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Manuel Giménez Abad
de Estudios Parlamentarios y del Estado Autonómico

CANADA'S CONSTITUTION AND CHARTER: AN EMERGING GLOBAL TEMPLATE FOR RECONCILING DIVERSITY, IDENTITY AND RIGHTS ?

Errol P. Mendes ∗
Universidad de Ottawa

This article argues that multiethnic federal or unitary states can only ensure social stability if their constitutional frameworks offers substantive equality to its minorities. Canada could be providing an emerging global template for federal or unitary states with multiethnic populations to develop such substantive equality constitutional frameworks to prevent ethnic conflict and the breakdown of federal states. Canada's judicial and socio-political experience under the Constitution and Charter of Rights and Freedom are hunching out principles and methods to balance collective interests and individual rights and to set down principled parameters for dealing with unilateral secessionist attempts.

I. INTRODUCTION

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 multiethnic 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

∗ Professor of Law, University of Ottawa, Faculty of Law, Editor-in-Chief, National Journal of Constitutional Law

Palacio de la Aljafería – Calle de los Diputados, s/n– 50004 ZARAGOZA
Teléfono 976 28 97 15 - Fax 976 28 96 65
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states, perhaps 23 if we include Kosovo.[1] Most of these newly independent states were forged by minorities who did not feel that their human rights were sufficiently protected by the federal structures they previously existed in. It is not an adequate counter argument to suggest that this spectacular break up of Eastern European, the Soviet Union and the Balkan multiethnic federal states was due to the ending of the oppressive authoritarian state after the end of the Cold War and the return of the historic ethnic hatreds and conflicts let loose without the restraints of the strong man and his overwhelming security forces. I suggest that ethnic identities are not predetermined to be in conflict with other groups and that the causes of ethnic conflict are not only influenced by history, but also by way in which such groups are treated. As one Bosnian Muslim teacher is reported to have said: "We were Yugoslavs. But when we began to be murdered because we are Muslims, things changed. The definition of who we are today has been determined by our killing"[2]

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 framework on substantive equality that can hope to remain united and

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1 See A. Stephan, "Federalism and Democracy: Beyond the U.S. Model" (1999) 10 *J. of Democracy* 4 at 19-34. For an excellent analysis of how federal structures in the Former Republic of Yugoslavia (FRY) did or did not contribute to the breakup of the FRY; see S. Malesevic, "Ethnicity and Federalism in Communist Yugoslavia and its Sucessor States" in Yash Ghai, ed., *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* ([Cambridge: Cambridge University Press, 2000) at 147. The author's thesis is that regarding the value of federal arrangements for the maintenance of multiethnic 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 B.W. Jentleson, "A Responsibility to Protect, the defining challenge for the global community" Harvard International Review, 2007 Vo. 28, No. 4, pg. 19 at pg. 19.

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avoid the human rights catastrophes that we see in multiethnic societies around the world today.

I suggest the value of substantive equality is even more important than having a formal democratic system in a multiethnic society. For example, Sri Lanka, a democratic multi-ethnic state, has stood accused of violating the human rights and equality rights of its Tamil minorities and found itself in a seemingly intractable civil war that has left more than 65,000 dead.[3] Similarly, other theoretically democratic multiethnic states, such as Russia,[4] are, in practice, refusing to go down the road of a democratic federalism based on respect for substantive equality—with potentially similar disastrous consequences.

The future for authoritarian non-democratic multiethnic 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 MULTIETHNIC SOCIETIES?

At the core of the concept of substantive equality is the thesis that sometimes treating minorities,[5] regions, or, indeed, citizens identically can sometimes lead to unequal treatment. Substantive equality, I suggest, would

3 See Tiruchelvam, *supra* note 1 at 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 July 29, 1999.

4 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 Russia, see online: Amnesty International <http://www.amnesty.org>, Human Rights Watch <http://www.hrw.org>.

5 For a discussion of equality and the accommodation of differences between minority groups and majorities, see W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 108-116.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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promote treating all groups in a 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. [6] I suggest asymmetrical constitutional frameworks are a vehicle to achieve substantive equality in multiethnic societies.

Canada could provide a global template of appropriate striving to attain the foundational value of substantive equality for its minorities and indigenous populations within a multiethnic federation. This country has the potential to be a global template in this regard.

