perçu comme un chef de file en matière d'accommodement de différentes formes de diversité, les besoins particuliers de ses communautés de langue officielle en situation minoritaire (CLOSM) ne sont pas adéquatement reconnus dans sa constitution et sont souvent laissés pour compte dans le « modèle canadien ». Est-il possible d'imaginer un nouveau pacte pour les CLOSM, peut-être sous la forme d'une nouvelle loi ou d'une nouvelle disposition constitutionnelle qui assurerait une reconnaissance accrue de leur statut national, de leurs droits collectifs et de leur autonomie politique ? Bien que je partage les objectifs politiques d'une reconnaissance et d'une autonomie accrues, le présent article relève un certain nombre d'embûches et d'impasses possibles qu'il importe d'éviter dans la recherche d'un tel nouveau pacte. Je m'intéresse principalement a) au rôle des catégories de groupes d'un point de vue juridique, b) aux limites du droit international et c) aux contraintes exercées sur une réforme constitutionnelle.

A New Deal for OLMC's? Three Challenges

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Abstract

While Canada is widely seen as a leader in accommodating different forms of diversity, the unique needs of official language minority communities (OLMCs) are not adequately recognized in the constitution, and often fall through the cracks of the “Canadian model”. Can we imagine a new deal for OLMCs, perhaps in the form of new legislation or even a new constitutional provision that would provide stronger recognition of their national status, their collective rights, and their political autonomy? While I share the political objectives of achieving greater recognition and autonomy, this paper identifies a number of potential pitfalls and dead-ends that need to be avoided in the pursuit of such a new deal. I focus in particular on a) the role of legal categories, b) the limits of international law, and c) the constraints on constitutional reform.

Résumé

Même si le Canada est largement perçu comme un chef de file en matière d’accommodement de différentes formes de diversité, les besoins particuliers de ses communautés de langue officielle en situation minoritaire (CLOSM) ne sont pas adéquatement reconnus dans sa constitution et sont souvent laissés pour compte dans le « modèle canadien ». Est-il possible d’imaginer un nouveau pacte pour les CLOSM, peut-être sous la forme d’une nouvelle loi ou d’une nouvelle disposition constitutionnelle qui assurerait une reconnaissance accrue de leur statut national, de leurs droits collectifs et de leur autonomie politique? Bien que je partage les objectifs politiques d’une reconnaissance et d’une autonomie accrues, le présent article relève un certain nombre d’embûches et d’impasses possibles qu’il importe d’éviter dans la recherche d’un tel nouveau pacte. Je m’intéresse principalement a) au rôle des catégories de groupes d’un point de vue juridique, b) aux limites du droit international et c) aux contraintes exercées sur une réforme constitutionnelle.

Official language minority communities (OLMCs) in Canada have faced a long and uphill struggle to gain recognition of their just claims to recognition and autonomy. This is partly due to the general tendency of majoritarian democracy to favour the majority at the expense of the minority. As Senator Serge Joyal put it, the history of OLMC struggles in Canada “demonstrates beyond any doubt” that minorities need a bulwark “against the inclinations of majorities to homogenize rules, standardize systems, and gobble up public funds” (quoted in Behiels 2004, xii).

To be sure, Canada is not a typical majoritarian democracy. On the contrary, it is widely-known for its extensive range of counter-majoritarian protection of minorities, such as a) recognizing the rights of Aboriginal groups; b) adopting multiculturalism for immigrant-origin ethnic groups; and c) accommodating the *French fact* through official bilingualism and federalism. I have elsewhere called these the three *pillars* of diversity policy in Canada (Kymlicka 2007a), and they clearly do operate to mitigate the majoritarian features of Canadian democracy.

However, OLMCs are neither fully nor adequately recognized by these existing provisions. While the federal structure ensures substantial autonomy to the Francophone majority within Quebec, there is no comparable guarantee of autonomy for OLMCs outside Quebec. Indeed, in some respects the provisions made to accommodate the Québécois—including the strong guarantees of provincial autonomy—can work to the detriment of Francophone minorities outside Quebec. The same autonomy that allows Quebec to limit federal efforts to promote the rights of Anglophones within Quebec allows other provinces to contest federal efforts to promote the rights of Francophone OLMCs within their jurisdiction. Indeed the Quebec government has intervened in court cases against the claims of Francophone OLMCs, precisely to preserve this principle of provincial autonomy. More generally, while the Official Languages Act sets minimum standards for the official language rights of all Canadian citizens from coast to coast, it does not establish clear principles for the governance of OLMCs, and, as a result, it has been a struggle to build autonomous governance structures. While innovative proposals were made in the 1960s and 1970s as part of the debate on bilingualism, these were quickly abandoned, subordinated to the overriding need to design a model of bilingualism and of federalism that is agreeable to the provinces, including Quebec.¹

