IDENTITY, COMMUNITY AND THE *CHARTER*

ABSTRACT

The author explores the ideas and histories that shape a nation's formation and notes that, in the case of Canada, our central project of establishing terms of relationship between the communities that comprise Canada has had to accommodate two other statecraft goals – the need to engender a national identity and national solidarity and the recognition of human rights. While we have a long history with the first accommodation, we are still confounded by the challenge of marrying group recognition and empowerment with personal liberties.

JOHN D. WHYTE

John Whyte is the Douglas McK. Brown Visiting Professor of Law in the Faculty of Law at the University of British Columbia and a Senior Policy Fellow at the Saskatchewan Institute of Public Policy.

Universal conceptions of constitutionalism – or any other element of political organization – are suspect. After all, both the effective promotion of human well-being and political solidarity depend on the recognition of cultural differences and the most revered constitutional principles enjoy only relative worth. Nevertheless, some propositions about statecraft have general application and can guide development of a normative understanding of good states. For instance, we can suggest that what normally lies behind a state's choice of instruments, institutions and structures is the search for national security, national stability and efficacy. In turn, we might be inclined to agree that the basic condition for political stability – and, consequently, for security and efficacy – is justice between the people of a nation and between the communities within a nation. These conditions depend on having effective state instruments for protecting personal freedom and for recognizing communities, particularly minority communities.

But we may have already become situated. Some might argue that state solidarity does not depend on a just accommodation of communities, but simply on just treatment of individuals. Others will argue that state protection of personal autonomy cannot be allowed to compromise national solidarity and that it is in maintaining this solidarity that individuals find their greatest security and, ultimately, secure their best interests. In fact, however, few nations are formed through sensible calculation of how to balance these competing notions of a just and stable state as much as they are formed through fierce emotion – fierce emotion over what interests the state must promote and protect. Historically, this emotion is less derived from ideas of economic flourishing and personal liberty than it is from imperatives of community survival. In nation-building the compelling force is most often to sustain, under the most promising conditions possible, continuation of the nation's communities, both its ethnocultural communities and its diverse historical communities. We misunderstand a nation's constitutional arrangements when we see them as presuppositionless and as arising inevitably.

Nations and institutions result from the joining together of existing communities with specific needs – the thirteen colonies of the United States, the three churches of the United Church of Canada, or the dispersed colonial settlements of British North America that formed Canada. In the Canadian record, we have many

clear instances of inter-community negotiation over the terms of national formation and national expansion.[1] Here is one instance of this search for terms of union. In the summer of 1899, federal Treaty Commissioners Laird, Ross and McKenna met with three First Nations – Wood Cree, Beaver and Chipewyans – to make what became Treaty 8, an agreement designed, amongst other things, to acquire land for Canada on which settlement by Europeans could take place. There seem to have been two inevitable outcomes to these discussions – there would be colonial settlement on First Nations' territory and Canadian criminal law would apply to First Nations people. They were told by the Commissioners that "… the law was designed for the protection of all and must be respected by all the inhabitants of the country, irrespective of colour or origin; and [First Nations people] are required to live at peace with white men …".[2] But, the First Nations were not without their demands. The Commissioners reported:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges and many were impressed with the notion that the treaty would lead to taxation and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.[3]

Uninterrupted continuation of cultural and economic practices, exemption from onerous state obligations, obtaining social transfers and services and maintaining religious integrity comprise a completely logical list on which to construct intercultural accommodation. The Commissioners gave unqualified agreement to all of these conditions, proof that long before a developed theory of intra-state group rights wise people understood that a nation and its constitution, rather than being prior to, and constitutive of, community, are built on relationships formed between communities.[4]

With respect to communities, and their inevitable reflection in constitutional arrangements, we need to note that they can also be geographic or historic, and contingent on fate. But history and geography are also shapers of destiny and of the sense of belonging and our constitution in its use of non-ethnic federalism is here, too, creating through group accommodation the conditions that will sustain order.

Constitutions, of course, are also about nations and individuals. In order to understand how the elements of individual, community and nation are resolved into a coherent and stable regime, we need to look more closely at two statecraft mechanisms by which we have promoted group recognition and group empowerment in the broader context of individual rights and national interests. These are the devices of federalism and rights.

