

## Ways for Insuring the Protection of Minorities

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Résumé de l'article

La première question qui se pose est celle de définir ce que sont les droits des minorités. L'auteur l'aborde en examinant la reconnaissance qu'ont reçue ces droits dans le passé, à travers les traités internationaux, les constitutions d'autres pays ainsi que l'expérience canadienne. Il s'attarde sur la distinction à faire entre « droits individuels » et « droits de minorités ». L'essence de cette distinction se situe surtout dans le fait que la protection des groupes minoritaires exige une action positive du gouvernement tandis que celle des droits individuels ne nécessite aucune intervention.

## Ways for Insuring the Protection of Minorities

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W. S. TARNOPOLSKY \*

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In discussing minority rights one can avoid excessively high expectations or unnecessarily pessimistic denigrations by examining what recognition

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such rights have received in the past. This will be done in the following contexts :

- (1) international treaties ;
- (2) the constitutions of other countries ; and
- (3) Canada's own experience.

Following this, I will discuss the distinction between individual rights and group rights and how this affects the problems of recognition and enforcement. First, however, it would be useful to refer briefly to definitions.

### 1. What are Minorities ?

One should probably start with the definition of a "minority" given by Webster's Dictionary : "as opposed to *majority* ; a race, religion or political group that is subject to a larger controlling group". The *Petit Larousse* provides a similar but, in my opinion, a more accurate definition for "une minorit  nationale" : "groupement de personnes qu'unit un lien de langue ou de religion, qui est int gr    une population plus importante de langue ou de religion diff rente". The Larousse definition is preferable because post-World War II international law would seem to recognize, at least for those national minorities that can be recognized as "peoples", a right to determine whether they will continue to be "integrated" with a larger and different population.

A "nation" can probably be said to be a people generally inhabiting a distinct portion of the earth, usually speaking the same language, using the same customs, possessing historical continuity, probably distinguished from other like groups by their racial origins and characteristics, and increasingly, although not invariably, living under the same government and sovereignty. However, although being a member of a "nation" does have the connotation of the bloodtie, of ancestral heritage, perhaps the only person who is a member of a particular "nation" is the one who "feels" he is a member. There is much to be said for Renan's statement that : "What constitutes a nation is not speaking the same tongue or belonging to the same ethnic group, but having accomplished great things in common in the past and the wish to accomplish them in the future".

The following definition of an "ethnic group" provided by the *International Encyclopedia of the Social Sciences*, appears to be the most apt and concise one can start with :

An ethnic group is a distinct category of the population in a larger society whose culture is usually different from its own. The members of such a group are, or feel themselves, or are thought to be, bound together by common ties of race or nationality or culture.

Are there any differences, then, between “national minorities” and “ethnic minorities”? Probably not consistently. The definitions overlap considerably. Probably the only important distinction that could be made is not so much between “ethnic minorities” and “national minorities” as that made in the *International Covenant on Civil and Political Rights* between a “people” who have a right to self-determination (art. 1) and an “ethnic, religious or linguistic minority”, which has a right “to enjoy their own culture, to profess and practice their own religion, or to use their own language” (art. 27).

## 2. International Protection of Minority Rights

The modern history of the international protection of minority rights commences in the 16<sup>th</sup> and 17<sup>th</sup> centuries, and concerns mostly the rights of religious minorities determined in peace treaties. It should be noted that none of these treaty provisions gave any right of enforcement to the minority groups themselves. Rather, it was expected that enforcement would be an international responsibility of the signatories to the treaties.

The next advance in the international protection of minorities came following World War I through the Minorities Treaties imposed upon the newly created states of eastern and central Europe. These Minorities Treaties went much further than any of the previous international provisions. In the first place, the protection was no longer merely for religious minorities, but for those distinguished by race and nationality, as well as religion. In the second place, the provisions were much more extensive and explicit, particularly with respect to use of language in schools and religious autonomy. In the third place, the international enforcement machinery was more specifically and rigourously established, under the supervision of the Council of the League of Nations.

After World War II, under the United Nations, the main emphasis was on individual human rights. It was not until the International Covenants were adopted in 1966 that art. 1 of both Covenants, and art. 27 of the Covenant on Civil and Political Rights, recognized minority group rights. Para. 1 of art. 1 of the Covenants provides :

All peoples have the right of self-determination. By virtue of that right they and freely determine their political status and freely pursue their economic, social and cultural development.

Art. 27 provides :

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

### 3. Internal Protection of Minority Rights

The constitutional or administrative devices which have been adopted for the protection of minorities have included :

- (1) bills of rights guaranteeing individual freedoms ;
- (2) human rights codes and commissions ;
- (3) the federal system wherein the provinces coincide as closely as possible to various minority groups and the provincial governments have jurisdiction over those cultural matters of vital importance to the promotion of the identity of these groups ;
- (4) the special jurisdiction of the central or federal government to protect those minority groups not large enough to have their own separate provinces or states ; and
- (5) offices similar to the ombudsman, which investigate the status of the protections for various minorities, and report on these to the central government which acts in protection of these smaller minority groups.

