

Substantive Equality in International Human Rights Law and its Relevance for the Resolution of Tibetan Autonomy Claims

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I. Introduction

In an effort to balance conflicting rights and interests, many

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plural societies attempt to devise measures that protect the identity rights of minority communities while simultaneously allowing for the integration and full participation of all groups and individuals in public life. These objectives are difficult to realize in practice, however, and the nature of the solutions often depends on the degree of marginalization experienced by minority groups and the strength of their claims. This article contends that international human rights law can inform the process of developing effective approaches and choosing between (or finding the right mix of) policies that emphasize accommodation or support integration. At the same time, the application of human rights standards can prevent the assimilation of minorities against their will and help determine where a given policy falls along an accommodation-assimilation spectrum.

The right to equality, as expressed in core human rights treaties and interpreted by their monitoring bodies, has particular resonance for minorities, because they often experience unfair treatment based on membership in a group identified by difference.¹ Reliance on a formal notion of equality, however, may not effectively address entrenched, systemic discrimination and may even pressure minorities to assimilate.² Developments in international law which clarify that equality must be understood according to a substantive theory, rather than a “colour-blind” equal treatment model, have revitalized the principle’s potential to contribute to more effective minority protection.³

China, the most populated multicultural society in the world with fifty-six officially recognized ethnic groups including the

¹ See, e.g., International Covenant on Civil and Political Rights, Oct. 5, 1967, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

² See Sandra Fredman, *The Future of Equality in Great Britain* (Equal Opportunities Commission, Working Paper No. 5, 2002). Fredman points out that “[e]arlier ideals behind equality legislation assumed that the aim was to free individuals from their group characteristics.” This notion of equality, however, “ignores the fact that cumulative disadvantage makes it difficult for members of out-groups to attain the prerequisite merit criteria. It also disregards the positive aspects of group identity, aiming at assimilation rather than pluralism.”

³ See *id.*

Han majority, also faces these challenges.⁴ Since reforms took off in the early 1980s, China has experienced explosive economic growth.⁵ Its increasingly global outlook and quest to strengthen state-building efforts have influenced its approach to minority claims.⁶ Rapid development, modernization priorities, and increasing investment in outlying minority areas have not alleviated the disaffection of certain groups, and in many cases have contributed to the intensification of inequalities and unrest in these regions.⁷

This article considers the applicability of the right to equality in international human rights law, to the case of the Tibetans in China whose efforts to achieve self-determination and “genuine” autonomy represent one of the world’s longest running, intractable ethnic conflicts. Ethnic unrest has continued in Tibetan regions, and discussions between the Chinese authorities and envoys of the Tibetan government-in-exile have failed to produce results.⁸ Studies reveal extreme social and economic inequalities in Tibet and suggest that China’s current strategy continues to place Tibetan identity at risk.⁹ This analysis focuses on Chinese educational policy in particular, especially the teaching and use of the Tibetan language in the educational context. Language is an important marker of identity for many minority communities, including the Tibetans, and provides a key medium through which members of a group can comprehend, develop, and perpetuate

⁴ For a discussion of minorities in the Chinese context, see JUNE TEUFEL DREYER, CHINA’S FORTY MILLIONS: NATIONAL MINORITIES AND NATIONAL INTEGRATION IN THE PRC (1979); COLIN MACKERRAS, CHINA’S ETHNIC MINORITIES AND GLOBALISATION (2003); ETHNIC MINORITIES IN MODERN CHINA: CRITICAL CONCEPTS IN ASIAN STUDIES (Colin Mackerras ed., 2011).

⁵ *Id.* at 7.

⁶ *Id.* at 5.

⁷ *See id.* at 56-76.

⁸ *See, e.g.,* Jiangtao Shi, “Middle Way” Unlikely to Bring Softer Stance, SOUTH CHINA MORNING POST, Nov. 24, 2008, at 6; RECOMMENDATION OF THE FIRST SPECIAL GENERAL MEETING CONVENED UNDER ARTICLE 59 OF THE CHARTER (Nov. 22, 2008), <http://www.tibet.net/en/index.php?id=595&articletype=flash&rmenuid=morenews&tab=1>.

⁹ *See* Seonaigh MacPherson & Gulbahar Beckett, *The Hidden Curriculum of Assimilation in Modern Chinese Education: Fuelling Indigenous Tibetan and Uyghur Cessation Movements*, in CULTURAL EDUCATION-CULTURAL SUSTAINABILITY 103, 116-18 (Zvi Bekerman & Ezra Kopelowitz eds., 2008).

their cultural identity.¹⁰ Education also plays a prominent role in this process and may either exacerbate or mitigate conflict while encouraging ethnic diversity or promoting assimilation.¹¹ Therefore, a consideration of the impact of Tibetan education and language policies demonstrates the tensions involved when choosing between measures which emphasize the accommodation of minority rights and those which respond to the imperatives of integration.

China has become increasingly engaged with the international human rights system, although questions remain about whether it has been, or will be, more of a “shaper” or “taker” of human rights norms.¹² China’s desire to bolster its legitimacy through this involvement creates opportunities for discussion of pluralism and minority rights at the domestic level and enhances the capacity of the standards to contribute to the resolution of Tibetan claims.¹³ The Tibetan situation allows for an examination of how a right to substantive equality may apply in a particularly difficult situation, and tests the limits of the scope and potential of equality to address identity claims.

Section II of this article provides an overview of the international human right to equality and non-discrimination. It examines (1) the definition of discrimination; (2) the general obligations of state parties to specific treaties, including the requirement to take special measures in certain circumstances; and (3) the content of a right to equality and non-discrimination in

¹⁰ *See id.*

¹¹ *See id.* at 106-09.

¹² Andrew J. Nathan, *Human Rights in Chinese Foreign Policy*, 139 CHINA Q. 622, 643 (1994) (“So long as democratization and promotion of rights remain dominant world trends and China remains outside the trend, human rights are likely to remain a structural weakness for China’s diplomacy. China will be a taker, not a shaper, of emerging world norms and institutions in the rights field, just as it is in the economic field where it has to adjust to norms favoured by economically more powerful trading and investment partners.”). *See generally* ANNE E. KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY (2007) (discussing China’s interaction with the international human rights system); ANNE E. KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999) (discussing China’s interaction with the international human rights system); Sophia Woodman, *Human Rights as “Foreign Affairs”*: China’s Reporting Under Human Rights Treaties, 35 H.K.L.J. 179 (2005) (discussing China’s interaction with the international human rights system).

¹³ *See* Woodman, *supra* note 12, at 201-03.

education. Section II references relevant provisions in the International Convention on the Elimination of all Forms of Racial Discrimination (hereinafter “ICERD”), the International Covenant on Economic, Social, and Cultural Rights (hereinafter “ICESCR”), and the Convention on the Rights of the Child (hereinafter “CRC”). These treaties apply to China and create binding duties in international law on the Chinese state to ensure non-discrimination on the grounds of race and ethnicity, among other markers of identity.¹⁴ This section also analyzes the interpretive materials produced by the committees and treaty bodies tasked with monitoring states’ implementation of their obligations under the ICERD, the ICESCR, and the CRC. The interpretive materials clarify that the right to equality is grounded in a substantive theory which demands an inquiry into the actual disadvantages facing particular groups.¹⁵

Depending on the outcome of that analysis, the right to equality may also necessitate the reordering of social and economic hierarchies through the application of positive measures.¹⁶ This sometimes involves preferential treatment to achieve de facto equality and real participation.¹⁷ Similarly, equality may require a degree of space, such as geographical separation and self-government, for the protection and development of minority identity, but it also guards against segregation based on racist policies.¹⁸ If differential treatment and appropriate space result in the improvement of a group’s status vis-à-vis a dominant community, this can enhance the group’s ability to integrate without assimilating. Therefore, the right to substantive equality calls for attention to both the protection of

¹⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S 3 [hereinafter CRC]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S 3 [hereinafter ICESCR]; ICERD, *supra* note 1, art. 1, ¶ 1, art. 2, ¶ 1.

¹⁵ *See, e.g.*, U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, ¶¶ 7-8, Aug. 3-28, 2009, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter CERD, General Recommendation No.32]

¹⁶ *See id.* ¶¶ 6, 19-22.

¹⁷ *Id.*

¹⁸ *See id.* ¶¶ 19-20.

minority identity rights as well as rights to minority participation in the larger public arena.

Section III of this article considers the establishment of autonomy arrangements for minority groups within states as a potential solution for ethnic conflict. This section likewise explores whether such mechanisms are consistent with the principle of substantive equality discussed in Section II. Autonomy is understood in this article as an arrangement designed to allow minority communities an amount of self-government to exercise their collective rights and make their own decisions about the use of language, religious practices, and other aspects of culture.¹⁹ In certain situations, autonomy arrangements may serve as valuable or even necessary tools for actualizing substantive equality. In some circumstances, including the Tibetan case, the full realization of minority rights and substantive equality may necessitate an effective autonomy arrangement.

Section IV considers the application of an international right to substantive equality to the Tibetan case. It reviews the framework for regional ethnic autonomy in China, which serves as the cornerstone of China's minority policy as set out in the 1982 Constitution of the People's Republic of China (hereinafter "Chinese Constitution"),²⁰ and the 1984 Law on Regional Ethnic Autonomy (as amended in 2001) (hereinafter "Autonomy Law").²¹ Section IV also provides an overview of the impact of education and language policies on the Tibetans' rights to cultural identity and participation. It examines evidence of systemic discrimination against the Tibetans and the apparent failure of current measures to alleviate these inequalities. Language plays a key role in defining and maintaining Tibetan identity, while the acquisition of the majority Han Chinese language (*putonghua*) often determines access to a variety of resources, including educational and employment opportunities.²² Education is considered crucial to

¹⁹ See generally HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING CONFLICTING RIGHTS* 4 (1996) (discussing autonomy in constitutional and international law).

²⁰ XIANFA (1982) (China).

²¹ Law of the People's Republic of China on Regional National Autonomy (promulgated by Order Number 13 of the President of the People's Republic of China, May 31, 1984, effective Oct. 1, 1984).

²² See MacPherson & Beckett, *supra* note 9, at 16-18 (discussing the interactions

social and economic advancement in Chinese society, and the language used in education has profound implications for the protection of identity as well as the ability to function in a society dominated by a majority language.²³ Therefore, debates about language policy in education demonstrate the tensions inherent in resolving minority identity claims while ensuring full participation.