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 welcome immigration from all over the world. Our major cities—Toronto, Montreal, and Vancouver—either at present or in the near future will have a majority non-European population in origin, creating calls by racial and ethnic minorities for collective rights to equality.[7]

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6 For further discussion of this hotly contested view, see D. Milne, "Equality or Asymmetry: Why Choose?" in R.L. Watts & D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 285-307.

7 For details of Canada's demographics, see Census, 2001, online: Statistics Canada http://www.statcan.ca/bsolc/english/bsolc?catno=95F0363XCB (date accessed: May 28, 2007).

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, *supra* note 5 at 137.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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The foundational act of the Canadian state, the *British North America Act, 1867*[8] is replete with provisions related to managing the diversity of its population. 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 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.

Leading American federalism theorists such as the late William H. Riker[9] argued, as did opponents of the Meech Lake Accord and the Charlottetown Accord,[10] that it is only symmetrical federalism that is truly compatible with

8 U.K. , 30 & 31 Victoria, c. 3. For a detailed discussion of the early pre and post-confederation history of Canada, see J.L. Finlay, *Pre-Confederation Canada: The Structure of Canadian History to 1867* (Toronto: Prentice-Hall, Canada, 1989); P.B. Waite, *The Life and Times of Confederaion, 1864-1867* (Toronto: University of Toronto Press, 1962); S.B. Ryerson, *Unequal Union: Confederation and the Roots of Conflict in the Canadas, 1815-1873* (Toronto: Progress Books, 1973); A.I. Silver, *The French Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

9 See William H. Riker, "Federalism" in F. Greenstein and N.W. Posby, eds., *Handbook of Political Science* (Boston: Addison-Wesley, 1975) Vol. 5, at 93-172.

10 For further discussion of the equality/asymmetry arguments that took place in these constitutional rounds, see P. Monahan, *Meech Lake: The Inside Story* (Toronto: University of

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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democratic federalism. The federal bargain that created the United States, according to many American federalism theorists like Riker, would deem asymmetrical arrangements as incompatible with the fundamental principle of equality of citizens and equality of states. I suggest that the promotion by some American federalism theorists of symmetrical federalism proposes a vision of constitutional formal equality based on their particular revolutionary history. In the evolution of American federalism, the overwhelming political imperative was to minimize differences to create a national identity based on the supremacy of individual and economic liberty. This imperative is protected and safeguarded by a strong central government and a Supreme Court empowered with the strongest remedial mechanisms inherent in the power of judicial review.[11]

However, where multi-ethnic nations have large dominant ethnic populations and historically settled national ethnic, linguistic, or religious minorities, an insistence on symmetrical federalism would be a denial of the substantial equality of these minorities. 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 Balkans. Asymmetrical federalism 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

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Toronto Press, 1991); K. McRoberts & P. Monahan, *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

11 There are a plethora of sources that advance this theme, see for example, P. A. Freund, "The Judicial Process in Civil Liberties Case" in V. Stone, ed., *Civil Liberties and Civil Rights* (Chicago: University of Illinois Press, 1975); *The Role of the Supreme Court in American Government* (Oxford: Oxford University Press, 1976); M. Kammen, *Sovereignty and Liberty* (Madison: University of Wisconsin Press, 1988).

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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population is essential to protect against the "nationalizing" tendencies of the dominant population in a multi-ethnic federation.[12] 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 is suggested that asymmetrical federalism within the Canadian multiethnic federal state is a fundamental requirement of substantive equality for its historically settled national communities. 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.[13] Democratic multiethnic federal and unitary states such as India[14], Canada, Malaysia, Belgium and Spain, have learned that asymmetrical federalism has been critical to the survival of their multiethnic and multi-linguistic societies.

In some respects, Spain has shown the greatest creativity among multiethnic or multinational societies in designing a constitutional framework to promote substantive equality through asymmetrical arrangements. Although in strict constitutional theory Spain is not a federal state, it demonstrates many of the most important features of a federation. In the quasi-federal Spanish framework there is constitutional recognition that there are differences in the desire, especially of the historic national communities of the Basque Country, Catalonia, Galicia, Navarre and Andalusia, for different levels of autonomy. After the 1978 Constitution, all regions gained the possibility of becoming autonomous communities. Thereafter, each autonomous community was granted its own statute of autonomy reached by negotiation between the Autonomous region's leadership and the central government and Parliament in

12 See Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) for a collection of essays by some of the leading experts in the world on this theme.

13 See *Kymlicka, supra* note 5 at pp. 10-130.

14 See A. Stephan, *supra* note 1 at 53.

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Madrid. There is also asymmetry in the different financial arrangements and the size and nature (conditional or unconditional) of the fiscal transfers from the national government.

