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Minority Language Rights and Education in China:

The Relevance of Human Rights Law and Substantive Equality

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Abstract

This chapter considers the potential role of international human rights law, especially provisions which are applicable to China, in mediating competing interests and objectives when determining minority language policy in the education context. In particular, it examines the content of - and the obligations arising from - the right to equality and non-discrimination and the right to equality in education. Equality, as understood in its substantive sense, requires an assessment of the actual situation of disadvantage faced by particular groups and the provision of appropriate remedies. While this principle can help ensure respect for minority language rights, political obstacles including state-building priorities often interfere with its practical realization in China.

Introduction

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Many multicultural societies struggle to achieve a workable dynamic that encourages cultural and linguistic diversity as well as social integration while avoiding the imposition of a majority culture on minority communities against their will. A key challenge involves formulating laws and policies which allow for full participation, prevent the assimilation of groups which are characterized by difference, and move toward the accommodation and celebration of that difference. In reality, an appropriate balance is often difficult to realize. As Dunbar notes, while “an integrationist policy toward minorities is not necessarily inconsistent with cultural and linguistic plurality ... the borderline between integrationist and assimilationist policies is a murky one at best” (2001, 104).

A number of contributors to this volume have explored these tensions with respect to minority language education in China, an area of policy which also involves careful mediation of competing interests and objectives. On the one hand minority communities have an interest in learning and using their own languages as part of exercising a right to identity. On the other, learning the state’s “official”, majority language may be necessary to facilitate participation and access to opportunities in higher education and employment. Language policy has the power to marginalize and the lack of knowledge of the dominant language may limit opportunities.

This chapter considers the potential contribution of international human rights law to the process of delineating appropriate boundaries and crafting effective solutions. In particular, it examines standards applicable to China which create binding duties on the Chinese state as a matter of international law to ensure substantive equality in the area of education. Although questions remain about the extent to which China complies with

these obligations in practice, its ratification of the instruments and active participation in the reporting procedures indicate at least formal acceptance of the system (for discussion of China's interaction with the human rights system see, for e.g., Woodman, 2005; Kent, 1999). The chapter will not investigate broader questions about the enforceability of international human rights standards, but assumes that the framework of rights can form the basis for discussion, negotiation and advocacy as states such as China develop policy and legal responses to the challenges posed by linguistic diversity. It concludes that international human rights instruments elaborate principles which can offer guidance for states and minority groups when faced with difficult choices and conflicting claims. At the same time, political obstacles such as China's state-building priorities and its emphasis on economic reform interfere with the incorporation of these treaties at the domestic level and limit their impact. Although rights such as freedom of expression, assembly and association are also relevant (as discussed, e.g., by de Varennes, 1998, pp. 33-53 and Dunbar, 2001, pp. 104-107), the chapter focuses on the right to equality in particular. It recognizes, however, that rights cannot be interpreted in isolation and that equality must be comprehended in connection with other rights which together elaborate a more robust protection framework.

Human Rights and Minority Claims

The above issues form part of a broader debate about whether human rights law – which initially arose in the mid-twentieth century as the foundation for the protection of individual rights – is adequate to address group-based cultural and linguistic claims and

secure positive rights to identity. When contemplating the potential contribution of human rights law to the project of balancing the imperatives of diversity and multiculturalism, some have commented on its flexibility and capacity to transform itself. For example, Ghai notes that the “framework of rights has been used with considerable success in mediating competing ethnic and cultural claims. As the cultural problems of more and more states take on a common form, a new version of human rights is emerging” (Ghai, 2000, p. 1099). When examining the international regime for the protection of minority language rights, de Varennes similarly argues that “human rights can help to provide a flexible, realistic mechanism which can adapt to a variety of situations” (1996, p. 2). Fredman observes that the realization of rights requires more than curbing the abuse of state power – or imposing duties of “restraint” - but also necessitates positive state action: “Human rights are based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position actually to enjoy that freedom ... While the State needs to be restrained from abusing its power, only the State can supply what is needed for an individual to fully enjoy her human rights” (Fredman, 2008, p. 9).