Section V concludes that current Chinese policies are inadequate to ensure the realization of substantive equality for the Tibetans and should be reevaluated with reference to international human rights standards. Substantive equality may, perhaps paradoxically, require the strengthening of autonomy in order to shield the Tibetans from countervailing forces and state priorities which could undermine their equal enjoyment of identity rights. An autonomy framework conceptualized and implemented according to substantive equality objectives may help alleviate concerns that Tibetan demands for genuine autonomy are motivated by separatist tendencies.

The flexibility of a substantive equality principle, with its calls for empirical analysis, constant vigilance, and readjustment of policies, renders it particularly useful as a device for managing minority claims.²⁴ This discussion does not suggest that solutions are obvious or easily achieved in practice; nor does it suggest that standards such as self-determination should be abandoned. It merely proposes that equality can assist, to a greater extent than is often realized, in the process of identifying and implementing effective approaches and in alleviating tensions between the demands of accommodation and integration. This article also

between language, culture, and jobs).

²³ *Id.* at 108-09. (“[Certain forms of] cultural knowledge depend on some formal of education for transmission and continuity. . . . [A]reas of ‘traditional’ cultural knowledge are precisely those subject areas and contents marginalized within modern curricula and, hence, most threatened by processes of modernization and globalization. The local language shift and loss that accompanies such curricular changes further undermines the sustainability of these local cultural knowledges and practices by creating linguistic, epistemic, and cultural gaps. In this way, changes in education and curriculum can have a dramatic effect on the sustainability of small non-dominant cultures.”).

²⁴ *See generally* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED 179-80 (2008) (discussing a substantive approach to equality).

highlights the consistency of some seemingly “unequal” measures, such as autonomy, with a richer substantive equality doctrine.

II. Substantive Equality in International Human Rights Law

A. Substantive Equality Theory and Minority Rights

This discussion of equality and minority rights alludes to a broader debate about the extent to which human rights law, generally conceptualized as a framework for protecting the rights of individuals, can address group-based minority claims.²⁵ This article takes the position that international human rights standards allow for flexibility and a contextual approach to implementation, and they therefore have transformative potential for realizing collective and individual rights as well as for reconciling identity claims. Yash Ghai notes that “[r]ights are rarely absolute; there are various mechanisms for balancing different interests that inhere in or surround the right.”²⁶ He observes that “[t]he framework of rights has been used with considerable success in mediating competing ethnic and cultural claims” and that “[a]s the cultural problems of more and more states take on a common form, a new version of human rights is emerging.”²⁷ Fernand De Varennes, writing about minority language rights, similarly argues that human rights “provide a flexible framework capable of responding to many of the more important demands on individuals, minorities or linguistic groups.”²⁸ Yoram Dinstein clarifies that collective rights may be categorized as “human” rights and realized within a human rights framework, since group-based rights are still provided to human beings directly.²⁹ Unlike individual rights, “[c]ollective human rights are afforded to human beings communally, that is to say, in conjunction with one another

²⁵ See generally Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 102-03 (1976) (discussing concepts of collective and individual claims and their relations to human rights).

²⁶ Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1099 (2000).

²⁷ *Id.*

²⁸ FERNAND DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS 275 (1996).

²⁹ Dinstein, *supra* note 25, at 102-03.

or as a group.”³⁰

A contextual interpretation of human rights implies that states may need to take affirmative measures to ensure respect for collective identity rights and to fulfill their obligations to address systemic discrimination.³¹ Sandra Fredman comments that the full realization of human rights requires more than negative duties of restraint.³² Positive action is necessary, because “[h]uman rights are based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position to actually enjoy those rights.”³³ Fredman’s position depends, to some degree, on whether an individual is a member of a group characterized by difference.³⁴ Formal state neutrality, and the exercise of restraint which it implies, does not lead to impartial results where social hierarchies exist.³⁵

The effectiveness of a right to equality in contributing to human freedom and rights depends to a large extent on the concepts underpinning the legal standard of equality, as well as the measures taken by states to implement their obligations under the standard.³⁶ Formal and substantive equality support different and potentially inconsistent outcomes.³⁷ Formal equality is “color-blind,” demanding that “likes be treated alike,” and can often

³⁰ *Id.* But see Patrick Macklem, *Minority Rights in International Law*, 6 INT’L. J. CONST. L. 531, 533 (2008) (“The claim that a minority population possesses rights that shield it from assimilative tendencies of a majority population fits uncomfortably with a conception of international human rights law as a field devoted to protecting essential features of what it means to be human. . . . [Human rights as a field] is attentive to the various forms of discrimination and marginalization that minorities may experience. Beyond this level of protection, however, minority rights run counter to the aspiration of international human rights law to protect universal, not contingent, features of human identity.”).

³¹ See FREDMAN, *supra* note 24, at 9-10.

³² *Id.* at 9.

³³ *Id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ See generally Beverly Baines & Ruth Rubio-Marín, *Introduction to CONSTITUTING WOMEN: THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 13-14 (Beverly Baines & Ruth Rubio-Marín eds., 2004) (introducing different conceptions of equality).

³⁷ See *id.*

dismantle obvious, unjustifiable race-based classifications.³⁸ Substantive equality, however, requires a careful evaluation of the context and the actual disadvantage faced by identifiable groups and individuals as a result of their group membership.³⁹ When minority communities attempt to exercise their human rights from unequal starting points, then the strict application of a formal equality principle could result in de facto discrimination.⁴⁰ “Substantive equality [however] tries to identify [and correct] patterns of oppression and subordination.”⁴¹ A robust equality principle, therefore, requires an empirical assessment of the relative disadvantage of the group concerned, the past and ongoing discrimination it has faced, the impact of apparently neutral measures on relevant communities, and other factors, such as the uniqueness of the group’s culture, and, in the extreme, possible threats to its survival.⁴²

Fredman advocates for a vision of equality aimed at achieving four primary objectives, which reflect a substantive theory.⁴³ These include: (1) the “promot[ion of] respect for the equal dignity and worth of all, [to] redress[] stigma, stereotyping, humiliation, and violence because of membership of an out-group”; (2) the “accommodation and positive affirmation and celebration of identity within community”; (3) the “break[ing of] the cycle of disadvantage associated with status-groups”; and (4) the “facilitat[ion of] full participation in society.”⁴⁴ Fredman 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.”⁴⁵ Achieving these goals may require positive duties, special measures, and other forms of adaptation and accommodation.⁴⁶ This enriched understanding of equality can enhance the principle’s transformative potential and its ability to

³⁸ See generally *id.* (describing formal equality in the context of gender issues).

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ See generally Baines & Rubio-Marin, *supra* note 36, at 13-14.

⁴² *Id.* (discussing definition of substantive equality).

⁴³ FREDMAN, *supra* note 24, at 179.

⁴⁴ *Id.* at 179-80.

⁴⁵ *Id.* at 180.

⁴⁶ *Id.* at 179.

support the resolution of minority claims, even, or perhaps especially, claims made by groups facing particularly extreme marginalization.⁴⁷

B. International Instruments

Fredman's conception of equality is reflected in the international legal right to equality and non-discrimination, as set out in the texts of key human rights treaties, and as interpreted by the U.N. human rights treaty monitoring bodies.⁴⁸ Equality is a foundational principle of the human rights regime and is articulated in most of the core human rights instruments.⁴⁹ This discussion focuses on the prohibition of discrimination in the ICERD, which includes a free standing right to racial equality;⁵⁰ the ICESCR, which requires substantive non-discrimination in the guarantee of social and economic rights;⁵¹ and the CRC, which also requires non-discrimination.⁵² These treaties obligate states to secure substantive equality on the basis of ethnicity or race, and therefore are relevant to the protection of racial and ethnic minorities' rights.⁵³ These treaties also apply to China and create binding duties on the Chinese state as a matter of international law.⁵⁴

⁴⁷ See *id.* at 179-80.

⁴⁸ See, e.g., CRC, *supra* note 14, art. 2, ¶¶ 2-3; ICESCR, *supra* note 14, art. 2, ¶¶ 1-2; ICERD, *supra* note 1, art. 2, ¶¶ 1-2.

⁴⁹ See generally U.N. OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, WHAT ARE HUMAN RIGHTS, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (last visited Oct. 22, 2011) (introducing human rights and equality).

⁵⁰ ICERD, *supra* note 1, art. 5.

⁵¹ ICESCR, *supra* note 14, art. 2, ¶ 2.

⁵² CRC, *supra* note 14, art. 2, ¶ 1.

⁵³ See *id.*; ICESCR, *supra* note 14, art. 2, ¶ 2; ICERD, *supra* note 1, art. 5. It should be noted that Article 2(1) and Article 26 of the ICCPR are also relevant and contain rights to equality and non-discrimination provisions which stand alone and are contingent on the rights contained in the Covenant. Article 22 of the ICCPR provides an explicit right for persons belonging to ethnic, religious or linguistic minorities not to be denied "the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." This article will not consider these standards in depth, however, since China has not yet ratified the ICCPR, despite having signed the treaty in 1998. ICCPR, *supra* note 1.

⁵⁴ CRC, *supra* note 14; ICESCR, *supra* note 14.

The ICERD was adopted in 1965 and entered into force in 1969.⁵⁵ It prohibits all forms of racial discrimination, as defined in Article 1, and places both positive and negative duties on states to ensure racial equality.⁵⁶ China acceded to the ICERD in 1981 and has submitted six reports to the Committee on the Elimination of Racial Discrimination pursuant to Article 9,⁵⁷ which requires states to report every two years and to provide details of “the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of th[e] Convention [ICERD].”⁵⁸

The ICESCR was adopted in 1966, entered into force in 1976, and is one of three documents constituting the International Bill of Human Rights.⁵⁹ The ICESCR recognizes core economic, social, and cultural rights, such as the rights to work, to social security, to an “adequate standard of living, . . . to enjoyment of the highest attainable standard of physical and mental health,” and to education.⁶⁰ Article 2 sets out the general obligations on states parties to “take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the [ICESCR] rights . . . by all appropriate means.”⁶¹

⁵⁵ ICERD, *supra* note 1. *See generally* MICHAEL BANTON, INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION (1996) (discussing the history of the ICERD); Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 135, 149-76 (Sandra Fredman ed., 2001) (discussing the history of the ICERD).

