Canadian Federalism, Fundamental Rights and Minorities

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The Canadian federation
Canada in 1867

The Shape of Canada in 1867

- Ontario
- Quebec
- New Brunswick
- Nova Scotia
- British Possessions
Canada’s “mosaic” of minorities

- First Nations (aboriginal peoples)
- Québec
- “New minorities”:
  - 20% of Canadian population is foreign-born
  - 16% belong to “visible minorities” (in twenty years: 30%)

  “Canada is a country marked and enriched by the many different backgrounds of its population. It is a multicultural and pluralistic society”:
A model for minority rights?

- Canada projecting itself as “example” in treating minorities:
  - Supreme Court, Amselem case (2004): Canada “is in many ways an example for other societies”

- Often seen abroad as “leader” in multiculturalist policies:
Questions today

✓ What status for fundamental rights in Canadian legal system?

✓ Specific approach(es) to minorities?

✓ Lessons?
1. The Canadian constitution: general aspects

2. The Canadian constitution and the protection of minorities: three distinct approaches
The Canadian constitution

General aspects
“Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom...”

- Constitution Act, 1867 (preamble)
Features of Canadian constitution

- Constitutional monarchy
- Parliamentary system
- Constitution is partly written, partly unwritten
- Federalism: 10 federated units + 1 central government
Structure of Canadian legal order

- Constitution
  - Includes *Charter of Rights and Freedoms* (since 1982)
- “Quasi-constitutional laws”
  - (Federal & Provincial human rights legislation)
- Legislation, Regulations
Supremacy of the Constitution

“The Constitution of Canada is the supreme law of Canada”: s. 52 of Constitution Act, 1982

Constitutional validity of any law can be challenged at any time by any citizen in any court

- No Constitutional Court, no prior constitutional review
- Judges of superior courts appointed by federal government
Underlying principles of Canadian Constitution

SCC, Advisory Opinion on Québec Secession (1998):

- Rights of minorities
  - Democracy
  - Rule of law
  - Federalism
## Division of powers (1867)

<table>
<thead>
<tr>
<th>Central government</th>
<th>Provinces</th>
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<tr>
<td>• &quot;Peace, Order &amp; Good Government&quot;</td>
<td>• Property &amp; Civil Law</td>
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<td>• Trade, Commerce</td>
<td>• Education</td>
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<td>• Criminal Law</td>
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<td>• Residual power</td>
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- Central government responsibilities include peace, order, and good government, trade, commerce, banking, defence, foreign affairs, and residual power.
- Provinces are responsible for property and civil law, education, hospitals, local works, and matters of a merely local or private nature.
Evolution of Canadian federalism since 1867

- Supremacy of federal laws over provincial laws
- Federal spending power
- Doctrine of federal emergency powers
- Doctrine of “national concerns“
- Doctrine of “co-operative federalism”
April 17, 1982: the Canadian constitution “comes home”
“Patriation” of constitution (1982)

- Canada can now modify its own constitution without UK

- With patriation comes new *Canadian Charter of Rights and Freedoms* (fundamental rights)
  - Part of the Constitution
  - Parliaments, governments must respect fundamental rights
The Canadian constitution and the protection of minorities

1. Human Rights
Canada’s forgotten history of discrimination against minorities

- Immigration restrictions on Asian workers – voting rights restricted (19th c.)
- Internment of Japanese–Canadians (WW2)
- Current anti-Muslim discrimination (UN Rapporteur)
Protection for fundamental rights

- **Constitutional:**

  - **Canadian *Charter of Rights and Freedoms* (1982)**
    - Applies to Legislative & Executive branches, federal & provincial
    - Fundamental freedoms – Democratic rights – Mobility rights – Legal rights – Equality rights – French & English as Official languages – Minority language educational rights
Protection for fundamental rights

- Legislative:
  - In every province & federal level: Human Rights Acts
    - Non-discrimination
    - Also applies to private relations
Protection for fundamental rights

- International:
  - Canada party to many international human rights treaties
  - International law is **not part** of Canadian domestic law
    - May only serve to interpret Canadian human rights standards
      - *BC Health Services* (SCC, 2007)
Rule of multicultural interpretation

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

- article 27,
  *Canadian Charter of Rights and Freedoms*
Multicultural jurisprudence: examples