It is worth noting that OLMCs are not the only group that is inadequately covered by our three pillars of diversity policies. In fact, each pillar is better suited to some of its

1. For the revealing story of the rise and decline of the idea of bilingual districts, see Bourgeois (2006).

intended beneficiaries than others. For example, our current legal regime of Aboriginal rights was developed primarily to address the needs of on-reserve status Indians and Inuit, but increasing numbers of urban Aboriginal People, non-status Indians, and Métis feel ignored or excluded by this regime. (To help remedy this problem, the federal government has recently created the Office of the Federal Interlocutor for Métis and Non-Status Indians).² Similarly, the Canadian model of multicultural integration has been developed for permanent immigrants, but says little about the needs of the increasing numbers of migrants who arrive as temporary workers. We might say that each of these pillars has its core case, as it were, for which it is primarily designed, and then a penumbra of other cases that struggle to get their distinctive needs addressed.

So the question naturally arises whether we can improve on these three pillars and, more specifically, whether we can imagine a new deal for OLMCs; perhaps in the form of new legislation or even a new constitutional provision that would provide stronger recognition of OLMCs' national status, collective rights, and political autonomy. This indeed is one of the central issues of these proceedings.

In what follows, I would like to raise three points of caution about defining a new deal for OLMCs. Since I support the political objectives of achieving greater recognition and autonomy, these points are not objections to such a project, but rather are intended to identify potential pitfalls and dead ends along the path. These three points of caution concern the issues of categories, international law, and constitutional reform.

The Challenge of Categories

The first issue concerns the question of how we categorize OLMCs. What type of group are they? In many existing political theories of minority rights, including my own work, a strong distinction is drawn between national groups and ethnic groups. The former—national minorities or substate nations—are assumed to be institutionally complete (to form their own societal culture) and to be capable of (and to desire) extensive self-government (potentially even complete sovereignty) over their historic territory. The latter—predominantly immigrant-origin ethnic minorities—are assumed to be smaller, more dispersed, and more integrated into the institutions of the larger society, seeking cultural accommodations and effective participation within shared institutions rather than institutional autonomy or political self-government. While the Québécois are a *national* group striving to attain territorial autonomy (self-rule), the Chinese in Canada are an *ethnic* group trying to obtain accommodation and participation within common institutions of the broader society (shared rule).

2. Office of the Federal Interlocutor for Métis and Non-Status Indians. Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014271>.

This sharp distinction between national and ethnic groups clearly does not capture the reality of many groups, including some OLMCs. With the exception of Acadians in New Brunswick, OLMCs are too small and dispersed to be either institutionally complete or to be capable of exercising territorial autonomy. In this sense, they share some of the characteristics of ethnic groups. They possess a sense of cultural distinctness and a desire for recognition, but do not see themselves as distinct *nations*, and do not mobilize en masse for nationalist political parties or movements. They have a strong sense of identification and affiliation with the larger French-Canadian nation, but that “nation” has no institutional existence, and OLMCs need to deal intensively in their day-to-day lives with the local, provincial, and federal institutions of the larger society.

In this context, some of the policies and institutional mechanisms that have been adopted for ethnic groups—models of consultation, participation, service provision, and accommodation—may very well be helpful for OLMCs. For that matter, some of the policies and institutions adopted for smaller or more dispersed Aboriginals may be relevant for OLMCs. Indeed, one might think that the entire exercise of categorizing groups as *indigenous*, *national*, or *ethnic* is unhelpful here. What matters, one might think, is not what category a group falls into, but what are its actual needs and capacities in practice. Perhaps we should replace these hard categories with the looser idea of a continuum of groups, varying in degree rather than kind in their numbers, territorial concentration, cultural distinctiveness, strength of ethnic identity and political aspirations, and so on. This idea has been promoted by prominent political theorists (e.g., Young 1997; Choudhry 2002; Benhabib 2002) and is discussed by other contributors in this issue.³

I sympathize with this argument, but I believe it is ultimately misguided. We certainly need to be more sensitive to variations within each of these categories and willing to learn from the experiences of groups in other categories. It may be true that for certain purposes, OLMCs have more in common—in terms of their circumstances, needs and feasible policies—with certain ethnic groups and Aboriginal communities than with the Québécois or other prototypical national(ist) groups, such as the Catalans or Flemish.