⁵⁶ ICERD, *supra* note 1, art. 1, ¶¶ 1-2, art. 2, ¶ 1.

⁵⁷ U.N., REPORT STATUS BY COUNTRY, <http://www.unhchr.ch/tbs/doc.nsf/NewhvVAlISPRByCountry?OpenView&Start=1&Count=250&Expand=36.4#36.4> (last visited Oct. 23, 2011).

⁵⁸ ICERD, *supra* note 1, art. 9, ¶ 1. *See generally* Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 244-46 (2005) (discussing the reporting process). The Convention contains more frequent reporting obligations than other human rights treaties, and overdue reports have been a persistent problem for the Committee, which sometimes considers combined reports from states. Boyle & Baldaccini, *supra* note 55, at 170-71. For example, China’s most recent report integrated its tenth, eleventh, twelfth, and thirteenth reports in one document. U.N., REPORT STATUS BY COUNTRY, *supra* note 57.

⁵⁹ ICESCR, *supra* note 14; U.N. Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights (1996) (noting that the other two documents included in the bill are the UDHR and the ICCPR).

⁶⁰ ICESCR, *supra* note 14, art. 6, ¶ 1, art. 9, art. 11, ¶ 1, art. 12, ¶ 1, art. 13, ¶ 1.

⁶¹ *Id.* art. 2, ¶ 1.

States also have an immediate obligation to ensure that the rights in the ICESCR “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶² China ratified the Covenant in March 2001 and has submitted two reports to the Committee on Economic, Social and Cultural Rights in accordance with Articles 16 and 17.⁶³

The CRC was adopted in 1989, entered into force in 1990, and has achieved near universal acceptance.⁶⁴ Article 2 sets out a general non-discrimination provision, which is similar to its counterpart in the ICESCR.⁶⁵ It mandates that “States Parties shall respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁶⁶ China ratified the CRC in March 1992 and has submitted three state reports to the Committee on the Rights of the Child pursuant to Article 44.⁶⁷

The provisions in these treaties, especially when read alongside the relevant interpretive materials produced by the treaty bodies, clarify that a right to equality and non-discrimination in the ICERD, the ICESCR, and the CRC demands the realization of substantive equality.⁶⁸ This is evident from the definition of discrimination, which includes indirect and unintentional discrimination, the positive duties on states to eliminate de facto discrimination and achieve substantive equality, and the requirement to take special measures targeting individuals or

⁶² *Id.* art. 2, ¶ 2. This general obligation of non-discrimination in the ICESCR essentially mirrors its counterpart provision in the ICCPR.

⁶³ ICESCR, *supra* note 14; U.N., REPORT STATUS BY COUNTRY, *supra* note 57.

⁶⁴ CRC, *supra* note 14.

⁶⁵ *See id.* ¶ 1.

⁶⁶ *Id.*

⁶⁷ *Id.*; U.N., REPORT STATUS BY COUNTRY, *supra* note 57.

⁶⁸ *See, e.g.*, U.N. Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9, Turkmenistan, Aug. 2-19, 2005, U.N. Doc. CERD/C/TKM/CO/5, 67th Sess. (Nov. 1 2005) [hereinafter Turkmenistan].

groups when warranted by the circumstances.⁶⁹ The following analysis more thoroughly reviews these standards and contemplates their implications for the protection of collective minority claims and for the securing of rights to participation without sacrificing minority identity.

C. The Meaning of Discrimination

The meaning of “discrimination,” as expressed in the human rights treaties and interpreted by the treaty bodies, clearly supports a substantive equality doctrine.⁷⁰ The word implies discrimination in both its direct and indirect forms, therefore recognizing that sometimes formal equal treatment can nevertheless violate the right to equality.⁷¹ It also specifies that special measures designed to transform social and economic hierarchies—which affect groups and individuals in order to achieve substantive equality—are not discriminatory and should not be characterized as exceptions to the non-discrimination principle.⁷²

The concept of “racial discrimination” is explicitly elaborated in the ICERD and further clarified by the Committee on the Elimination of Racial Discrimination.⁷³ Although the ICESCR and the CRC prohibit discrimination in the application of the rights under those instruments, the term is not defined within their texts. Their monitoring bodies, the Committee on Economic, Social, and Cultural Rights and the Committee on the Rights of the Child, have reflected on its meaning, however, when clarifying state obligations under those instruments.

Article 1 of the ICERD defines racial discrimination, the ICERD’s core concept, as any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.⁷⁴

⁶⁹ See CRC, *supra* note 14; ICESCR, *supra* note 14; ICERD, *supra* note 1.

⁷⁰ See, e.g., ICERD, *supra* note 1.

⁷¹ See, e.g., *id.*

⁷² See, e.g., *id.* art. 1, ¶ 4.

⁷³ See, e.g., Turkmenistan, *supra* note 68.

⁷⁴ ICERD, *supra* note 1, art. 1, ¶ 1.

Such a broad understanding of discrimination, as well as the meaning of “race,” which includes identities based on ethnic and cultural characteristics, social background, and color, places the concerns of many ethnic groups squarely within the ICRD’s remit and renders the treaty particularly relevant to the protection of minority rights.⁷⁵ In this regard, the Committee has commented in its concluding observations on state reports that the ICRD obligates states to adopt positive measures to protect the identity of minority communities and prevent assimilation.⁷⁶

The words “purpose or effect” in the ICERD’s definition indicate that the treaty covers both intentional and unintentional acts as well as direct and indirect discrimination.⁷⁷ Indirect discrimination occurs when the application of apparently neutral criteria disproportionately and negatively impacts members of a particular racial or ethnic group, sometimes requiring group-based approaches to eradicate structural inequalities.⁷⁸ The prohibition of indirect and unintentional discrimination demonstrates the ICERD’s recognition that strict neutrality and formal equal

⁷⁵ See generally Kristen Henrard, *The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies*, 14 INT’L J. ON MINORITY & GROUP RIGHTS, 141, 141-42 (2007) (discussing the relevance of human rights treaties to the protection of minority rights and arguing that the ICERD is of particular importance to minorities).

⁷⁶ See, e.g., Turkmenistan, *supra* note 68, ¶ 12 (“[The] policies of forced assimilation amount to racial discrimination and constitute grave violations of the Convention. [The Committee] urges the State party to respect and protect the existence and cultural identity of all national and ethnic minorities within its territory.”); see also CERD, General Recommendation 21: Right to Self-determination, ¶ 5, U.N. Doc. A/51/18 (Aug. 23, 1996) (“In accordance with article 2 of the [ICERD] and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups. . . . Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups . . . where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.”); Kristin Henrard, *supra* note 75, at 142 (“In its *Concluding Observations on Turkmenistan* of 2005, the Committee even remarked that the prohibition of racial discrimination actually entails not only a prohibition of forced assimilation, but also a positive duty to protect and promote the cultural identity of minorities.”).

⁷⁷ ICERD, *supra* note 1, art. 1(1).

⁷⁸ U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in Economic, Social, and Cultural Rights (art. 2, ¶ 2, of the ICESCR), ¶ 20, May 4-22, 2009, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR, General Comment No. 20]

treatment are insufficient to address all forms of discrimination.⁷⁹ An evaluation of context, such as the impact of group membership on accessing resources, is necessary.⁸⁰ The Committee notes that:

The term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect. . . . The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.⁸¹

The ICERD also indicates what racial discrimination does *not* include.⁸² Article 1(2) excludes distinctions between citizens and non-citizens, although the Committee has interpreted this provision narrowly.⁸³ Article 1(4) 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*, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁸⁴

⁷⁹ *Id.*

⁸⁰ See CERD, General Recommendation No. 32, *supra* note 15.

⁸¹ *Id.* ¶ 8.

⁸² ICERD, *supra* note 1, art. 1(2).

⁸³ See Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non Citizens, ¶ 2, U.N. DOC. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005) [hereinafter CERD].

⁸⁴ ICERD, *supra* note 1, art. 1(4) (emphasis added).

If evaluated according to a formal equality theory, special measures that constitute differential treatment based on racial classifications could appear to contravene the equality principle.⁸⁵ The ICERD's qualification of the definition of discrimination clarifies, however, that race-based differentiation complying with the special measures criteria is not discriminatory.⁸⁶ In other words, "differential treatment" is not the same as "discrimination."⁸⁷ "Differential" treatment must also be distinguished from "preferential" treatment since the latter term implies that the group for which the special measures are designed is in a *better* position than another group (generally the majority) once the measures are applied.⁸⁸ Use of this sort of terminology in relation to special measures belies a formal, rather than a substantive, understanding of equality.⁸⁹ Because of the difference in power relations between groups, special measures targeted at the disadvantaged community are actually designed to "equalize" rather than raise one group above another.⁹⁰ In this sense, they are transformative and such an interpretation opens the door for affirmative policies aimed at advancing the situation of a marginalized group relative to the majority.⁹¹

The Committee explains that the draft text of Article 1(4) was amended from "*should* not be deemed racial discrimination" to "*shall* not be deemed racial discrimination."⁹² It follows that differential treatment designed to rectify de facto inequalities is not discriminatory by definition, and "special measures are not an exception to the principle of non-discrimination but are integral to

⁸⁵ See generally WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 159 (Clarendon Press 1983) (noting that the Commission amended the Sub-Commission's original text to make clear that the measures adopted for the development and protection of racial groups or individuals should not be deemed to be preferential or discriminatory).

⁸⁶ ICERD, *supra* note 1, art. 1(4).

⁸⁷ *Id.*

⁸⁸ See generally CERD, General Recommendation 21, *supra* note 76, ¶¶ 11-18 (discussing the concept of special measures, how they differ from permanent rights, and how countries can implement them).

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 11.