Others have expressed less confidence in the capacity of law to address diversity. Macklem notes that although sources of international human rights law “provide minorities with several avenues for challenging the exercise of state power”, these treaties “have come to be understood in terms that display a deep ambivalence about the international legal significance of minority status” (2008, p. 534). In the education context, when writing about students with disabilities in Canada, MacKay (2010, p. 466) notes that some stakeholders have regarded lawyers and judges more often “as sources of

fog shrouding the education process” (p. 466) rather than “beacons of light to guide educators through the complex fog of public education” (p. 466). Despite this perception that the law contributes to a *lack* of clarity, he argues that: “the concept of equality [reflected in the law] and properly understood and applied with adequate resources can be the lighthouse that guides us to more inclusive, effective and even safer public schools” (MacKay, 2010, pp. 466).

The next two sections examine this concept of equality and how it has been expressed as a legal right in international human rights treaties and developed through interpretation toward a more robust principle which requires positive duties and attention to the accommodation of multiplicity. Equality, when understood according to a substantive model, elaborates guiding principles which can inform the task of balancing linguistic diversity and integration in minority language education policy.

Concepts of Equality

The effectiveness of a legal right to equality in contributing to a positive acceptance of difference depends to a large extent on the concept of equality conveyed by the law. Theories of formal and substantive equality promote varying objectives which can lead to divergent outcomes and may have conflicting implications for the law’s potential to successfully contend with diversity. Substantive equality goes beyond a formal notion that “likes should be treated alike” and requires a careful analysis of context and an assessment of the actual situation of disadvantage faced by particular groups and individuals within those groups. When individuals and groups are competing

from unequal starting positions due to past discrimination, lack of language education, etc., then strict equal treatment – in a formal sense – could in fact amount to discrimination. Substantive equality on the other hand “tries to identify patterns of oppression and subordination” (Baines and Rubio-Marin, 2005, p. 14) and then correct them.

Fredman proposes a framework of substantive equality which is directed toward achieving four primary aims which have implications for addressing the challenges of linguistic diversity. First, equality should promote “respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an out-group”. Second, it should entail an “accommodation and positive affirmation and celebration of identity within community”. Third, it should break “the cycle of disadvantage associated with out-groups”. Finally, it should facilitate “full participation in society” (2008, p. 179 & 2002). She adds that “[p]articipation is a multi-layered concept” and that “equality law should specifically compensate for the absence of political power of minority groups” (Fredman, 2008, p. 180).

Achieving these objectives – and thus conforming to a substantive equality principle - may require positive duties, special measures, and other forms of adaptation. Dunbar divides rights related to minority languages into two categories: 1) a “regime of linguistic tolerance” (i.e., formal non-discrimination – characterized by restraint or refraining from interference) and 2) a “regime of linguistic promotion” (requiring positive action such as providing education through the medium of minority languages) (2001, pp. 91-92). This classification illustrates the dichotomy between obligations of

restraint and formal equality on the one hand and obligations on states to take positive action to achieve substantive equality on the other.

If framed with reference to Fredman’s equality goals and Dunbar’s dichotomy of obligations, a legal right to equality has the potential to serve as a mediating principle for resolving issues in minority language education. To conform to the demands of equality, states must first analyze the existing situation to identify any disadvantage caused by language policies and practice – or a lack of such policies. They must then remove any obstacles and/or institute measures to provide minority language education while at the same time ensuring official language acquisition. The resulting policy choices can then be measured by their ability to achieve and support the goals of equality: greater participation, the redressing of disadvantage, the celebration of identity, and respect for human dignity.

The International Human Rights Framework

Equality forms a basic, foundational principle underpinning the international human rights regime (Human Rights Committee, 1989: ¶ 1-3). As Thornberry notes, “the underlying emphases in [the canon of human rights] are on equality as a governing principle in society and law” (2005, p. 240). The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, proclaims that “all human beings are born free and equal in dignity and rights” (Article 1) and the right to equality is expressly and prominently included in most of the core human rights treaties. These provisions create obligations on states to employ measures which achieve both

formal and substantive equality. The human rights framework therefore requires that states ensure equality in education by refraining from interference with the exercise of individual liberty, including the freedom to use a minority language, as well as by taking positive action when needed to realize equality in effect. States must also guarantee that other rights, such as the right to education, be implemented without discrimination of any kind. Together these provisions create an overlapping arrangement of rights and obligations which should inform the development of policies involving minority language education.