### 4. Canada's Experience in Promoting the Rights of Minority Groups

After an initial attempt in the *Royal Proclamation* of 1763 to introduce English law into the newly conquered French-speaking lands along the St. Lawrence, the British Government drew back in the *Quebec Act* of 1774 and re-established the application of French law as to property and civil rights. After the *Constitutional Act* of 1791, the legislature of Lower Canada operated bilingually. Although the *Act of Union* of 1840 provided that the work of the legislature should be in English only, by 1848 the French had won recognition of their language as having equal status with English in the legislature and the statutes enacted by it. Throughout this whole period French continued to be the dominant language in the courts of Lower Canada and the new Civil Code was enacted in 1865 in both languages.

The *Constitution Act* of 1867 had only one language rights guarantee, s. 133. In addition, s. 23 of the *Manitoba Act* of 1870 granted the same language guarantees as s. 133 provided. In 1890, however, the Manitoba legislature adopted the *English Language Act* making English the sole language of the Manitoba legislature and the courts. Similarly, the *Northwest Territories Act* of 1877 officially created the Northwest Territories as bilingual, but by resolution of the Legislative Assembly in 1892 this too was abolished.

It should be noted that although s. 133 merely requires that there be bilingualism in the federal legislature and courts, in practice even before the influence of the Royal Commission on Bilingualism and Biculturalism, a greater acknowledgement of the French language was achieved.

In the years since the appointment of the Royal Commission on Bilingualism and Biculturalism in 1963, official thinking on the question of the position of cultural groups in this country has evolved considerably.

Almost from the first public hearings, it was evident that the various ethno-cultural groups were putting forth facts and arguments disputing the official "bicultural" views of Canada. Within the year following the issuance of volume 1, a conference was organized "to study Canada's multicultural patterns in the 60's" in mid-December 1968. In less than three years, by October, 1971, the federal government had laid the official policy of biculturalism to rest and proclaimed a policy of "multiculturalism within a bilingual context".

Because linguistic rights are the subject of another paper, let me merely summarize the most recent developments concerning minority rights in Canada. At the federal level the *Official Languages Act*, 1969, proclaimed English and French as official languages in all federal institutions and an official Languages Ombudsman was established. Sections 16 to 20 of the *Constitution Act*, 1982, constitutionalized the extended protection of the *Official Languages Act* and applied it to New Brunswick as well. Section 21 preserves the application of s. 133 of the *1867 Act* to Quebec and s. 23 of the *Manitoba Act* to that province. Section 23 provides for minority language educational rights and facilities. There are certain limited protections for the "aboriginal peoples" of Canada in sections 25, 35 and 37 (all recently amended). Finally, s. 27 provides that :

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

## 5. Protection and Promotion of Minority Rights

The effectiveness of the various devices for the protection of minority rights that have been described must be considered in the light of important distinctions between individual rights and minority rights.

Both types involve essentially the relationship between an individual or a group and the state. This relationship can be expressed as an obligation undertaken by the state either negatively to restrain from interfering in the activities of the person or group, or positively to intervene by way of provision or protection. However, there are at least two fundamental distinctions which must be emphasized for the sake of clarity.

The first is that an assertion of an individual right emphasizes the requirement that everyone is to be treated the same *regardless* of membership in a particular identifiable group. The assertion of group rights, on the other hand, bases itself upon a claim of an individual or a group of individuals *because of* membership in an identifiable group.

Certain rights, such as language rights, seem to lie in a borderland. When examined more closely, however the distinction becomes clear. A guarantee of freedom of speech, for example, assures one the right to communicate, regardless of which language is used as the medium of communication. It does not, however, give any assurance that the communication will be understood, nor that the reply, if there be any, will be in a language which the initiator of the communication will understand. To put this in a different way, anyone who would like to use a particular language meaningfully is not helped by guarantees of free speech: he needs others who can understand him and communicate with him.

This leads to the second distinction between group rights and individual rights. The guarantee of a human right like free speech requires essentially the non-interference of the state. A language right on the other hand, requires the obligations of positive governmental action.

The important thing is that a group right like that of language singles out certain groups from others. In a homogeneous country there is no need for constitutional protection for the language which is spoken by the people. Language rights need constitutional guarantees only in those places where there are minorities who want to safeguard a language other than that spoken by the majority of the country or the province.

In considering group rights, it is necessary to recognize the limitations upon constitutional guarantees. Constitutions are intended to define what various governmental organs may do if they so choose, as well as what they may not do even if they do choose, but they seldom set out in specific detail the positive steps that must be taken.

In the end, however, we should not be too mesmerized by the power of a constitution. For one thing, history shows many cases of constitutions that have been ignored or overthrown. For another, no constitutional protection or even provision of financial or administrative support can be a substitute for the will to survive, and the effort in doing so. On the other hand, there is very little cultural activity of any kind which is not dependent upon government support or subsidy. If so, there is no reason why both federal and provincial governments should not fund the cultural and educational activities which reflect the pluralism of a country like Canada.