⁹¹ *Id.*

⁹² *Id.* ¶ 20 (emphasis added).

its meaning and essential to [its] project of eliminating racial discrimination and advancing human dignity and effective equality.”⁹³ In his commentary on the ICERD, McKean similarly explains that special measures are necessary for the realization of de facto equality.⁹⁴ He writes that a definition of discrimination “which incorporates the notion of temporary special measures, not as an exception to the principle but as a corollary to it, demonstrates . . . the method by which the twin concepts of discrimination and minority protection can be fused into the principle of equality.”⁹⁵

The Committee elaborates that the phrase “adequate advancement” in Article 1(4) implies that special measures entail “goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights . . . affecting particular groups and individuals, protecting them from discrimination.”⁹⁶ It clarifies that these include, but are not limited to, “persistent or structural disparities and *de facto* inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality.”⁹⁷ Proof of historical discrimination is not required to justify special measures, and “the emphasis should be placed on correcting

⁹³ CERD, General Recommendation 21, *supra* note 76, ¶ 20.

⁹⁴ MCKEAN, *supra* note 85, at 159. *But see* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 266 (1991). In response to McKean’s statement, Thornberry argues against an overly broad understanding and cautions that the ICERD’s “limited concession in the definition of discrimination in favor of disadvantaged groups should not be idealized into a substitute for the protection of minorities, which is a wider notion.” While Thornberry is certainly correct that the special measures provisions are limited and may be insufficient on their own to fully protect the rights of minority communities, the provisions are nonetheless significant since their inclusion clarifies the ICERD’s requirement of substantive equality. Since a substantive equality theory takes difference into account and requires the transformation of social and economic hierarchies based on group membership, it has important implications for identity rights. Substantive equality is consistent with minority rights so long as “separate” rights do not lead to policies of segregation that are supported by theories of racial superiority.

⁹⁵ *See* MCKEAN, *supra* note 85, at 159; *see also* Wojciech Sadurski, *Gerhardy v. Brown v. the Concept of Discrimination: Reflections on the Landmark Case that Wasn’t*, 11 SYDNEY L. REV. 5 (1986) (discussing the distinction between special measures as an exception to equality and special measures as part of a substantive equality theory).

⁹⁶ CERD, General Recommendation No. 21, *supra* note 76, ¶ 22.

⁹⁷ *Id.*

present disparities and on preventing further imbalances from arising.”⁹⁸

Although the ICESCR does not explicitly define the term “discrimination,” the Committee on Economic, Social and Cultural Rights provides a definition based on Article 1 of the ICERD and other specialized human rights treaties:

[D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁹⁹

The Committee clarifies that discrimination includes both its direct and indirect forms,¹⁰⁰ and that states are obligated to eliminate both formal and substantive discrimination.¹⁰¹ In this regard, it notes that the enjoyment of human rights under the ICESCR often depends on whether a person is a “member of a group characterized by the prohibited grounds of discrimination.”¹⁰² In order to eliminate de facto discrimination, 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.”¹⁰³

Like the ICERD, the Committee on Economic, Social, and Cultural Rights recognizes that special measures are legitimate and non-discriminatory and that states may be obligated to adopt them “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.”¹⁰⁴ The Committee goes further than the Committee on

⁹⁸ *Id.*

⁹⁹ CESCR, *supra* note 78, ¶ 7.

¹⁰⁰ *Id.* ¶ 10(b).

¹⁰¹ *Id.* ¶ 8.

¹⁰² *Id.* ¶ 8(b).

¹⁰³ *Id.* ¶ 8(b).

¹⁰⁴ CESCR, *supra* note 78, ¶ 9.

the Elimination of Racial Discrimination, however, by noting that special measures must sometimes be of a more permanent nature.¹⁰⁵

The Committee on the Rights of the Child has also affirmed that non-discrimination requires attention to context and has also noted that states must actively “identify individual children and groups of children the recognition and realization of whose rights may demand special measures.”¹⁰⁶ This process of ascertaining the existence of discrimination requires the collection of necessary data.¹⁰⁷ Like the other treaty bodies, the Committee emphasizes that combating discrimination does not necessarily require identical treatment. Instead, the Committee refers to the Human Rights Committee, which has “underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination.”¹⁰⁸

D. States’ General Obligations and Special Measures

The ICERD, ICESCR, and CRC all require that state parties take positive steps to ensure substantive equality for groups and individuals.¹⁰⁹ As noted above, they also obligate states, depending on the context, to take “special measures” which, by definition, are not “discriminatory” even if they involve different treatment for particular racial groups.¹¹⁰ The relevant provisions and treaty body interpretations contain express limitations on special measures.¹¹¹ For example, special measures cannot

¹⁰⁵ *Id.* ¶ 9 (“Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.”).

¹⁰⁶ Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, arts. 4, 42, 44(6), Sept. 19-Oct. 3, 2003, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (citing Human Rights Comm., General Comment No 18: Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.6 (Nov. 10, 1989)).

¹⁰⁹ CRC, *supra* note 14, art. 2; ICESCR, *supra* note 14, arts. 2-5; ICERD *supra* note 1, arts. 8-16.

¹¹⁰ *See supra* note 85 and accompanying text.

¹¹¹ *See, e.g.,* CESCR, *supra* note 78, ¶ 9 (“[Special] measures are legitimate to the extent that they . . . are discontinued when substantive equality has been sustainably achieved.”).

continue after their objectives have been achieved.¹¹² However, these qualifications are intended as safeguards against forms of racial segregation based on theories of racial superiority (such as apartheid), which undermine the enjoyment of human rights, and should not be read as constraints on the protection of minority identity rights.¹¹³ They do not undermine the potential of substantive equality to support a workable balance between the accommodation of identity and rights to participate in society as a whole.¹¹⁴ Instead, they can be understood as a defense against the abuse and misuse of special measures by those who wish to advance racist policies.¹¹⁵

Article 2 of the ICERD sets out states' general obligations.¹¹⁶ According to Article 2(1), states must pursue "by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races."¹¹⁷ These objectives require both proactive steps and adherence to duties of restraint.¹¹⁸ States must refrain from engaging in any discriminatory acts or practices or from sponsoring, defending or supporting racial discrimination by any persons or organizations.¹¹⁹ They must also actively "take effective measures to review . . . policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."¹²⁰ States must "prohibit and bring to an end, by all appropriate means,

¹¹² See, e.g., ICERD *supra* note 1, art. 1(4) ("[Special measures] shall not be continued after the objectives for which they were taken have been achieved.").

¹¹³ See *id.* art. 1(4) (explaining that special measures "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups").

¹¹⁴ See CERD, General Recommendation 21, *supra* note 76, at 6-9 (interpreting "special measures" and limiting the scope of acceptable motivations for enacting special measures).

¹¹⁵ See *id.* ¶ 21 (explaining that by expressing that the "sole purpose" of special measures is to ensure equal enjoyment of human rights and fundamental freedoms, the Convention limited the scope of acceptable motivations for special measures, thereby defending against misuse of special measures for racist motivations).

¹¹⁶ ICERD, *supra* note 1, art. 2.

¹¹⁷ *Id.* art. 2(1).

¹¹⁸ *Id.* art. 2.

¹¹⁹ *Id.* art. 2(1)(a), (b).

¹²⁰ *Id.* art. 2(1)(c).

including legislation as required by circumstances, racial discrimination by any persons, group or organization.”¹²¹

These duties include special and concrete measures in the social, economic, cultural or other fields which states must take “when the circumstances so warrant” in order 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.”¹²² Special measures are limited in the sense that they “shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”¹²³

The Committee confirms the mandatory nature of the measures and explains the importance of evaluating the particular situation when determining whether special measures are required.¹²⁴ The phrase “when the circumstances so warrant” provides “context for the application of the measures The phrase has, in principle, an objective meaning in relation to the disparate enjoyment of human rights by persons and groups in the State party and the ensuing need to correct such imbalances.”¹²⁵ The language of Article 2(2) signals that states must continually assess a group’s relative disadvantage, based on sound empirical data, to determine whether special measures are required and whether any special measures previously taken have achieved their objectives.¹²⁶

The Committee has consistently emphasized this concern within the context of its comments on state reports.¹²⁷ The mere existence of special measures is not enough—they must be evaluated for their necessity and their ability to achieve the

¹²¹ ICERD, *supra* note 1, art. 2(1)(c).

¹²² *Id.* art. 2(2).

¹²³ *Id.*

¹²⁴ GENERAL RECOMMENDATION NO. 32, *supra* note 15, ¶ 30 (“The use in the paragraph of the verb ‘shall’ in relation to taking special measures clearly indicates the mandatory nature of the obligation.”).

¹²⁵ *Id.*

¹²⁶ *See generally id.* (discussing the language of art. 2(2) of the ICERD).

¹²⁷ *See supra* notes 85-90 and accompanying text.

Convention's objectives.¹²⁸ For example, in its 2008 Concluding Observations on Fiji's report, the Committee expressed its view that "the need for special measures, in sectors such as education and employment, may not be based on a realistic appraisal of the current situation of the different communities" and encouraged the state party to "engage in a data-gathering exercise to ensure that special measures are designed and implemented on the basis of need, and that their implementation is monitored and regularly evaluated."¹²⁹

The application and scope of the special measures provisions are restricted, however.¹³⁰ The Committee explains that "the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed—the equality goals—have been sustainably achieved."¹³¹ There is no specified time limit within which these goals must be achieved, and "[t]he length of time permitted for the duration of the measures will vary in light of their objectives, the means utilized to achieve them, and the results of their application."¹³² It is conceivable that special measures may be necessary for long periods, even indefinitely, depending on the degree of exclusion faced by the community concerned. The key is an evaluation of the exigencies of the situation. Where a group faces severe marginalization or its cultural identity is at risk, as is arguably the case in Tibet, special measures may take longer to achieve substantive equality. The

¹²⁸ See *supra* notes 85-90 and accompanying text.

¹²⁹ U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Fiji, U.N. Doc. CERD/C/FJI/CO/17, (Mar. 2008), ¶ 17 [hereinafter Fiji]; see also U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Republic of Moldova, U.N. Doc. CERD/C/MDA/CO/7, (Mar. 2008), ¶ 16; [hereinafter Republic of Moldova] U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Ethiopia, U.N. Doc. CERD/C/ETH/CO/15, (June 2007), ¶ 25; U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Israel, U.N. Doc. CERD/C/ISR/CO/13, (June 2007), ¶ 8; U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Ukraine, U.N. Doc. CERD/C/UKR/CO/18, (February 2007), ¶ 14 [hereinafter Ukraine]

¹³⁰ See CERD, General Recommendation 32, *supra* note 15, ¶¶ 26-27 (noting that these provisions have therefore been interpreted by the Committee as "temporary" in nature).