China is party to several of the core international human rights treaties including the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) which are particularly relevant to minority language rights in education. It has also signed, though not yet ratified, the International Covenant on Civil and Political Rights (ICCPR) which is therefore not yet strictly binding on the PRC. The ICCPR has applied to the Hong Kong and Macau SARs, however, both before and since their return to Chinese sovereignty in 1997 and 1999. In addition, by signing the Covenant, China has agreed to refrain from acts which would defeat the object and the purpose of the treaty (1969 Vienna Convention on the Law of Treaties, Article 18). China is also bound by the 1960 UNESCO Convention against Discrimination in Education which elaborates a framework for equality in education. It arguably provides a weaker basis for claiming minority language rights, however, than the later instruments which constitute the core human rights canon. For example, while Article 5 states that it is “essential to recognize the

right of members of national minorities to carry on their own educational activities, including the maintenance of schools”, it also clarifies that the use or the teaching of a minority language depends on the educational policy of each state. In addition, this right must not be exercised in a manner which “prevents the members of minority groups from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty” (Article 5).

The UN human rights treaty bodies, the committees tasked with monitoring the implementation of states’ obligations under the human rights conventions, have issued General Comments and other interpretive materials which provide guidance for states to better comprehend the content of the rights enumerated in these instruments. Although the right to equality and non-discrimination has traditionally been construed in its formal sense, increasingly these committees have paid greater attention to the need for positive action within a richer model of substantive equality. While debate continues about whether a right to education or a right to equality requires states to provide education in minority languages at public expense (Marks & Clapham, 2005, p. 140), this discussion suggests that the answer depends on context and that policy can be guided by the theoretical framework of substantive equality discussed above and reflected in the human rights instruments examined below.

The International Covenant on Civil and Political Rights (ICCPR)

Although the ICCPR is an instrument which was initially conceived within an individual rights – as opposed to a group rights - paradigm, it nevertheless provides some

protection for minority communities to develop their own languages. The right of members of minority groups to enjoy their culture, the right to equality, and participation rights are of particular significance.

Article 27 of the Covenant affirms that state parties must not deny the right of persons belonging to ethnic, religious or linguistic minorities – in community with other members of their groups – to enjoy their culture, to profess and practice their own religion, or to use their own language. On a plain reading of the text, this article is constructed as a duty of restraint (i.e., an obligation on the state to refrain from interfering with the exercise of the right) rather than as a positive duty to promote minority languages. Although drafted in a tentative manner (members of minority communities “shall not be denied” the right to enjoy their culture), it has implications for language rights in education since a right to *use* a language depends on the ability to *learn* the language (OSCE, 1999 citing the Foundation for Inter-Ethnic Relations, 1996 as cited in Dunbar, 2001, p. 109). Similarly, Thornberry argues that Article 27 “goes beyond a guarantee of non-discrimination towards a more positive notion of conservation of linguistic identity. Thus ... failure to allow minority languages to be taught in schools ... when a minority desires this” would breach Article 27 (Thornberry, 1991, p. 197).

When setting out states’ general obligations, the ICCPR provides that states must respect and ensure to all individuals subject to its jurisdiction the rights granted by the Covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2(1)). In addition, Article 26 guarantees an autonomous right to equality and non-discrimination which applies beyond the parameters of the rights in the Covenant and so

would also necessitate the realization of a right to equality in the education context. The Human Rights Committee (HRC), the expert monitoring body which oversees implementation of the ICCPR, has explained that these provisions contain a right to substantive equality. It recognizes that the meaning of discrimination includes distinctions, exclusions, restrictions or preferences which have the effect as well as the purpose of impairing the enjoyment of human rights (HRC, 1989, ¶ 6 & 7). This has been interpreted to include policies which apply equally to all, but which disproportionately and negatively affect a particular group (sometimes referred to as “indirect discrimination”). The principle of equality may also require states to take affirmative action “to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”. Therefore “where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions” (HRC, 1989, ¶ 10).

The HRC has also observed that language is important in relation to the full enjoyment and exercise of other rights, including political rights. For example, in its General Comment on the right to participate in the conduct of public affairs the Committee affirms that states must remove barriers in order to ensure the enjoyment of participation rights under the ICCPR and that “[p]ositive measures should be taken to overcome specific difficulties such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively” (HRC, 1996, ¶ 12).