Yet I still think these categories matter at a very deep level. Indeed, I would argue that the reason Canada has made progress in developing effective counterweights against “the inclinations of majorities to homogenize rules, standardize systems, and gobble up public funds” (in Senator Joyal’s words) is precisely because we rely on these categories to justify minority rights and to articulate the underlying model of group-differentiated citizenship. I noted earlier that Canada’s approach to diversity involves differentiating between three pillars or tracks: Aboriginals, French-Canadians and immigrant-origin ethnic groups. In

3. Cardinal and Poirier explicitly endorse the continuum model, Roy implicitly. Thériault also discusses the difficulty of locating OLMCs in the national and ethnic categories.

each case, I believe that progress towards greater justice has depended upon keeping the categories distinct and reassuring Canadians that accommodations made in one track do not necessarily create a precedent in other tracks.

For example, the willingness of Canadians to accept the recognition of customary law and land claims for Aboriginal peoples has depended on the assumption that these are precisely *Aboriginal* rights, which are tied to their status as Aboriginal peoples and therefore cannot be claimed by either French Canadians or immigrant groups. Similarly, the willingness of Canadians to accept official language rights for Francophone minorities outside Quebec has depended on the assumption that these rights flow from the status of French Canadians as one of the two national groups that colonized North America and therefore cannot be claimed by subsequent immigrant communities. We need to emphasize this point even when—and perhaps especially when—the various groups “look” the same, in terms of numbers or dispersion. There may be communities of Aboriginals, French Canadians, and Ukrainians in parts of Alberta that are of comparable size, and they may indeed have much to learn from each other with respect to *best practices*. However, it is vital to insist that the rules and principles governing the settlement of these cases are distinct. Aboriginal issues are addressed through the lens of Sections 25 and 35 of the Constitution, with its principles of fiduciary trust, reconciling prior sovereignty, treaty rights, *sui generis* land rights, and so on. The rights of OLMCs are addressed through the lens of Sections 16-23 of the Constitution and the associated Official Languages Act, with its commitments to official bilingualism, the equal status of French and English, the promotion of the vitality of official language communities, and so on. The claims of immigrant-origin ethnic groups are addressed through the lens of Section 27 of the Constitution and the associated Multiculturalism Act, with its principles of non-discrimination, respect for diversity, reasonable accommodations, fair terms of integration, and multicultural citizenship.⁴

It may well be that, in specific contexts, the best way for the federal government to implement its fiduciary trust to Aboriginal peoples will overlap with the sorts of policies that promote the vitality of OLMCs, which in turn might overlap with the sorts of policies that promote fair terms of integration for immigrant communities. Nevertheless, the underlying concepts and principles are different, and the success of the Canadian model of counter-majoritarian democracy depends on keeping these pillars distinct. Progress for OLMCs, as it is for other groups in Canada, does not require the dissolving of these pillars, but rather greater innovation and flexibility in applying the underlying principles *within* each pillar. Given that Aboriginal communities differ enormously in their size, history, and settlement

4. My argument here is about both normative principles and political strategy. From a strategic perspective, I worry that dissolving these categories may lead to reduced public support for all counter-majoritarian claims. But even if this strategic concern is overstated, I would still defend the distinctness of the three pillars on the grounds that different normative principles appropriately apply to them.

patterns, we need innovative models to reconcile the prior sovereignty of Aboriginal peoples; given that OLMCs differ in their size, history, and settlement patterns, we need innovative models to uphold the equal status and vitality of official language communities; and given that ethnic groups differ in their characteristics, we need more flexible models to implement multiculturalism. The categories should remain distinct, as should their underlying principles, but the modalities of implementation need expanding.

We certainly need to pay more attention to variations within the category of OLMCs in terms of their size, territorial concentration, strength of identity, and political aspirations, and we need to be equally attentive to variations within the Aboriginal and ethnic categories. But these variations are not reasons to replace the distinction between indigenous, national, and ethnic groups with a fuzzy continuum. Dissolving these categories would, I believe, be politically destabilizing in the Canadian context and would simply leave us without any clear principles for addressing the legitimate claims of different types of groups.