¹³¹ *Id.* ¶ 27.

¹³² *Id.*

main consideration is context and the limitation “implies the need . . . for a continuing, system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal.”¹³³

It is arguable that these limitations are already implicit in the purpose of special measures, as set out in the ICERD, and therefore their explicit mention may appear redundant and unnecessary. Their inclusion, and thus their emphasis, is understandable in light of the historical environment within which the ICERD was drafted and the treaty’s clear concern with tackling apartheid, colonialism, and other racist policies.¹³⁴ This focus is evident in the text of the Convention as Article 3 requires that state parties “particularly condemn racial segregation and apartheid.” Article 3 further obligates state parties to “prevent, prohibit, and eradicate all practices of this nature in territories under their jurisdiction.”¹³⁵

The restrictive language in ICERD Article 1(4) explicitly limited the extent of the special measures by mandating that they should not “lead to the maintenance of separate rights for different racial groups.”¹³⁶ The Committee on the Elimination of Racial Discrimination explained that “[t]his provision is narrowly drawn to refer to ‘racial groups’ and calls to mind the practice of Apartheid referred to in Article 3 . . . and to practices of segregation referred to in that article and in the preamble to the Convention.”¹³⁷

Special measures and minority rights are distinct from racial segregation in this sense. The Committee explains that:

[t]he notion of inadmissible ‘separate rights’ must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and

¹³³ *Id.* ¶ 35.

¹³⁴ *See generally* ICERD, *supra* note 1 (condemning colonization, apartheid, and racial segregation in preamble and throughout the document).

¹³⁵ *Id.* art. 3.

¹³⁶ *Id.* art. 1(4).

¹³⁷ CERD, General Recommendation No. 32, *supra* note 15, ¶ 26.

recognized within the framework of universal human rights.¹³⁸

Some have noted, however, that the ICERD's apparent emphasis on integration could interfere with respect for minority identity rights.¹³⁹ Kevin Boyle and Anneliese Baldaccini point out that "Article 2(2) provides no safeguards against the use of measures that, in promoting the adequate development of racial groups, constitute assimilationist policies."¹⁴⁰ Additionally, Article 2(1)(e) obligates states "to encourage, where appropriate, integrationalist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."¹⁴¹

References to integration, like the limitations on special measures, must be understood in light of the ICERD's context and purpose. This includes the ICERD's primary concern with decolonization and racist segregation policies at the time of its drafting.¹⁴² If integration, as understood in the ICERD, is designed to prevent apartheid-like regimes, it could therefore be consistent with the protection of minority identity when such protections conform to the aims of substantive equality and human rights. As such, the ICERD does not allow the implementation of measures that result in the assimilation of a minority group or its members

¹³⁸ *Id.* The practice of the CERD confirms this approach. For example, when commenting on policies in the Czech Republic which led to the overrepresentation of Roma children in special schools for students with learning disabilities, the Committee cautioned that "special measures for the advancement of certain groups are legitimate provided that they do not lead, in purpose or in practice, to the segregation of communities." The CERD reaffirmed the need for an assessment of context by recommending a review of "the methodological tools used to determine the cases in which children are to be enrolled in special schools so as to avoid indirect discrimination against Roma children on the basis of their cultural identity." In this case, the de facto segregation of Roma students undermined their human rights rather than supported a positive promotion of identity. See U.N. Committee on the Elimination of Racial Discrimination, Concluding Observations: Czech, ¶ 17, U.N. Doc. CERD/C/CZE/CO/7 (Apr. 11, 2007).

¹³⁹ See, e.g., Boyle & Baldaccini, *supra* note 55, at 158.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31 (requiring that a treaty be interpreted in good faith and within the context of the treaty's objective).

against their will.¹⁴³ Preventing assimilation, however, entails a careful balancing exercise and attention to the actual disadvantage of a group in accordance with substantive equality.¹⁴⁴ As Robert Dunbar observes, while “an integrationist policy towards minorities is not necessarily inconsistent with cultural and linguistic plurality [T]he borderline between integrationist and assimilationist policies is a murky one, at best.”¹⁴⁵ An equality principle grounded in a theory of human rights based on a richer understanding of human freedom, as proposed by Fredman, can assist with delineating these boundaries and achieving an appropriate equilibrium.¹⁴⁶

At the same time, policies which may result in a degree of *separation* for a minority community from the rest of society (such as autonomy mechanisms as discussed in Section III) could be necessary to guarantee the “protection” and equal enjoyment of human rights (including minority rights). This is especially true when minorities face serious threats to their identity. When designed appropriately, these measures will be consistent with achieving the objective of non-assimilationist integration espoused by the ICERD.¹⁴⁷ In other words, separation (as distinct from “segregation”) allows minority groups the opportunity to freely enjoy their culture, language, and religion. As such, separation may be the best response to ensure a group’s “adequate development and protection . . . for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”¹⁴⁸

The Committee’s work reveals the ICERD’s concern with ensuring the participation and representation of minority communities in public life as well as with preserving ethnic

¹⁴³ See U.N. Office of the High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, U.N. DOC. HR/PUB/10/3, at 10 (Feb. 2011) [hereinafter OHCHR].

¹⁴⁴ See *id.* (“The implementation of the rights of persons belonging to minorities has highlighted the need not only to understand and redress inequality but also to accommodate difference and diversity.”).

¹⁴⁵ Robert Dunbar, *Minority Language Rights in International Law*, 50 INT’L & COMP. L.Q. 90, 104 (2001).

¹⁴⁶ FREDMAN, *supra* note 24, at 9.

¹⁴⁷ See OHCHR, *supra* note 143, at 10.

¹⁴⁸ ICERD, *supra* note 1, at art. 2(2).

identity.¹⁴⁹ The work confirms that special measures may assist with these goals and support both integration (in the sense of participation rather than assimilation) and the protection of minority identity; these objectives are not mutually exclusive.¹⁵⁰ The reference to both groups and individuals in the special measures provisions, coupled with a substantive understanding of equality and non-discrimination, strengthens this interpretation and indicates that equality sometimes necessitates strategies that target collective entities.¹⁵¹

E. Non-discrimination in the Enjoyment of a Right to Education

International human rights instruments also set out a framework for the protection of the right to education and non-discrimination in the exercise of that right. These protections require the effective balancing of identity and participation rights in the education context.

Article 13 of the ICESCR elaborates on the content of a right to education. It describes the right as including free and

¹⁴⁹ See OHCHR, *supra* note 143, at 4 (“minorities have traditionally highlighted their rights to have their existence as a group protected, their identity recognized and their effective participation in public life and respect for their cultural, religious and linguistic pluralism safeguarded.”).

¹⁵⁰ See, e.g., Fiji, *supra* note 129, ¶ 18 (recommending that Fiji consider adopting “measures to ensure that all ethnic groups are duly represented in State institutions and the public administration, including special measures aimed at achieving adequate representation of all communities, particularly in the military. . . .”); Republic of Moldova, *supra* note 129, ¶ 12 (requiring Moldova to involve the community concerned in the implementation and monitoring of any plan to institute special measures); see also Ukraine, *supra* note 129, ¶ 18 (recommending that the Ukraine “take special measures for the protection and preservation of the cultural heritage of minorities such as the Crimean Tatars, the Karaites and the Roma.”); OHCHR, General Comment No. 23, art. 27, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (stating that the protection of minority rights is consistent with their right to participation. The enjoyment of cultural rights “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”).

¹⁵¹ CERD, General Recommendation No. 32, *supra* note 15, ¶ 34 (“Beneficiaries of special measures under article 2, paragraph 2 may be groups of individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals.”).

compulsory primary education, generally accessible secondary education, and equally accessible higher education—all of these without discrimination.¹⁵² Article 13 also sets out the core values which education must encompass and promote. These include (1) “the full development of the human personality” and sense of dignity; (2) strengthening “respect for human rights and fundamental freedoms”; (3) enabling “all persons to participate effectively in a free society”; (4) “promoting understanding, tolerance and friendship among all nations and all ‘ethnic’ groups, as well as nations and racial and religious groups”; and (5) furthering the activities of the United Nations for the maintenance of peace.¹⁵³

Article 28 of the CRC also provides for a right to education, while Article 29 contains a similar, but more elaborate list of aims toward which education must be directed.¹⁵⁴ The Committee on the Rights of the Child explains:

The child’s right to education is not only a matter of access (art. 28) but also of content. An education with its contents firmly rooted in the values of article 29 (1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related

¹⁵² ICESCR, *supra* note 14, art. 13(2).

¹⁵³ *Id.* art. 13(1). CESCR has proposed a framework for understanding states’ obligations to respect, protect and fulfill a right to education. Known as the “4-As,” this system of analysis reveals that in order to comply with the ICESCR, education must be available, accessible, acceptable, and adaptable. “Acceptability” means that the form and substance of the teaching methods and curricula be relevant, culturally appropriate, and of good quality, and “adaptability” means that the education system and curriculum must conform to internationally recognized human rights aims. *See* Committee on Economic, Social, and Cultural Rights, General Comment No. 13, The Right to Education, art. 13, ¶ 6, U.N. DOC. E/C.12/1999/10 (Dec. 8, 1999); *see also Preliminary Rep. of the Special Rapporteur on the Right to Education*, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights Resolution 1998/33, ¶ 42-74, U.N. DOC. E/CN.4/1999/49 (Jan. 13, 1999); SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS LEXICON 136-44 (2005).

¹⁵⁴ *See generally* Committee on the Rights of the Child [General Comment No. 1: The Aims of Education] U.N. DOC. CRC/GC/2001/1 (Apr. 17, 2001) (elaborating on the educational aims of the CRC).

phenomena.¹⁵⁵

The values articulated in Article 29 are relevant to this discussion since they inform education's content and therefore its ability to contribute to the process of balancing the priorities of protecting cultural identity and promoting integration. One of the objectives of education is to support "respect for the child's . . . cultural identity, language and values" as well as "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."¹⁵⁶ Education must also be directed toward "[t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin."¹⁵⁷ The Committee notes that "[a]t first sight, some of [these] diverse values" might appear to be potentially conflicting in certain circumstances.¹⁵⁸ Attempts "to promote understanding, tolerance and friendship among all peoples . . . might not always be automatically compatible with policies designed . . . to develop respect for the child's own cultural identity, language and values. . . ." ¹⁵⁹ It adds, however, that "part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference."¹⁶⁰

The ICESCR, the CRC, and the ICERD each guarantee a right to education without discrimination in accordance with a substantive equality principle.¹⁶¹ The Committee on Economic, Social and Cultural Rights has clarified that the immediate obligation of non-discrimination in the enjoyment of the rights

¹⁵⁵ *Id.* ¶ 3.