Adding to the Spanish creativity is the possibility that as each Autonomous Community advances in its political development, there may be less asymmetry between them, thereby promoting diversity but also having a safety valve against excessive asymmetry.[15] Such Spanish constitutional creativity is also courageous as it risks the possibility of creating ever greater demands for asymmetry from either the most advanced autonomous region or from the region(s) with the most radicalized national identity. However, the risks may well be worth taking as a way of ensuring the survival of a complex society with so many national communities each with their own unique historic identities.

II. RESPECT FOR HUMAN RIGHTS AS A FOUNDATION FOR THE PROTECTION OF MINORITY RIGHTS WITHIN THE CONTEXT OF MULTIETHNIC STATES AND, IN PARTICULAR, MULTIETHNIC OR MULTINATIONAL DEMOCRATIC FEDERAL STATES

As Professor Stephan has also pointed out, leading American federalism theorists, such as Riker, also claimed that an essential feature of democratic federalism is to protect individual rights against encroachments by central or state governments or by the will of the majority.[16] This is accomplished by a number of classic federal structures such as an entrenched *Bill* or *Charter of Rights and Freedoms*, a bicameral legislature where the will of the majority in the lower house can be restrained by an upper house based on regional

15 Robert Agranoff (1994), 'Asymmetrical and Symmetrical Federalism in Spain: An Examination of Intergovernmental Policy', in Bertus de Villiers (ed.), Evaluating Federal Systems, Dordrecht, Boston and London: Martinus Nijhoff, at pp. 61-89,

16 See Riker, *supra* note 10.

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representation, and, most importantly, a federal Supreme Court that protects the fundamental rights of all citizens of the federation and whose remedial orders are backed by the coercive powers primarily, but not exclusively, of the central government.[17]

The fundamental problem posed by this classic American model of the role that rights play within democratic federalism is that American jurisprudence, particularly that of the U.S. Supreme Court, has not acknowledged the existence of collective rights, which some would assert is the very marrow of minority rights. While some liberal thinkers have attempted to downplay this denial of collective rights legitimacy by pointing out that what may seem to be collective rights can be exercised by individuals and are thereby transformed into individual rights,[18] a major theoretical and practical challenge still exists. In many multi-ethnic federal states, individual citizens of a group can participate effectively in a "group benefiting right" only if the group obtains the effective collective right to education and access to cultural, religious, or legal institutions that are specific to their particular forms of cultural self-determination.[19] As will be discussed below, this is a fundamental aspect of distributive justice within a democratic federalist state.

The dilemma of how to fit minority rights within a federalism framework that is liberal and democratic 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. Liberal think tanks like the Friedrich Naumann Foundation of Germany, linking up with Canadian political

17 See Kymlicka, *supra* note 12 for discussion on this point also.

18 It is ironic that one of the main architects of the modern Canadian constitutional order, the late Right Hon. Pierre Trudeau, seemed to have held this perspective of collective rights, see K. McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 60-64.

19 See Kymlicka, *supra* note 6 at 75-106.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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philosophers and legal experts like Kymlicka and this author, together with other experts and minority representatives from around the world, have developed a liberal manifesto on "The Rights of Minorities" that upholds the group specific rights of minorities while proclaiming the supremacy of individual or universal rights.[20] The fundamental premise of these new liberal democratic federalists 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 within the limits of the supremacy of individual and universal rights and the Rule of Law.[21]

Indeed it is unlikely that the majority francophone population in Quebec or the minority francophone communities outside Quebec or the Catalans in Spain would ever feel comfortable as equal citizens in their democratic federal states without the "group specific" rights enshrined in the respective federal constitutions of their countries.[22]

However, as with all things, the devil is in the details. The way in which national minorities are settled can often determine the way in which democratic federal states can afford them such group-specific rights. Where such

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20 *A Declaration of Liberal Democratic Principles concerning Ethnocultural and National Minorities and Indigenous Peoples*, adopted by members of 38 indigenous peoples, national and ethnocultural minorities from 26 countries at the 2nd Minorities Conference of the Friedrich Naumann Foundation held at Berlin from September 13-16, 2000. Copies can be obtained from Liberales Institut der Freidrich-Naumann-Stiftung, Postfach 90 01 64, D-14437 Potsdam or online: Freidrich-Naumann-Stiftung <http://www.fnst.de/libinst/publikationen/minoeng.pdf>

21 See Kymlicka, *supra* note 6 at 75-106.

22 For an extensive discussion of how important language is, with such "group specific" rights from a historical and international perspective, see F. de Varennes, *Language, Minorities and Human Rights* (Boston: Martinus Nijhoff Publishers, 1996).