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)

The ICESCR also includes a right to equality as well as a general right of everyone to education which “shall enable all persons to participate effectively in a free society [and] promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups” (ICESCR, Article 13). Like Article 2(1) of the ICCPR, Article 2(2) obligates state parties to guarantee that the rights enunciated in the Covenant – including the right to education - be exercised without discrimination of any kind on the same range of grounds, including race and language. Despite the lack of an equivalent to Article 27 of the ICCPR or other references to minority rights, the Committee on Economic, Social and Cultural Rights (CESCR) frequently raises questions during the state reporting process concerning minority language education (Åkermark, 1997, p. 193).

The CESCR has recognized that Article 2(2) provides for a right to substantive as well as formal equality observing that “[m]erely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2)”. In order to eliminate discrimination in practice, states must pay “sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.” To achieve this, states must “immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination” (CESCR, 2009, ¶ 8(b)).

The CESCR has commented that in order to eliminate substantive discrimination, states “may be, and in some cases are, under an obligation to adopt special measures to

attenuate or suppress conditions that perpetuate discrimination”. These measures are “legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities ...” (CESCR, 2009 ¶ 9).

In its Concluding Observations on China’s state report in 2005, the CESCR expressed concern about reports of discrimination against ethnic minorities, including in the field of education, and information relating to “the use and teaching of minority languages, history, and culture” in the Xinjiang Autonomous Region and the Tibet Autonomous Region (CESCR, 2005, ¶ 38). It recommended that China “increase public expenditure on education in general” and “take deliberate and targeted measures towards the progressive realization of the right to education” for disadvantaged and marginalized groups (CESCR, 2005, ¶ 66).

The Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child (CRC) is the only other core human rights instrument – apart from the ICCPR - which mentions minority groups explicitly. Article 17(d) obligates states to “[e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”. It also duplicates the language of Article 27 of the ICCPR in relation to children who are members of minority or indigenous groups (Article 30). Article 29(1)(c) further provides

that “States Parties agree that the education of the child shall be directed to ... [t]he development of respect for ... his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own”. Article 28 reaffirms the right to education with respect to children.

Like the ICCPR and the ICESCR, the CRC also contains a non-discrimination provision (Article 2(1)) and the Committee on the Rights of the Child, the Convention’s monitoring body, has similarly interpreted it as a right to substantive equality. The Committee explains that the obligation requires states to actively identify “individual children and groups of children the recognition and realization of whose rights may demand special measures”. It also notes that “the application of the non-discrimination principle of equal access to rights does not mean identical treatment” and that special measures may be necessary to diminish or eliminate discrimination (Committee on the Rights of the Child, 2003, ¶ 12).

The Committee advised China that all teaching and learning materials for primary and secondary level education should be made available in ethnic minority languages and have culturally sensitive content (Committee on the Rights of the Child, 2005, ¶ 77(d)). It also recommended increasing resources allocated to education generally and targeting these to ensure equal access to education for all, including members of ethnic minority communities (Committee on the Rights of the Child, 2005, ¶ 77(b)).

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)

The ICERD obligates states to “condemn racial discrimination and undertake to pursue ... a policy of eliminating racial discrimination in all its forms” (Article 2(1)). Although it does not mention language or minorities explicitly, the Convention prohibits discrimination on a range of relevant grounds including race, descent (which includes, for example, indigenous communities and caste), and ethnic or national origin. There is often a close connection between race and language and many linguistic minorities fall within the categories protected from discrimination by the Convention (Henrard, 2007). Like the other treaties, the Convention requires substantive equality – an interpretation which is apparent from both a reading of the text as well as the materials produced by its monitoring body, the Committee on the Elimination of Racial Discrimination (CERD).

Similar to the other instruments, the definition of discrimination includes the *effect* (not only the purpose) of a distinction, exclusion, restriction or preference (ICERD, Article 1). Language requirements and policies can sometimes have a racially discriminatory impact and could therefore amount to indirect discrimination. The CERD has confirmed that “[t]he principle of equality underpinned by the [ICERD] combines formal equality before the law with equal protection of the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles” (2009b, ¶ 6). The right to education without discrimination in Article 5(e)(v) of the Convention should therefore be read with reference to a substantive equality principle. Thus where language policies reduce accessibility to education or otherwise negatively impact linguistic minorities in effect – even if they appear “neutral” on their face - then they would contravene the Convention.