The Limits of International Law

Let me turn now to a second issue regarding a potential new deal for OLMCs, which concerns the role of international law. Whenever minorities run into a political impasse at the domestic level, it is natural and appropriate for them to look to the international level for support. In fact, both religious minorities and Aboriginal peoples in Canada have successfully appealed to international norms, including United Nations human rights and minority rights norms. However, unlike some other authors in these proceedings, I am not optimistic that this is a realistic strategy for OLMCs.⁵ One obvious problem is that even when minorities “win” at the United Nations, this does not necessarily translate into actual change in Canada. International law is notoriously weak, and Canada has proven quite capable of rejecting UN judgements. Both Aboriginals and religious minorities have been unable to translate victories at the UN into actual change in Canada.⁶

The situation is even worse for OLMCs. The reality is that international law has been markedly unsympathetic to national minorities, and there is no credible prospect that international law will support OLMCs’ request for greater recognition or accommodation. Insofar as OLMCs seek greater autonomy, they are likely to encounter particularly strong international resistance. To be sure, international organizations have clearly embraced ideas of pluralism and diversity, and in this sense have helped to delegitimize older models of

5. For more optimistic views about the benefits of international law, see the contributions by Poirier and Roy (this issue).

6. The Lubicon Cree won their case at the UN Human Rights Committee in 1990, but Canada has yet to comply with the Committee’s recommendation to enter into a land claims agreement (see Amnesty International 2010). Similarly, a coalition of religious minorities from Ontario won their argument at the UN in 1999 that it was discriminatory to provide public funding for Catholic schools but not for other religious groups. Again, no action has been taken.

homogenizing and assimilationist nation-states. The international community today expects states to acknowledge and protect minorities, rather than excluding or assimilating them.

However, this generalized support for diversity has not translated into concrete support for the specific claims of national minorities, particularly claims for autonomy. There was a brief moment in the early 1990s when both the United Nations and the Council of Europe contemplated proposals to enshrine a right to autonomy for national minorities.⁷ But these proposals were overwhelmingly rejected, and today are a dead letter. While the idea of a right to autonomy for indigenous peoples has been overwhelmingly supported by international organizations, comparable calls for a right to autonomy for national minorities have been explicitly rejected.

There are many reasons for this diverging treatment of indigenous peoples and national minorities at the international level, which I have tried to explore elsewhere (Kymlicka 2007b; 2011). In brief, while international organizations feel it is safe to grant autonomy to weak and vulnerable indigenous peoples, most states around the world view their national minorities as security threats (i.e., potentially disloyal and destabilizing elements). It is true that, in many parts of the world, national minorities are a much more powerful threat to the state than indigenous peoples. Granting autonomy to national minorities in Asia, Africa, or the Middle East is perceived as a high risk strategy.

In Canada, we are fortunate that OLMCs are not seen by the state as a security threat or fifth column. State-minority relations in Canada are largely desecuritized, but this is relatively rare in the rest of the world. As a result, there is no appetite at the international level to strengthen the autonomy rights of national minorities, and OLMCs are very unlikely to get a sympathetic hearing at the UN for fear of setting a precedent that national minorities in other countries could invoke. We can certainly look to other countries to learn from their best practices, but the idea that the international community has recognized (or might recognize) a right to autonomy is deeply misleading.

The Risks of Constitutional Reform

Finally, let me conclude with the issue of constitutional reform. Can we envisage a new constitutional provision that would recognize the national status, collective rights, and political autonomy of OLMCs? This idea is implicit in the contributions by Seymour and Landry

7. In 1993, for example, the Council of Europe Parliamentary Assembly adopted Recommendation 1201 stating (inter alia) that “in the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities”. Similarly, in 1994, Liechtenstein submitted to the UN General Assembly a “Draft Convention on Self-Determination through Self-Administration” that recognized a right of internal autonomy for national minorities. Both proposals were soundly defeated, and support for such ideas has, if anything, dropped in the last 15 years. For details, see Kymlicka 2007b.

(this issue). Their analysis shows that the Charter's existing provisions do not explicitly recognize the collective rights of OLMCs (just as they do not recognize the nationhood of Quebec) and, in this respect, the Charter falls short of what justice requires in terms of a politics of recognition.

As a normative political philosopher, I sympathize with this claim for greater constitutional recognition. But as an observer of Canadian public opinion, I fear it is a hopeless quest, at least for the foreseeable future, and think that non-constitutional options should therefore be considered. The fundamental problem, of course, is that constitutional reform is deadlocked in Canada. Aboriginal peoples will attempt to veto any constitutional change that does not address their unresolved claims;⁸ people in the West will object to any change that does not address their demands for a more equitable or democratic Senate; Quebec will veto any change that does not recognize its distinct society; ethnic groups will oppose any change that looks like a return to the old "two nations" view of Canada and renders their presence invisible; and so on. Canada suffered through two painful processes of trying to overcome this impasse (the failed Meech Lake and Charlottetown Accords), and there is simply no desire to engage in a third attempt in most of Canada. Constitutional reform has almost become a taboo idea in most parts of English Canada—to express support for it is a form of political suicide.