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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minorities are living in contiguous and compact settlement areas and form a majority, granting some form of territorial autonomy to allow them to fully exercise their right to cultural self-determination can be accomplished most effectively in democratic federal structures through the establishment of a state or province where they form the majority. The province of Quebec in Canada and Catalonia in Spain are examples of such territorial autonomy.[23] However, liberal democratic federalists would insist that such territorial autonomy granted to such minorities should not come at the expense of the rights of individuals or other minority groups within the territory granted autonomy being trampled on. There is thus a need for an entrenched *Bill* or *Charter of Rights* enforced by an independent federal judiciary.

Where minorities live dispersed among the majority population within a federal structure, other functional forms of protecting the essential areas of cultural self-determination in areas such as language, education, etc., are needed. Examples include the constitutional guarantees for minority language education for dispersed minority francophone communities outside Quebec, which will be discussed below.

This being said, the biggest challenge still remains: how to set fundamental federal socio-economic and political objectives and both individual and group specific rights within a coherent "human rights framework" that determines the specific content of both sets of rights and how to adjudicate between them when they clash, as they inevitably will.

This is where fundamental conceptions of distributive justice which underpin the concept of substantive equality must enter the picture to set the context for the human rights framework of individual and collective rights within

23 For a comparison of these two types of territorial autonomy see M. Pares & G. Tremblay, eds., *Catalunya, Quebez: Dues Nacions, Dos Models Culturals,* (Ponencies del Primer Simposi, Barcelona, maig, 1985, Generlitat de Catalunya, 1988).

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a democratic federalism framework and to help in adjudicating conflicts between different sets of rights.

Again, the Canadian constitutional order is "hunching" out a theoretical and practical framework for the human rights framework of individual and collective rights which seems to be based on unarticulated notions of distributive justice.

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.[24] In the Constitution, we recognize the collective rights of our Aboriginal people, and our multicultural and multiracial communities. Through court decisions and provisions of the original Constitution and the *Charter of Rights*, we recognize the collective rights of our French-speaking population. It should also be noted that despite the fact that the Quebec National Assembly did not consent to the repatriated 1982 Constitution which contained the *Charter*, that entrenched rights document has the overwhelming support of the francophone majority in the province.

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 three examples, namely, section 23(3) and 27 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. The Section states:

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24 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Schedule B of the *Canada Act*, 1982 (U.K.) C.11 [*Charter*]. For one of the most comprehensive analyses of

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> 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
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> > (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.[25] Recently the Supreme Court of Canada, in *Arsenault-Cameron* v. *P.E.I.*,[26] handed down a profound example of the critical role distributive justice, on a conscious or unconscious level, plays in setting the context of the human rights framework for protection of minority rights within a democratic federal system.

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

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the provisions of the *Charter*, see, G.-A. Beaudoin & E. Mendes eds., *The Canadian Charter of Rights and Freedoms, 4th*[rd] *ed.,* (Carswell, 2005).

25 See M. Bastarche, ed., *Les droits linguistique au Canada,* (Montreal: Yvon Blais, 1986).

26 [2000] 1 S.C.R. 3.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
fundacion@fundacionmgimenezabad.es

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. Here the Minister had failed to realize that the existence of a local minority language school was the single most important institution for the survival of the linguistic minority and to prevent the assimilation of minority language children. The Court also held that the local management and control by the minority language community was critical to the enjoyment of the section 23 rights.

It is suggested that this P.E.I. decision of the Supreme Court of Canada is a paradigm example of the need to strive for substantive equality based on conceptions of distributive justice within the context of democratic federalism to protect the rights of minorities within a democratic federal system.