¹⁵⁶ CRC, *supra* note 14, art. 29(1)(c).

¹⁵⁷ *Id.* art. 29(1)(d).

¹⁵⁸ Committee on the Rights of the Child, General Comment No. 1, *supra* note 154, ¶ 4.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See CRC, *supra* note 14, art. 28-29; ICESCR, *supra* note 14, art. 13(1); ICERD, *supra* note 1, art. 5(d)(v).

under the ICESCR may entail positive steps and special measures and include a prohibition against indirect, substantive discrimination.¹⁶² Article 5 of the ICERD mandates that states prohibit and “eliminate racial discrimination in all its forms” and guarantee equality and non-discrimination in the enjoyment of human rights.¹⁶³ It provides a non-exhaustive list of civil, political, economic, social, and cultural rights that, in light of developments in human rights law, arguably extends to all human rights and fundamental freedoms, including minority rights.¹⁶⁴ Article 5(e)(v) specifies that the right to education and training is one of the fundamental rights, which must be guaranteed without racial or ethnic discrimination.¹⁶⁵ The Committee on the Elimination of Racial Discrimination has noted that this provision requires an assessment of the impact of education and language policies on the rights of minorities. The Committee’s comments also underscore the ICERD’s dual concern with accommodation and integration.¹⁶⁶ In this regard, it has called on states to take measures to protect minority languages while likewise facilitating the acquisition of the majority language. The result will be a realization of participation rights.¹⁶⁷

III. Autonomy as a Framework for Balancing Identity and Integration

This discussion of a human rights framework underpinned by substantive equality reveals the potential of international human

¹⁶² See CESCR, General Comment No. 20, *supra* note 78, ¶ 8.

¹⁶³ ICERD, *supra* note 1, art. 5.

¹⁶⁴ See, e.g., ICCPR, *supra* note 1, art. 27; see also Committee on the Elimination of Racial Discrimination, General Recommendation No. 20: The Guarantee of Human Rights Free From Racial Discrimination, art. 5, ¶ 1, U.N. Doc. A/51/18 (Mar. 15, 1996) (observing that “the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list” and that “[m]ost of these rights have been elaborated in the International Covenants on Human Rights.”).

¹⁶⁵ ICERD, *supra* note 1, art. 5(e)(v).

¹⁶⁶ See, e.g., Committee on the Elimination of Racial Discrimination, Concluding Observations: Latvia, ¶ 26, U.N. Doc. CERD/C/304/Add.79 (Apr. 12, 2001).

¹⁶⁷ See *id.* (urging the “[s]tate party to maintain the possibility to receive an education in languages of various ethnic groups or to study those languages at different levels of education, without prejudice for learning the official language, as well as of using mother tongue in private and in public”).

rights law to contribute to the resolution of minority claims while effectively balancing the demands of integration and accommodation. Human rights can also provide the basis for negotiating and designing measures that allow minorities to exercise some degree of self-government within the confines of the state.

Since the end of the Cold War, a number of states have responded to ethnic conflict and identity claims by establishing regional autonomy mechanisms for geographically concentrated minorities.¹⁶⁸ Autonomy has become one strategy for preventing and resolving tensions between governments and disaffected groups. It can also serve to maintain the territorial integrity of states while addressing the collective demands and rights of particular communities.¹⁶⁹ Ghai, among others, has observed this trend and notes that autonomy “has been seen as a panacea for cultural diversity, and . . . seems to provide the path to maintaining unity of a kind while conceding claims to self-government.”¹⁷⁰ Autonomy can support the collective rights of minority groups because it provides the group concerned with the necessary space and control over the development of its own culture, religion, or language.¹⁷¹ At the same time, autonomy can enhance the participation of the group at the national level because it strengthens the group’s status vis-à-vis the majority, thereby enabling a move towards achieving substantive equality.

A. Meaning of Autonomy

Although international law does not define or recognize an explicit right to autonomy, there is growing agreement about its key features and the elements needed to ensure its efficacy in mitigating competing interests. Both the flexible nature of autonomy and the varying forms it may take in different situations

¹⁶⁸ See Yash Ghai, *Ethnicity and Autonomy: A Framework for Analysis*, in *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES* 1 (Yash Ghai ed., 2000).

¹⁶⁹ *Id.* at 8, 24.

¹⁷⁰ *Id.* at 1.

¹⁷¹ Yoram Dinstein, *Autonomy (International Guarantees of Autonomy)*, in *BEYOND A ONE-DIMENSIONAL STATE: AN EMERGING RIGHT TO AUTONOMY?* 243-44 (Zelim A. Skurbaty ed., 2005).

add to autonomy's potential as a mechanism of conflict resolution. This flexibility, however, also contributes to the elusiveness of its definition. As Marc Weller observes, "there is no one generally agreed definition of autonomy. Nevertheless, there is something of a consensus relating to most aspects of autonomy."¹⁷² Several scholars have attempted to identify certain common features that may be necessary to ensure the successful functioning of an autonomy arrangement.¹⁷³

Autonomy is often understood as a system that provides for the devolution of power from a central government to a regional authority allowing the regional government to exercise control over matters directly relevant to that particular locality.¹⁷⁴ Ghai defines autonomy as "a device to allow ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them, while allowing the larger entity those powers which cover common interests."¹⁷⁵ Weller defines territorial autonomy generally as "self-governance of a demographically distinct territorial unit within the state."¹⁷⁶ These arrangements are usually entrenched in peace treaties, constitutions, and other forms of national legislation.¹⁷⁷

Weller includes several elements in his definition of territorial autonomy which highlight autonomy's capacity to support integration and participation as well as the protection of minority identity.¹⁷⁸ For example, Weller mentions that the autonomy structure must reflect the demographic distinctiveness of the dominant group, and, although it does not exercise separate sovereignty, it can establish its own statute and maintain

¹⁷² Commission on Human Rights, Subcommission of the Promotion and Protection of Human Rights, *Towards a General Comment on Self-determination and Autonomy*, Working Paper Submitted by Marc Weller, Director, European Centre for Minority Issues, 4, U.N. Doc. E/CN.4/Sub.2/AC.5/2005/WP.5 (May 25, 2005); see also HANNUM, *supra* note 19, at 4 (discussing various instances of autonomy).

¹⁷³ See, e.g., Yash Ghai, *Autonomy as a Strategy for Diffusing Conflict*, in *INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 483* (Paul Stern & Daniel Druckman eds., 2000).

¹⁷⁴ HANNUM, *supra* note 19, at 4.

¹⁷⁵ Ghai, *supra* note 168, at 8.

¹⁷⁶ Weller, *supra* note 172, at 5.

¹⁷⁷ *Id.* at 5-6.

¹⁷⁸ *Id.*

significant powers “specifically defined in the autonomy law or settlement.”¹⁷⁹ These powers, however, should also be “balanced with tools that ensure the continued and effective integration of the autonomous unit with the overall state” including “the guaranteed representation of the autonomous unit in the structures of national government.”¹⁸⁰

B. Autonomy: Potential Tensions and Contradictions

Despite the promise of autonomy, its implementation has revealed a number of inherent tensions and potential contradictions. First, collective claims to greater autonomy are frequently framed with reference to the right to self-determination in international law, which has served as a legal basis for collective claims as well as a powerful rhetorical device but has nonetheless proven difficult to apply.¹⁸¹ Because self-determination is often associated with independence or secessionist movements, states have sometimes viewed autonomy with trepidation and remain unsure whether to reject or embrace self-government measures as solutions to minority demands.¹⁸²

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.*; see also HANNUM, *supra* note 19, at 467-68 (listing requirements for a “fully autonomous” region including “a locally elected legislative body with some independent legislative authority,” “a locally selected chief executive, who may be . . . jointly responsible to the local and central authorities,” “an independent local judiciary with full responsibility for interpreting local laws,” and “power-sharing arrangements”).

¹⁸¹ See generally Marc Weller, *Settling Self-determination Conflicts: Recent Developments*, 20 EUR. J. INT’L L. 111 (2009) (reviewing self-determination settlements negotiated since the Cold War). After World War II, self-determination was applied successfully to the process of decolonization of European colonies. Its explicit meaning outside of the colonial context remains unclear, but scholars suggest there is a growing acceptance of self-determination’s internal dimension, closely linked with a right to democratic participation. Since the end of the Cold War, many groups have relied upon self-determination in their struggles for greater democratic participation and recognition of rights *within* states. They have likewise relied on self-determination amidst ethnic and nationalistic struggles for separation *from* states. This dichotomy is often referred to in literature as “internal” and “external” self-determination. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL* (1995). For a discussion of the potential application of internal self-determination in the Tibetan context, see Kelley Loper, *The Right to Self-Determination: Recent Developments in International Law and Their Relevance for the Tibetan People*, 33 H. K. L. J. 167 (2003).

¹⁸² See STEFAN WOLFF & MARC WELLER, *Self-determination and Autonomy: A Conceptual Introduction*, in *AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION: INNOVATIVE APPROACHES TO INSTITUTIONAL DESIGN IN DIVIDED SOCIETIES* 1, 1 (Marc

Stefan Wolff and Marc Weller argue that until recently, states were unlikely to agree to autonomy, believing that it was a “dangerous concept that a state would only employ at its own peril.”¹⁸³ In his study of settlements of self-determination disputes, Weller notes that although “self-determination has numerous layers of meaning” the doctrine has often been perceived “as an all-or-nothing proposition.”¹⁸⁴ Since the end of the Cold War, however, the number of internal ethnic conflicts in which minority groups have claimed self-determination has risen sharply, and states have become increasingly interested in autonomy as a means of addressing minority interests and avoiding secession.¹⁸⁵

In addition, the prospect of autonomy raises concerns that separation could entrench ethnic identity or become a tool of control over the region rather than serve to protect a marginalized culture.¹⁸⁶ On the other hand, encouraging integration, possibly through participation in economic, social, and political activities, may create common values between the autonomous areas and the rest of the state; it may likewise dilute and destroy a distinctive culture. In other words, autonomy displays several potentially contradictory tendencies that could serve to either (1) preserve or threaten the territorial integrity of states; (2) promote the integration of ethnic groups or entrench ethnic identity; (3) ensure minority rights protections or further marginalize communities; and (4) resolve or increase the likelihood of conflict. Since autonomy is usually an asymmetrical arrangement in which certain regions or groups obtain self-government powers that may not be available to other areas of the state, excluded groups may express dissatisfaction.¹⁸⁷ Regional autonomy often creates new minority groups within an autonomous entity that may face marginalization

Weller & Stefan Wolff eds., 2005); Weller, *supra* note 181, at 117.