The Convention's general obligations also require that states take positive measures to address *de facto* discrimination in certain circumstances to achieve the rights of both individuals and groups. Article 1(4) – which forms part of the Convention's elaboration of the definition of racial discrimination – clarifies that “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*” (emphasis added). Article 2 provides that “[w]hen the circumstances so warrant” states must “take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”. These measures must not entail, however, “the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.” According to a General Recommendation issued by CERD, “[t]he concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfill obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms” (2009b, ¶ 11).

The Australian High Court referred to the special measures provisions in the ICERD when considering a claim under the Australian Racial Discrimination Act (RDA) which challenged the legality of the Land Rights Act – a law granting special rights to an

indigenous group over traditional lands (*Gerhardy v. Brown*). The plaintiff, who was not a member of that particular indigenous community, argued that the Act discriminated against him because he could not access the land without permission solely based on a racial category. Because the definition of racial discrimination in Australian domestic law duplicates the definition in the ICERD, the court looked to the Convention for guidance. In doing so, it decided that although the Land Rights Act violated the RDA in a formal sense, it fell within the special measures provisions in Articles 1(4) and 2(2) and was therefore an *exception* to the prohibition against racial discrimination.

In a critique of this case, Sadurski highlights an important distinction between special measures as an “exception” and special measures as an element of the obligation to prohibit discrimination. He argues that “[b]y considering the ‘special measures’ as an exception to a general prohibition of racial discrimination rather than ... a proper inference from the principle of non-discrimination, the Court has assumed that racial distinctions are per se discriminatory and invalid, even if they are aimed at the improvement of the situation of traditionally disadvantaged groups”. This is inappropriate since “the test of discrimination must not abstract from the invidiousness of its aims and/or effects ...” (Sadurski, 1986-88, p. 7). Similarly, McKean explains that Articles 1(4) and 2(2) of the ICERD incorporate “the notion of special temporary measures, not as an *exception* to the principle [of non-discrimination] but as a necessary *corollary* to it” and argues that this is “the method by which the twin concepts of discrimination and minority protection can be fused into the principle of equality” (McKean, 1983, p. 159). In their analyses of the special measures provisions in the

Convention, both Sadurski and McKean are essentially distinguishing between formal and substantive equality models.

When commenting on China's state report in 2009 and its obligation to ensure equality and non-discrimination in education in particular, the CERD took note of China's "policy of bilingual education for ethnic minorities" but expressed concern about reports that in practice "Mandarin is the sole language of instruction in many schools in the autonomous minority provinces". It recommended that China intensify its efforts to ensure implementation of bilingual education at all levels. It also recommended that China ensure that special measures "to promote access to education for children of ethnic minorities" are available in practice (CERD, 2009a, ¶ 22).

The Content of a Right to Education

Although the ICCPR, ICESCR, CRC, and ICERD present a general framework for equality in education which requires attention to special measures and the rights of linguistic communities, the specific content of the right to education has been more difficult to identify. Fredman points out that this is true because "more than any other socio-economic right, education can be provided according to a range of different models with differing emphases on various elements including mother tongue instruction" (2008, p. 220). In fact, a formulaic response is not desirable given this diversity of situations. Fredman advocates for reliance instead on "prima facie principles" when interpreting the right to education and determining whether states have fulfilled their obligations (2008, p. 220). She refers to a set of four criteria proposed by the Committee on Economic, Social

and Cultural Rights and Katarina Tomaševski, the former UN Special Rapporteur on the Right to Education, known as the “4-A” scheme. The first – “availability” - requires that states ensure the necessary infrastructure, institutions, functional programmes, etc. in sufficient quantity. The second, “accessibility”, goes one step further by mandating that education also be accessible to all in a non-discriminatory manner. Third, education must meet standards of “acceptability” in terms of culture, language and religion. Finally, it must demonstrate “adaptability” to changing circumstances (Tomaševski, 1999; Fredman, 2008, p. 220; Marks & Clapham, 2005, pp. 138-141). This scheme – especially its flexibility and attention to context and actual disadvantage – reflects and supports the goals of substantive equality discussed above.

Domestic Implementation in China

Language and education can serve as important vehicles for ensuring the survival of minority cultures as well as means for promoting the national language to meet state-building objectives. China’s minority language education policy and practice demonstrates the difficulties of balancing cultural preservation with the demands of economic development, state-building priorities and access to opportunities available in the majority language (see e.g., Zhou, 2000a, 2000b, 2008, 2010; Johnson & Chhetri, 2002; Postiglione, Zhu, & Jiao, 2004; Clothey, 2005; Nima, 2008). The international human rights treaties discussed above elaborate a principle of equality which, in conjunction with a right to education and other relevant standards, can arguably inform these balancing efforts and support effective approaches toward minority language

education. Nevertheless the implementation of these standards in domestic law and practice is often fraught with difficulties.