First, with respect to federalism, we know that a political society will only be sustained if there is on-going loyalty to it, if there is some degree of common identity and some level of common and mutual empathy. A nation's peoples must have enough of a common sense of national purpose to wage wars, or comply with public regulation and taxation and to support transfers and public goods. For that reason we need not only a national state but an idea of nation and confidence in that nation's capacity to meet the needs experienced by the people of the nation. One might say that, in the historically specific discourse that buttresses the communitarian foundation of the state, there must also be reflected the idea of a national community.

While a fully centralized state is most effective in engendering common political identity and in building common political projects, the fact that stronger political identities are most likely to be attached to communities within the state – provinces and ethnocultural groups – means that in the longer run stability and capacity will be eroded through insistent centralization. Of course, one can be both a good Canadian and a committed Buddhist or a staunch Saskatchewanian, but when one's group-based identity is increasingly constructed around the sense that the group that one belongs to is consistently ignored, or is unfairly treated, and if this sense leads to demands for political self-determination in order to avoid unfairness and to sustain cultural integrity, there is reasonable concern that the elements of common national purpose will grow too thin to sustain projects of national governance – or, ultimately, the nation itself. Federalism attempts to forestall both exploitation of minorities and diminished commitment to the nation through creating – and legitimating – two political identi-

ties, each one of which, it is hoped, will be able to attract commitment and loyalty. While the national identity will tend to be a functional commitment – having important needs effectively met by the nation – a strong emotional national attachment can also grow. Consider, for instance, the recent 90th anniversary of the battle at Vimy Ridge.

Three advantages flow from constructing political societies from existing cultural communities. First, it leads to governments which enjoy a heightened sense of legitimacy and to which a stronger loyalty is attached. This is important from the perspective of sustaining support for the governmental business of providing public goods. A political society which attracts low political solidarity produces insecure governments and, hence, weak governance. Second, constitutional recognition and empowerment of minority communities is likely to produce less deep hostility to national political bodies and to the policies and settlements that those bodies arrive at. They are not seen as destructive or oppressive of the social elements that define people or bind them together. Third, if our constitutional organization contains political authority for constituent communities, national majorities are, at least to some extent, prevented from tyrannizing national minorities. The structure of federalism, then, serves to produce strong governments, develop national solidarity and political stability and forestall oppression.

The other standard device of liberal state constitutionalism – protecting individual and group rights – is also designed to produce stability through adopting the attitude of reduced political ambition. Identifying rights and entrenching them (to a greater or lesser degree) reflects the sense that it is foolhardy and destabilizing to build national identity through a comprehensive conception of social goals. While we can certainly form a common commitment to some state goals, such as meeting national emergencies or, even, perhaps, promoting a national culture, our deepest national commitments are procedural – choosing governors through elections, preserving constitutional relationships through the rule of law and protecting liberties, due process and equality and recognizing self-determination for minority communities through rights. In the absence of a specific conception of what is right, or good, for all people, we create positive conditions for personal and group entitlement and capacity and we set limits on what the state can pursue as the general good.

But, this straightforward claim for personal autonomy becomes more complicated in describing our basic commitments in the context of the relationship between individuals and the groups to which they belong and tender allegiance. After all, it is not just the national good that must fall to the idea of autonomy, it is the broader idea of collective determinations of what is good. Generally, within political societies, like Canada's, that are built on commitments to pluralism, we have not been able to come to a clear understanding of the extent to which we should recognize the self-governing capacity of minority communities and, consistent with that recognition, how we should extend protection from oppressive community practices to members of those communities.[5] Both communities and individuals have compelling identity related interests. Individuals can be caught between, on the one hand, finding purpose, becoming empowered and knowing their value through group membership and, on the other hand, realizing through critical intelligence and an understanding of their personal needs that community norms and expectations will inflict harm. In liberal democracies, we guarantee a domain of self-determination and we promise equal respect and dignity because we know the injury of being controlled with respect to deep personal interests. Yet we ground exercises of autonomy on the capacity that is formed through complex understandings of social identity. The *Charter of Rights* reflects this difficult interaction. As Professor Mohammed Qadeer has written, "… it was the enactment of the *Charter of Rights and Freedoms* in 1982 that gave muscle to the multiculturalism policy of 1971."[6] Prime Minister Trudeau in his Patriation Day address to Canadians said, "For if individuals and minorities do not feel protected against the