- Regulating "hate speech"?
  - “The commitment to a multicultural vision of our nation bears notice to the importance of eradicating hate propaganda from society”:

- Allowing kirpan in school?
  - “An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others”:
Individual accommodation of diversity

- Equality sometimes requires differential treatment: Aristotle

- Canadian antidiscrimination law requires “reasonable accommodation” of differences:
  - Examples:
    - Seventh-Day Adventist may refuse to work after sunset – SCC, *O’Malley* (1985)
    - Civil servants may wear religious symbols
2. Territorial approach (federalism)
Québec: a minority within Canada

Language (Québec)

Language (Canada)
A territorial response to Québec concerns

- Advisory Opinion on Québec Secession, Supreme Court of Canada, 1998:

  “The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and which possesses a distinct culture.”
Québec and patriation

- 1982 patriation rejected – Does Québec has veto?

- 1981 SCC ruling: patriation was legal (although “in violation of constitutional conventions”)

- Québec is now legally bound by patriation (including *Charter of Rights*), but still rejects it
Québec independence referendums

![Bar chart showing percentages of 'Yes' and 'No' votes in 1980 and 1995 referendums. The chart indicates a decrease in 'Yes' votes and an increase in 'No' votes from 1980 to 1995.](chart.png)
Québec secession: legal situation

- 1998 SCC advisory opinion:
  - “Clear majority” vote on a “clear question” will give **democratic legitimacy** to Québec secession;
  - **Negotiations will then have to ensue** between the majority of the population of Quebec and that of Canada as a whole;
  - Although Québec “shares many of the characteristics of a people”, it is **not a colonial or oppressed people**;
  - Therefore, cannot claim right of **external self–determination** (secession) **under international law**;
  - Ultimate success of unilateral secession would depend on **recognition by the international community**.
3. Communitarian approach: aboriginal rights
Article 35 of the Constitution Act, 1982

- “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
Aboriginals

- 3% of Canadian population; 600 “Indian bands” recognized

- 19th & 20th c. policy of assimilation
  - “Unequal treaties”
  - “Reservation system”

- 1973 SCC *Calder* decision: recognizes aboriginal title to land
  - Creates pressure for negotiating on equal, nation-to-nation basis again
Aboriginal rights: why?

- “The doctrine of aboriginal rights exists [...] because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.”

  ◦ R. v. Van der Peet (SCC, 1996)
Example of an aboriginal right

- *Sparrow* case (SCC, 1990):
  - Is fishing with a large net constitutionally protected?
    - Salmon fishery part of native way of life
      - “Fishing rights are not traditional property rights. They are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property.”
Modern treaty rights

- The Nisga’a Treaty (2000)
  - Establishment of Nisga’a government
  - Nisga’a jurisdiction over aboriginal citizenship, language, culture, etc.
  - Nisga’a laws must equal standards in state laws (child protection, education, forest protection, etc.)
  - Nisga’a Treaty subject to Canadian Constitution, Charter of Rights
Aboriginal ways of life recognized under anthropological definitions of culture in human rights treaties:

- UN Human Rights Committee, *Ominayak v. Canada* (land expropriation)

- Also: *Kitok v. Sweden* (restrictions on hunting)
Tensions with other human rights

- Gender equality vs. group belonging:


    - Sexual discrimination in Canada’s *Indian Act* (loss of Indian status for women marrying non-Indian men) – Prevented Ms Lovelace from enjoying right to take part in community’s cultural life – *Indian Act* amended (1985) but gender issues persist
Self–determination

- UN Declaration on Rights of Indigenous Peoples (2007) relates indigenous rights to human right to self–determination

- Understood by Canada, Australia, New Zealand, U.S., etc. as not implying right to external self–determination (secession)

- Aboriginal title requires frequent litigation
Conclusion
Approaches to minority rights in Canada

Federalism
(Territorial approach)

Aboriginal Rights

Human Rights

Rights of Linguistic Minorities
Conclusions from Canada

- Principle of non-discrimination protects minority rights on individual basis; does not satisfactorily address “historical” minorities/group issues

- Asymmetrical federalism may be necessary to accommodate historical minorities
  - Canadian federalism remains symmetrical

- Aboriginal rights illustrates potential tension between group rights and individual human rights
Select bibliography


Gracias
Merci
Thank you

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