Protection of minorities has been confirmed as one of four foundational principles of Canadian federalism by the Supreme Court in its landmark ruling

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Teléfono 976 28 97 15 - Fax 976 28 96 65
fundacion@fundacionmgimenezabad.es

on the right of Quebec to unilaterally secede from Canada. In *Reference re Secession of Quebec,*[27] the Court held that neither the Canadian Constitution nor International Law gave the government of Quebec the right to effect secession unilaterally. However, in a landmark ruling, the first of its kind in any multi-ethnic democratic federalist state, the Court went much further. The Court advised that there would be a constitutional duty on all parties to negotiate if the legitimate goal of secession was supported by *"the clear expression of a clear majority"* of Quebecers.[28] Such negotiations would have to address the interests of all provinces and the federal government and the rights of all Canadians wherever they live. Most relevant to this discussion, the Court stipulated that such negotiations would have to proceed with respect for "*the same constitutional principles that give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."*[29]

I suggest that the Canadian Supreme Court has advised all democratic multiethnic federal states that the breakup of such federations are subject to much the same fundamental values as the preservation of such states as I have argued above. I also suggest that because Canada has striven hard to observe these fundamental values, there will never be a clear expression of a clear majority of Quebecers to leave the Canadian federation.

Finally in section 27 of the *Charter*, one finds an interpretive section which reinforces the view that racial and ethnic minorities who derive their existence from immigration into Canada have socio-cultural collective rights that are different in nature from the historically settled national minority communities of French and English found across Canada. The section states:

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27 [1998] 2 S.C.R. 217.

28 *Ibid.* at para. 100.

29 *Ibid* at para. 90.

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

This section requires that all rights and freedoms in the *Charter* be interpreted in a manner that not only ensures the survival of the collectivist principle of cultural pluralism, but also promotes its actual enhancement. Does it not seem paradoxical that individual rights found in other sections of the *Charter* must be interpreted in a way that not only preserves but enhances the collectivist principle of cultural pluralism?

Let us examine what this collectivist principle of multicultural heritage of Canadians consists of as set out in section 27. For the purpose of the ensuing discussion, I am assuming that the concept of multiculturalism is equivalent to the concept of multicultural heritage of Canadians. It is imperative to define multiculturalism first. Attempts to define multiculturalism have usually set out an historical evolution of Canadian nationhood accompanied by what the concept means or should mean today. The 1987 House of Commons Report entitled *Multiculturalism* [30] arrives at the following essential features of multiculturalism:

- Multiculturalism is a principle applicable to all Canadians and it seeks to preserve and promote a heterogeneous society in Canada. The principle refutes the idea that all citizens should assimilate to one standard paradigm over time.
- Multiculturalism is today most fundamentally concerned with ensuring substantial equality for all Canadians regardless of what cultural groups they belong to.

30 House of Commons Standing Committee report on *Multiculturalism: Building the Canadian Mosaic*, 2d Sess. 33rd Parl., 1987 at 22-23.

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If this is correct, then the interpretive rule in section 27 is a mandate for Canadian courts and governments to interpret all rights and freedoms in the *Charter*, even those focused on individual rights, in a manner that preserves cultural pluralism and substantive equality among all citizens in Canada. This, again, is a fundamental principle of distributive justice.

The most relevant and controversial conclusion from this analysis of section 27 is that there will be situations when the exercise of individual rights will, in some circumstances, have to give way to the collectivist principle of cultural pluralism, where the exercise of such rights crushes the equal access by minority groups to the most important goods in our society. This has been illustrated in the area of hate propaganda in the *R.* v. *Keegstra*[31] decision of the Canadian Supreme Court, where the Court, in upholding the hate propaganda provisions of the Canadian *Criminal Code*[32] ruled that the freedom to willfully disseminate hate propaganda against identifiable minority groups in our society cannot crush the rights of such minorities to equality and full citizenship in our society. The Court ruled that these rights are protected both by section 15, (the equality guarantee) and section 27 of the *Charter* in the context of balancing rights against collective interests under section 1 of the *Charter.*

A CANADIAN CONCEPTION OF DISTRIBUTIVE JUSTICE

By the above discussion, I have tried to show that distributive justice must also be at the core of any attempt to entrench substantive equality to protect minority rights. It is time for me to explain what, then, is the conception of distributive justice that I advocate.

31 [1990] 3 S.C.R. 697 [*Keegstra*].

32 R.S.C. 1985, c. C-46 [*Criminal Code*].

Palacio de la Aljafería – Calle de los Diputados, s/n– 50004 ZARAGOZA
Teléfono 976 28 97 15 - Fax 976 28 96 65
fundacion@fundacionmgimenezabad.es

Distributive justice encapsulates every aspect of all human societies because all human societies are also institutions of distribution. Different political and legal systems promote different distributions of society's most valued assets, such as power, knowledge, wealth, security of the person, health, and education. The judiciary also is an instrument of distributive justice. Different interpretations of rights, especially collective rights, lead to different distributions of power and access to public goods. The decisions of the Supreme Court in the area of linguistic rights most clearly demonstrate this.