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possibility of the tyranny of the majority, if French-speaking Canadians or Native peoples or new Canadians do not feel they will be treated with justice, it is useless to ask them to open their hearts and minds to their fellow Canadians."[7]

The rights of the *Charter of Rights* are frequently based on membership and the idea that personal empowerment arises in membership. Rights are often designed to protect people through recognition of the communities they belong to. Freedom of religion, association and assembly are manifestations of the link between community and personal effectiveness. Freedom of expression is, at heart, the freedom to find a community of common interests. Equality is a claim that in Canada is based on membership in a group or class. The *Charter* gives recognition to multiculturalism, sectarian education rights, Aboriginal rights, minority language rights and official language rights.

As a matter of developed statecraft, however, we have come to a place of deep challenge. We can certainly celebrate our multiculturalism – our respect for minority ethnocultural groups – and we know that this largely successful experiment in pluralism, this "act of defiance against the history of mankind"[8] as Prime Minister Trudeau described it, can produce both the tremendous dividends of interculturalism and the deeper bases for political solidarity. But, beyond the respect for cultural difference and the rhetoric of peaceable relations and mutual respect, lie hard barriers to group recognition. For example, for the First Nations of Treaty 8, there was no room for indigenous structures for preserving social order. And, nearly a century ago, in Saskatchewan, there was no will to accept the communal land ownership by Doukhoubors even though, in a fine moment of cultural accommodation, that had been the very promise that Canada had made to them. Recently, in Ontario, even though religious arbitration over the effects of family dissolution is an inevitable and widespread practice and has been recognized for years, it was decided that such religious and cultural frameworks could no longer be tolerated in the province's administration of family law.

But it would be wrong to condemn equally all of these limits to the acceptance of pluralism. In our different reactions to these narratives, we learn that pluralism, as a state policy, must have limits and that there are interests that we must attend to when we accept that minority communities need to be recognized and accommodated. These limits are based on fundamental human interests, particularly the interests of not being exploited or enslaved or oppressed through damaging adherence to the precepts of exclusion: sexism, racism, homophobia, arbitrariness and punishment for free inquiry. The recognition that we give to communities is an aspect of our best purposes and our best history, but we are compelled to explore its limits when that recognition places at risk the rule of law, or due process, or our precepts of citizenship or our sense of what political values Canada stands for. In this exploration, we are aided by the articulation twenty-five years ago of principles of regard for both liberty and identity. Our constitution and the history that lies behind it affirm our clear acceptance of community based social ordering but they do so in the context of granting to everyone equal respect and the essential political conditions for personal dignity.

NOTES

[1] There is a not unreasonable interpretive tendency to see nation-building as attempted ideological resolution. See, eg., Ajzenstat, J. and Smith, P. (Eds.). (1995). Canada's origins: Liberal, Tory or Republican? Ottawa: Carleton University Press. But, cf, LaSelva, S. (1996). *The moral foundations of Canadian federalism: Paradoxes, achievements and tragedies of nationhood.* Montreal & Kingston: McGill-Queen's University Press in which Canadian constitutional development is explained in terms f the moral dimension of inter-group accommodation.

[2] Commissioners' Report to the Superintendent General of Indian Affairs, September 22, 1899, reproduced in *Canada v. Benoit,* 2003 FCA 236 at para.7.

[3] *Ibid.*

[4] Of course, the more familiar Canadian story of intersocietal agreement over governance structures relates to Confederation. See, eg., the interview with Réal Bélanger, the well-known Laval University historian, in Gougeon, G. (1994). *A history of Quebec nationalism.* Toronto: Lorimer. Like the history of relations with the people of Treaty 8, this post-Confederation history is marked by the willingness of the larger group to forget the centrality of intersocietal accommodation in actually living out the relationship that had been created.

[5] See Eisenberg, A. (2005). Identity and Liberal politics: The problem of minorities within minorities. In A. Eisenberg & J. Spinner-Halev, *Minorities within minorities: Equality, rights and diversity* (pp. 249). Cambridge: Cambridge University Press.

[6] Qadeer, M. (2007, February). The *Charter* and multiculturalism, Policy Options, 28(2), 89 at 90.

[7] As reproduced in Gruending, D. (Ed.). (2004). *Great Canadian speeches.* Toronto: Fitzhenry & Whiteside.

[8] *Ibid*, 214.