Of course, we shouldn't simply resign ourselves to the constitutional status quo if it contains profound injustices. If the failures of recognition in the Constitution are impeding groups from advancing their legitimate political projects, then we should do whatever we can to unblock this impasse. But is this really the case? One could argue that in relation to OLMCs, as indeed for Aboriginals and Quebec, the constitutional status quo permits these groups to advance their political projects and to act upon their political identities. The Constitution may not provide full or sufficient symbolic recognition, but in practice it may be flexible enough to allow groups to act in ways that reflect their aspirations and identities.

In the case of Aboriginals, for example, the absence of a constitutional guarantee of an inherent right of self-government has not prevented Indian bands from negotiating self-government agreements with the federal government. Similarly, in the case of Quebec, the absence of a constitutional recognition of Quebec's "distinct society" or "nationhood" has not prevented Quebecers from acting as a distinct society and as a nation. To this end, Quebec has used both the powers recognized in the Constitution and the powers acquired through agreements with the federal government, most recently the 2004 health care agreement.⁹

8. Recall that as part of the original patriation of the Constitution in 1982, there was a commitment to negotiating an amendment that would entrench an Aboriginal inherent right of self-government. That promise remains unfulfilled, and Aboriginal peoples plausibly argue that this should be the priority if we are going to re-open the constitution.

9. The text accompanying this agreement talks about "asymmetrical federalism that respects Quebec's jurisdiction" and about "flexible federalism that notably allows for the existence of special agreements and arrangements adapted

And so, too, one could argue that OLMCs, despite their minimal recognition in the Constitution, have in fact been able to make use of existing constitutional and legal provisions to advance their political interests and to express their political identities. The reality is that section 23 of the Charter¹⁰ has proven to have more far-reaching implications than was originally realized or predicted in grounding claims for autonomy, and the potential of Part 7 of the Official Languages Act is not yet known.¹¹ We are far from having identified the outer limits of what can be achieved within the existing constitutional framework, through some combination of section 23 and Part 7.

In this respect, compared with the heyday of constitutional reform debates in the 1990s, we have grounds for both pessimism and optimism. On the one hand, I am much more pessimistic about the prospects for constitutional reform—I see no public appetite to reopen the Constitution in most of English Canada. On the other hand, I am much more optimistic about the capacity of the existing Constitution to be pushed and pulled in directions that advance the interests and identities of minority groups. Constitutional politics is dead, but sub-constitutional innovation is alive and well in Canada, whether in terms of Aboriginal peoples, Quebec, OLMCs, or ethnic groups.

This is not to say that, in the long term, we should not aspire to a fuller constitutional recognition of our diversity in Canada, including the role of OLMCs—recognition is a valid goal in and of itself, even if the absence of recognition is not blocking innovative reforms. Nor is it to say that we may not eventually hit a point at which further progress on the ground will require constitutional reform. But this, I think, will depend on the evolution of political consciousness within OLMCs themselves. Part of the difficulty in making predictions here, as Magord and Forgues rightly argue, is that we do not yet have a clear consensus within OLMCs about what sort of recognition or autonomy they desire over what issues or institutions. If and when OLMCs develop the sort of political subjectivity that cannot be accommodated within the limits of the existing Constitution, then we will need to re-open constitutional debates, no matter how much resistance there may be within English Canada. However, we are not there yet, and I worry that a premature attempt to reopen the

to Quebec's specificity". See Health Canada, "Asymmetrical Federalism that respects Quebec's Jurisdiction" (September 2004), at: http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2004-fmm-rpm/bg-fi_quebec-eng.php.

10. OLMCs in New Brunswick can also invoke section 16(1) of the Charter, guaranteeing equality of status to the French and English linguistic communities in that province.

11. Part 7 (Section 41) states that:

41.(1) The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1).

Constitution will at best distract from more promising avenues for sub-constitutional innovation and at worst will deepen a number of cleavages within Canadian society (Aboriginal/non-Aboriginal; English/French; white/visible minority; Central Canada/the West, etc.) that are exposed whenever constitutional issues are raised. The desire for a pure form of constitutional recognition may get in the way of the more informal yet nonetheless effective practices of accommodation that characterize Canadian politics.

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Keywords

autonomy, multiculturalism, nationalism, official language minority communities, Canada

Mots clés

autonomie, multiculturalisme, nationalisme, communautés minoritaires de langue officielle, Canada

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