In human history, some societies have either expressly (*e.g.,* the former apartheid regime in South Africa) or de facto (including many so-called Western liberal democracies) allowed full and equal access to the above-mentioned societal goods only to those who conform to a singular and dominant racial, ethnic, linguistic, or cultural paradigm. This has been the root cause of much of the racial and ethnic strife that we have seen and continue to see around the world today, from the civil rights movement in the United States to the ethnic strife in the Balkans and Sri Lanka. Conceptions of distributive justice within pluralist societies should deny that such societal distributional criteria can ever be just. Pluralist conceptions of distributive justice must acknowledge that all manifestations of race, language, ethnicity, or national origin are worthy of equal concern and respect. Distributive justice in pluralist societies must aim at the establishment of a society where no one segment of society can claim that they have the singular and dominant racial, cultural, ethnic, or linguistic paradigm and, on that basis, have the predominant access to society's most valued goods.

It is readily acknowledged that this is one conception of distributive justice. As others have so well stated, distributive justice is one of most hotly

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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contested battlegrounds for different political, philosophical, and moral perspectives.[33]

It is suggested that this approach to distributive justice is also the predominant value behind the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms* as confirmed by the jurisprudence of the Supreme Court of Canada.[34]

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. Many of the civil and political rights are stated in absolute terms that seems to allow little room for abridgement. For example, section 2 of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

The jurisprudence of the Canadian Supreme Court has imposed a two-step approach to interpreting rights such as these in any litigation process. First, the complainant who is alleging that his or her rights have been infringed must establish a *prima facie* case that the government has violated the guaranteed right. No governmental justification for abridgement of the right is permitted at this stage. For example, even the curtailment by government

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33 See T. Campbell, *Justice* (Atlantic Highlands, New Jersey: Humanities Press International, 1988).

34 For a discussion of the recent jurisprudence of the Court, see E.P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12 National J. of Constitutional L. 1 at 3.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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action or legislation of the vilest forms of hate propaganda and more recently, child pornography, have been ruled a violation of section 2.[35] The Supreme Court has held that any form of communication has expressive content and government restriction of any such form of expression is a violation of section 2(b).[36]

However, despite this initial, seemingly absolutist, approach to civil and political rights, we do not place collective rights and interests of groups and society at risk of being trumped by individual rights and freedoms no matter how they are being used. Rather, we attempt to balance the categories of rights by the distributive justice principles that have been enunciated in the Supreme Court of Canada case law interpreting section 1 of the *Charter*.

The need to develop some fundamental principles of distributive justice is introduced in the first section of our *Charter.* This section states:

> The rights set out in the *Charter* are subject to reasonable limits demonstrably justified in a free and democratic society.

The section comes into operation after the plaintiff has proven that there is a *prima facie* violation of his or her rights, as described above. The burden of proof then switches to the government to show that it can justify such a violation on the basis of the criteria set out in section 1, which makes all the guaranteed rights subject to reasonable limits demonstrably justified in a free and democratic society.

I suggest that section 1 was a mandate given by the people of Canada to the judiciary, in particular the Supreme Court of Canada, to work out a

35 *Keegstra, supra* note 33; *R*. v. *Sharpe* (2001) S.C.C. 2.

36 *Irwin Toy Ltd*. v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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framework of distributive justice within which an appropriately Canadian rights adjudication process could take place.

During the relatively brief period of the existence of the Canadian *Charter*, there have been cases where, I suggest, the Supreme Court met the challenge of creating this uniquely Canadian framework of distributive justice for rights adjudication. The landmark decision of the Canadian Supreme Court in *Ford* v. *Quebec (A.G.)*[37] 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.[38]

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

37[1988] 2 S.C.R. 712.

38 For a detailed discussion of this case, see E. P. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the Ford Decision" (1991-92) 1 National Journal of Constitutional L. 283.

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Teléfono 976 28 97 15 - Fax 976 28 96 65
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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 democratic pluralist societies if minority rights are to be protected and to ensure the survival of such societies. There can be no better description of the values of democratic pluralism and substantive equality based on Canadian perceptions of distributive justice than that which comprises the Canadian template for multiethnic federal or unitary states around the world.

Zaragoza, 7 de junio de 2007.

[4][4][1986] 1 S.C.R. 103 at 136.

[4][5] *Ibid.*

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Teléfono 976 28 97 15 - Fax 976 28 96 65
fundacion@fundacionmgimenezabad.es