This section considers the limits of China's domestic legal framework as a means of achieving substantive equality and minority language rights in education. It also notes a number of language policies and practices which could undermine the realization of *de facto* equality. As Feng argues, "there is a potentially vicious cycle in which social stratification can be exacerbated by inappropriate language policies, which may result in more severe inequality in education, and in turn lead to further social and ethnic divisiveness" (2009, pp. 98-99). To fulfill their international obligations, the Chinese authorities must refrain from implementing language policies which cause disadvantage (duties of restraint) as well as proactively take measures to correct and remedy the effects of past discrimination (positive duties).

The arrangements for regional national autonomy in the PRC – expressed in the Constitution of the People's Republic of China (Constitution), the Law of the People's Republic of China on Regional National Autonomy (LRNA) and various policy documents – serve as the key legal and political tools for addressing issues of diversity, and define the parameters within which language policy can develop. The Constitution and the LRNA both contain protections for minority language rights. Article 4 of the Constitution – reflected in Article 10 of the LRNA - guarantees the freedom for minorities "to use and develop their own spoken and written languages" (Constitution, 1984 and LRNA, 1984). Article 121 grants "the organs of self-government of the national autonomous areas" power to "employ the spoken and written language or language in common use in the locality" (Constitution, 1984). Article 134 elaborates a

right to use the spoken and written languages of one's own nationality in court proceedings (Constitution, 1984).

In the context of education, the LRNA allows the organs of self-government in the autonomous areas to decide on “plans for the development of education” in autonomous areas, “the establishment of various kinds of schools at different levels, and their educational system, forms, curricula, the language used in instruction and enrollment procedures” (LRNA, Article 36). In addition, when most students come from minority communities, schools shall, whenever possible, use textbooks in the minority language and use that language as the medium of instruction (Article 36). At the same time, Chinese must be taught whenever possible at the junior and senior grades of primary school. Previously Chinese language was promoted at a later stage of education. This provision was amended in 2001, however, and is indicative of a shift in language policy during the past decade toward a greater emphasis on learning Chinese and the increasing dominance of the majority language (Zhou, 2008, p. 6 and 2010).

Although these documents apparently guarantee minority rights – including the use of minority languages in education – full realization of these rights in practice is often limited by competing political imperatives including the authorities' central concerns with state unity and economic development. In China, as in many countries, the use or promotion of a language often has real or perceived political ramifications which may create obstacles to the enjoyment of minority language rights. Political priorities are reflected in the text of the law itself and demonstrated by the realities of state control. The provisions in Chinese law related to minority rights and ethnic autonomy must be read in conjunction with overarching principles including 1) the unitary nature of the

Chinese state, 2) the supremacy of the Chinese Communist Party, 3) the exercise of autonomy powers under unified state leadership and 4) the need for autonomous areas to “place the interests of the state as a whole above anything else and make positive efforts to fulfill the tasks assigned by the state organs at higher level” (LRNA, Article 7; see discussion of these provisions in Ghai, Woodman & Loper, 2010, pp. 152-3). He Baogang points out that cultural autonomy may be possible for minorities except where it involves activities which threaten the unity of the state (He, 2005).

State control is also evident in the role the Chinese authorities have played in defining minority cultural identity, including language, and interpreting the “authentic” expression of that identity. For example, Schiaffini argues that while there had been a zealous “destruction” of cultural identity in Tibet in the past, especially during the Cultural Revolution, the state has been “reconstructing” this identity with equal measure of zealotry. She notes that after the Cultural Revolution, the Chinese Government, “[b]y publicly proclaiming the rights of ethnic minorities and promoting the official reconstruction of ethnic identities”, was actually “legitimizing and reinforcing its own rule over them” (Schiaffini, 2004, p. 85). This theme of the state’s construction - or reconstruction - of minority culture is emphasized in a number of official documents. For example, a State Council White Paper on the Protection and Development of Tibetan Culture asserts that after the liberation of Tibet, the Central People’s Government “actively helped Tibet protect and recover its traditional culture, and develop its modern cultural, educational and health sectors, opening up a completely new chapter for the development of Tibetan Culture” (2008, Foreword).