¹⁸³ WOLFF & WELLER, *supra* note 182; see also Ruth Lapidot, *Autonomy: Potential and Limitations*, 1 INT'L J. ON GROUP RIGHTS 269, 289 (1994) (explaining the reasons governments are often reluctant to grant autonomy).

¹⁸⁴ Weller, *supra* note 181, at 112.

¹⁸⁵ See WOLFF & WELLER, *supra* note 182, at 1-2.

¹⁸⁶ See Ghai, *supra* note 168, at 24.

¹⁸⁷ *Id.* at 12-14.

by the new “majority” in the region.¹⁸⁸ In this sense, autonomy could act as a form of control, isolation, or segregation as understood in the ICERD, rather than a tool of integration.¹⁸⁹ Ghai notes that autonomy may be a double-edged sword in this regard; although it can be used to maintain unity within a state, it may also separate communities on ethnic grounds and become an entrenched system of discrimination.¹⁹⁰

C. Autonomy and Substantive Equality

As discussed above, the doctrine of substantive equality in international law could guard against such an outcome while supporting an autonomy regime that allows enough space for a minority community to exercise identity rights. A regional autonomy system separates a minority group from the rest of society to some degree, and while it may therefore appear inconsistent with a regime of individual rights (or equality’s traditional concern with individual freedom and uniform treatment), such an interpretation reflects a constrained theory of equality.¹⁹¹ Hurst Hannum observes that rather than segregate a community, one purpose of autonomy is to provide a “means of ensuring that a state is truly democratic, so that all significant segments of society are able to participate effectively in the political and economic decisions which affect their lives.”¹⁹² Therefore, attention to substantive equality when establishing autonomy may go some way in mitigating potential contradictions and alleviating the root causes that fuel self-determination movements. As Patrick Thornberry observes, “[i]n general, while more elevated claims may be made on behalf of particular groups for self-determination, it seems clear that lifting the burden of basic discrimination enables groups and persons to stand taller and express their authenticity.”¹⁹³ Substantive equality may also serve

¹⁸⁸ See WOLFF & WELLER, *supra* note 182, at 16.

¹⁸⁹ See ICERD, *supra* note 1.

¹⁹⁰ Ghai, *supra* note 168, at 24-25.

¹⁹¹ See Hurst Hannum, *The Right to Autonomy: Chimera or Solution?*, in ETHNICITY AND POWER IN THE CONTEMPORARY WORLD 287, 289 (Kumar Rupesinghe & Valery A. Tishkov eds., 1996).

¹⁹² *Id.* at 288.

¹⁹³ Thornberry, *supra* note 58, at 258.

as an alternative or additional basis on which to support an autonomy claim that could be more palatable to states than the more explosive principle of self-determination.¹⁹⁴ Indeed, greater autonomy may be a necessary means of realizing substantive equality, especially in cases of severe systemic discrimination and serious threats to minority identity.

IV. Minority Policy in China and the Tibetan Case

China has also attempted to manage ethnic diversity and conflict through a constitutionally entrenched system of regional ethnic autonomy which serves as the cornerstone of the country's minority policy.¹⁹⁵ Due to its potential to reconcile the need for both integration and the protection of minority identity within a human rights framework, substantive equality provides an appropriate benchmark for evaluating these measures. This section briefly reviews the Chinese framework, as well as minority policies within the fields of language and education in particular. It contends that the state's priorities of unity and stability—rather than diversity—inform the current approach which has failed to rectify structural inequalities between certain minority communities and the majority. The state has thus not achieved the appropriate balance between integration and the protection of identity required by international human rights standards.

The Tibetans as a group continue to experience substantive discrimination, marginalization, and threats to their cultural identity.¹⁹⁶ The Tibetan situation is an example of an especially intractable ethnic conflict in the Asian region, and it has eluded any real resolution. A series of talks has failed to produce results, and ethnic riots in March 2008, coupled with the continuing suppression of dissent, highlight the persistence and potentially explosive nature of the problem.¹⁹⁷ The extent of systemic

¹⁹⁴ See *generally id.* (discussing claims and self-determination).

¹⁹⁵ See MacPherson & Beckett, *supra* note 9, at 104.

¹⁹⁶ See ANDREW MARTIN FISCHER, STATE GROWTH AND SOCIAL EXCLUSION IN TIBET: CHALLENGES OF RECENT ECONOMIC GROWTH xv (2005).

¹⁹⁷ Envoys of the Dalai Lama have met with representatives of the Chinese leadership in a series of nine meetings since 2002. For information on the ninth round of talks held in January 2010, see the Statement by Special Envoy of his Holiness the Dalai Lama, Kasur Lodi Gyari, Head of the Delegation which Visited China in Jan. 2010 (Feb. 2, 2010), *available at*

inequalities faced by the Tibetan people has been well-documented.¹⁹⁸ For example, Andrew Martin Fischer, in a study on state growth and social exclusion in Tibet, points out that the “Tibetan areas of western China have among the highest poverty rates in China, the highest urban-rural inequality and by far the worst education indicators.”¹⁹⁹ To address these issues, it is critical to identify effective solutions which mitigate competing priorities while complying with China’s international human rights obligations.

A. The Chinese Framework for Minority Protection

China’s framework for regional ethnic autonomy is set out in Section 6 of the Chinese Constitution and is elaborated on in the Autonomy Law.²⁰⁰ Article 4 of the Constitution provides generally that “[r]egional autonomy is practised in areas where people of minority nationalities live in concentrated communities; in these areas organs of self-government are established to exercise the power of autonomy. All national autonomous areas are integral parts of the People’s Republic of China.”²⁰¹ Autonomous areas enjoy some degree of autonomous legislative powers, including the power to modify national laws to suit local circumstances as well as to adopt their own “autonomy regulations.”²⁰²

The Constitution also guarantees a range of minority rights including “the freedom [for minorities] to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs.”²⁰³ In relation to education, the Autonomy Law provides that the organs of self-government in

<http://www.tibet.net/en/index.php?id=120&articletype=press&rmenuid=morepress&tab=2#TabbedPanels1>. For an overview of the history of the Tibetan conflict and the case for genuine autonomy based on international legal standards, see Michael C. Davis, *The Quest for Self-Rule in Tibet*, 18 J. OF DEMOCRACY 157 (2007) and Michael C. Davis, *Establishing a Workable Autonomy in Tibet*, 30 HUM. RTS. Q. 227 (2008).

¹⁹⁸ See generally FISCHER, *supra* note 196 (summarizing extensive research on the socio-economic disparity of the Tibetan people).

¹⁹⁹ *Id.* at xv.

²⁰⁰ XIANFA, *supra* note 20, § 6.

²⁰¹ *Id.* art. 4.

²⁰² See *id.* art. 116.

²⁰³ *Id.* art. 4.

autonomous regions may decide “on plans for the development of education in these areas, on the establishment of various kinds of schools at different levels, and on their educational system, forms, curricula, the language used in instruction and enrollment procedures.”²⁰⁴ In addition to autonomy and specified constitutional rights, the Chinese government’s minority policies include affirmative action measures that grant the Tibetans access to certain opportunities, such as special admissions criteria for tertiary education.²⁰⁵ The government has also promoted economic modernization and provided educational subsidies in minority regions.²⁰⁶

In practice, however, China’s state-building and modernization priorities have limited the implementation of regional autonomy and the impact of these special measures.²⁰⁷ Autonomy powers and minority rights must be understood and exercised within the overall constitutional context that emphasizes unity, respect for territorial integrity, and a hierarchical structure of governance.²⁰⁸ The Preamble of the Constitution affirms that China “is a unitary multi-national State created jointly by the people of all its nationalities. Socialist relations of equality, unity and mutual assistance have been established among the nationalities and will continue to be strengthened.”²⁰⁹ Seonaigh MacPherson and Gulbahar Beckett note that these principles promote assimilation instead of the multicultural values of “diversity” and “ethnic identification.”²¹⁰ Ghai observes that the “leadership’s obsession

²⁰⁴ Law of the People’s Republic of China on Regional National Autonomy, *supra* note 21, art. 36.

²⁰⁵ See INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, CHINA’S ETHNIC POLICY AND COMMON PROSPERITY AND DEVELOPMENT OF ALL ETHNIC GROUPS (Sept. 27, 2009), *available at* http://www.china.org.cn/government/whitepaper/node_7078073.htm.

²⁰⁶ *Id.*

²⁰⁷ See *generally* MacPherson & Beckett, *supra* note 9 (discussing how autonomy efforts have not succeeded).

²⁰⁸ XIANFA, *supra* note 20, at Prmb1.

²⁰⁹ *Id.*

²¹⁰ MacPherson & Beckett, *supra* note 9, at 104; see INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, SIXTY YEARS SINCE PEACEFUL LIBERATION OF TIBET, ch. II, ¶ 3 (July 12, 2011), *available at* http://www.gov.cn/english/official/2011-07/11/content_1904075.htm; INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, PROGRESS IN

with state sovereignty” closely relates to its “preference for a unitary state, despite China’s huge size and diverse population” and that this concern about sovereignty “prevents a significant constitutional accommodation of ethnic and political diversity.”²¹¹ Indeed, evidence suggests that the constitutional autonomy powers have been underutilized as a result of these priorities.²¹² For example, the Tibet Autonomous Region has been unable to enact its own autonomy regulations despite previous attempts, and autonomous regions have been impeded from using their powers to modify national legislation.²¹³

Despite limitations of autonomy in China, the Tibetan government-in-exile has framed its demands for greater autonomy within the existing legal framework.²¹⁴ In October 2008, Tibetan envoys of the Dalai Lama—the Tibetan’s exiled spiritual leader—

CHINA’S HUMAN RIGHTS IN 2009, ch. V (Sept. 26, 2010), *available at* http://www.gov.cn/english/official/2010-09/26/content_1709982.htm (describing how these principles are used in Chinese government discourse on Tibet and minority rights).