Language policies developed in response to state-building and economic priorities reflect this emphasis on the state's control of identity construction and often fail to support substantive equality for members of minority communities. Indeed, scholars have documented the link between language strategies and China's objectives of reform and state unification. Research indicates that in many cases these imperatives have given rise to inequalities and exacerbated – or at least failed to alleviate – the marginalization of minority communities. MacPherson (Chapter 11 in this volume) observes that “[t]oday in China and other states the dominant ideology driving language policy decisions ... involve the appropriation of ‘modernization’ and ‘globalization’” and that “[d]omestic policies are transacted on the assumption of the ends of secularization and economic integration and a ‘citizenry’ reduced to a ‘workforce’”. In this context, indigenous language is viewed as having little economic value. Zhou (2010) notes that economic development is one factor affecting the implementation of the PRC's language policy at the local level. Economic reforms have fuelled the demand for a “lingua franca to serve communication needs” and *Putonghua* has taken up this role (Zhou, 2011). Zhou argues that *Putonghua* has experienced a “revolution” and has developed “from a state-endorsed language to one that is endorsed by the state and empowered by the market” (2011). Ma remarks on the trend toward greater bilingual teaching (in minority languages and *Putonghua*) for minority students in Xinjiang and the need for mastery of *Putonghua* to compete in the job market (2009). He also observes that even with the strengthening of *Putonghua* teaching in minority schools, significant differences in performance standards between Han and minority students persist.

Another result of a “reduced public commitment to Indigenous language education” – and potential obstacle to realizing minority language rights in education - is the “increasing use of boarding schools that relocate cohorts of Tibetan and Uyghur students in distant Han communities and schools in Central China, thereby dislocating students culturally and geographically (MacPherson, 2011).

Reforms have also spurred the “unprecedented” development of English language education (Feng, 2009). In some minority regions, English language is promoted and provided to both minority and majority students. In Xinjiang, however, studies indicate that most minority students have not been not offered English instruction (Feng, 2009). Feng suggests that it may be possible for pupils from Tibetan and Uyghur communities to become empowered through learning English as a third language but this is more likely if the system alleviates disadvantage by fully honouring their “home language” and allowing them to take high-stakes examinations in their mother tongue rather than in *Putonghua* (Feng, 2009, p. 96).

Further research on the impact of these policies on minority identity and on the nature of any disadvantage is needed in order to evaluate China’s implementation of its legal obligations to ensure substantive equality. As discussed above, fulfilling a right to substantive equality as mandated by the international human rights instruments applicable to China requires attention to the actual situation and the development of special measures tailored to the specific circumstances. Therefore, sound empirical research – beyond a review of legal and policy documents - is needed to understand how language policies may entrench or reinforce social and economic marginalization in practice. Feng calls for “extensive research” in order to “inform policy making and to develop models

that are workable for different minority groups in different contexts” and remarks that “the role of researchers is undeniably crucial” (2009, pp. 98 & 99).

Conclusion

The approaches to minority language education in China discussed in this volume and elsewhere demonstrate the difficulties involved in balancing the exigencies of diversity, accommodation, integration and participation. Marks and Clapham note that education can function as an instrument of both state control as well as individual empowerment (2005: 133-134). Because substantive equality emphasizes the latter, implementation of a right to equality in education as required by international law should ensure that state-building imperatives do not negate the expression of identity, including the use of a minority language. Further incorporation and adherence to the international legal standards considered above could serve to reconcile competing objectives and mitigate obstacles such as the perceived political nature of culture and attempts by the state to control and determine the attributes of authentic minority identity.

Substantive equality can help inform this process since it acts as a balancing principle which demands attention to actual disadvantage and is measured according to its capacity to ensure dignity, minority identity, and participation. If the scale is tipped too far toward isolation and exclusion, equality can shift it back toward integration. If on the other hand a culture is in danger of assimilation and identity rights are at stake, then substantive equality can serve as the basis for modifications to restore equilibrium. The appropriate formula will depend on the specific situation in question and cannot conform

to a standard equation. Substantive equality is particularly helpful since it recognizes the importance of context. It therefore requires vigilance and continual reevaluation of the placement of groups within social hierarchies. It is empirical and practical and recognizes the rights of minorities as a community as well as the rights of individuals within those communities, other communities and individuals in society.

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