²¹¹ Yash Ghai, *Autonomy Regimes in China: Coping with Ethnic and Economic Diversity*, in *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES* 77, 78 (Yash Ghai ed., 2000).

²¹² See XIANFA, *supra* note 20, arts. 112 & 116 (defining the autonomy powers); Ghai, *supra* note 211, at 85.

²¹³ See Yash Ghai & Sophia Woodman, *Unused Powers: Contestation over Autonomy Legislation in the PRC*, 82 *PACIFIC AFFAIRS* 29 (2009); see also Chunli Xia, *Autonomous Legislative Power in Regional Ethnic Autonomy of the People’s Republic of China: The Law and the Reality*, in *ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS - PERSPECTIVES OF EVOLUTION* 541, 559 (Jorge Oliveira & Paula Cardinal eds., 2009) (noting the “intensive interference” of the Chinese Communist Party in the autonomous legislative process); Guobin Zhu & Lingyun Yu, *Regional Minority Autonomy in the PRC: A Preliminary Appraisal from a Historical Perspective*, 7 *INT’L J. MINORITY & GROUP RTS.* 39, 54-55 (2000) (identifying the discrepancy between how regions may constitutionally enact autonomous self-regulations but no regulations have been adopted “at the level of national autonomous regions”). See generally Yash Ghai et al., *Is There Space for ‘Genuine Autonomy’ for Tibetan Areas in the PRC’s System of Nationalities Regional Autonomy?*, 17 *INT’L J. MINORITY & GROUP RTS.* 137 (2010) (discussing whether Tibetan demands can be met within the framework of regional ethnic autonomy in China).

²¹⁴ See generally Baogang He & Barry Sautman, *The Politics of the Dalai Lama’s New Initiative for Autonomy*, 78 *PAC. AFF.* 601 (2006) (explaining what the Dalai Lama did); Baogang He, *The Dalai Lama’s Autonomy Proposal: A One-Sided Wish?*, in *CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION* 67 (Barry Sautman & June Teufel Dreyer eds., 2006) (discussing the Dalai Lama’s approach).

presented a *Memorandum on Genuine Autonomy for the Tibetan People* (hereinafter “*Memorandum on Genuine Autonomy*”) in their eighth round of discussions with Beijing since 2002.²¹⁵ The document sets out the Tibetan proposal for a “Middle Way Approach” as the basis for negotiations on the future of Tibet.²¹⁶ The proposal claims that the Tibetans “remain firmly committed not to seek separation or independence” and that “a solution to the Tibetan problem through genuine autonomy” is compatible with “the principles of autonomy” in the Chinese Constitution.²¹⁷ The Chinese-side responded to this document through a “signed article” published by Xinhua, the official news agency.²¹⁸ The article characterized the *Memorandum in Genuine Autonomy* as an “attempt . . . to set up a ‘half independent’ or ‘covertly independent’ political entity controlled by the Dalai clique on soil that occupies one quarter of the Chinese territory, and when conditions are ripe, they will seek to realize ‘total Tibet independence.’”²¹⁹ This concern with separatism and suspicion of the Tibetans’ autonomy agenda exemplifies Wolf’s and Weller’s observation that many states view autonomy with trepidation.²²⁰ It also raises questions about whether an autonomy system that simultaneously promotes identity and participation is workable in the Chinese context.

B. Approaches to Minority Language and Education

A review of language and education policies, especially as they apply to Tibet, leads to similar conclusions.²²¹ Language

²¹⁵ MEMORANDUM ON GENUINE AUTONOMY FOR THE TIBETAN PEOPLE, *available at* <http://www.tibetoffice.ch/web/mwa/memorandum/english.pdf> (last visited Oct. 21, 2011).

²¹⁶ *Id.* at 1.

²¹⁷ *Id.*

²¹⁸ Yiduo, *Signed Article: On the “Memorandum” of the Dalai Clique*, Xinhua News Agency (Nov. 21, 2008), http://news.xinhuanet.com/english/2008-11/21/content_10391968.htm.

²¹⁹ *Id.*

²²⁰ Weller, *supra* note 181, at 117.

²²¹ See Kelley Loper, *Minority Language Rights and Education in China: The Relevance of Human Rights Law and Substantive Equality*, in CHINA’S ASSIMILATIONIST LANGUAGE POLICY: THE IMPACT ON INDIGENOUS/MINORITY LITERACY AND SOCIAL HARMONY 207 (Gulbahar Beckett & Gerard Postiglione eds.) (forthcoming 2011) (discussing minority language rights in education in China). See generally CHINA’S

learning and education have profound implications for the protection of ethnic identity, as well as for the ability of members of minority groups to access opportunities. A consideration of policies in these areas, therefore, highlights the difficulties involved in realizing substantive equality for the Tibetans and in balancing integration and accommodation priorities. For example, the dilution of the Tibetan language impacts cultural identity, while the need to learn *putonghua* in a Han dominated society for pragmatic reasons creates pressure to assimilate. This section also raises questions about the content of education and whether the curriculum can achieve the pluralistic aims articulated in the CRC and other human rights instruments as discussed in Section II.

The *Memorandum on Genuine Autonomy* emphasizes the significance of Tibetan language and places language at the forefront of the Tibetans' basic needs.²²² It explains that "[l]anguage is the most important attribute of the Tibetan people's identity" and "in order for Tibetans to use and develop their own language, [it] must be respected as the main spoken and written language. Similarly, the principal language of the Tibetan autonomous areas needs to be Tibetan."²²³ The *Memorandum on Genuine Autonomy* argues that education will help influence the realization of these objectives in relation to language and cultural identity as well as the balance between integration and accommodation.²²⁴ Reinforcing this proposition, Rebecca Clothey notes that "schools serve not only the economic but also the political integration needs of nation-states" and, therefore, "the education system provides an arena within which to view the relations between national and ethnic identities."²²⁵ She observes that the challenge for all education systems is to "help minorities to gain access to a social and economic system that is dominated

ASSIMILATIONIST LANGUAGE POLICY: THE IMPACT ON INDIGENOUS/MINORITY LITERACY AND SOCIAL HARMONY (Gulbahar Beckett & Gerard Postiglione eds.) (forthcoming 2011) (discussing language policy in China and its tendency to promote assimilation).

²²² MEMORANDUM ON GENUINE AUTONOMY FOR THE TIBETAN PEOPLE, *supra* note 215, § IV, ¶ 1.

²²³ *Id.*

²²⁴ *Id.* ¶ 4.

²²⁵ Rebecca Clothey, *China's Policies for Minority Nationalities in Higher Education: Negotiating National Values and Ethnic Identities*, 49 COMP. EDUC. REV. 389, 389 (2005).

by the values of the majority while, at the same time, retaining their separate ethnic group cultures and identities.”²²⁶ Anwei Feng adds the insight that “there is potentially a 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.”²²⁷

Like the regional ethnic autonomy framework, Chinese policies related to minority languages and education must be understood in connection with broader state objectives, including the goals of national unity, state-building, modernization and economic development. These priorities shape the central government’s response to real or perceived separatist movements, especially in Tibetan and Uighur regions.²²⁸ Clothey notes that China’s affirmative action policies, such as bilingual education and quotas admitting minorities to universities, “have the ultimate aim of ensuring ethnic stability, national integration, and economic development in minority areas.”²²⁹ In her review of education policy in Tibet, Catriona Bass explains that China’s primary education objectives have been “to encourage political allegiance towards China and enhance stability in border areas”²³⁰ and to promote “a sense of commitment to the unity of China.”²³¹ In other words, these measures are not designed to preserve minority identity as such. Therefore, the measures may not fulfill the ICERD requirement to ensure substantive equality by “advancing” the status of the group vis-à-vis the majority to support both minority identity and integration in the sense of participation.²³²

Scholars have highlighted the impact of China’s renewed promotion of *putonghua*—an approach fueled by the state priorities mentioned above—on language policy in education and

²²⁶ *Id.*

²²⁷ Anwei Feng, *English in China: Convergence and Divergence in Policy and Practice*, in MULTILINGUAL, GLOBALIZING ASIA, 85, 98-9 (Lisa Lim & Ee-Ling Low eds., 22 AILA REV., 2009).

²²⁸ See generally Clothey, *supra* note 225 (describing how educational policies inform the government’s response).

²²⁹ *Id.* at 389.

²³⁰ CATRIONA BASS, EDUCATION IN TIBET: POLICY AND PRACTICE SINCE 1950 10 (1998).

²³¹ *Id.* at 3.

²³² ICERD, *supra* note 1, art. 1, ¶ 4.

minorities' access to opportunities.²³³ While this could potentially support integration and participation, it could also result in assimilation and the dilution of ethnic identity and language rights.²³⁴ Indeed, the growing emphasis on *putonghua* reflects, in part, the practical reality that the state language is dominant, and its acquisition is necessary to access higher educational and employment opportunities.²³⁵

Minglang Zhou explains that the new Chinese language order “treats *putonghua*, or Han, as the superlanguage, and reserves for it most public functions and political, legal, financial, and human resources while politically and functionally marginalizing minority languages.”²³⁶ He notes that this order is reflected in the Autonomy Law and other laws such as the 2001 New PRC National Commonly Used Language and Script Law.²³⁷

Stephen Carney also observes that recent Chinese education reforms based on international models emphasizing student-centered learning are designed to meet the needs of market reforms that remain a key linchpin of China's modernization strategy.²³⁸ In Tibet, however, “the gradual shift to Chinese as the language of instruction from grade 3 for all subjects except Tibetan language studies was viewed by teachers in different rural schools as one significant problem in engaging all pupils, and limited enormously the possibilities for the new teaching

²³³ See generally Shuang Zhang, *China's Bilingual Education Policy and Current Use of Miao in Schools*, 41 CHINESE EDUC. & SOC'Y 28 (2008) (analyzing the problems with minority language teaching); Yuming Li, *Humankind's Three Major Language Topics Today and the State of China's Linguistic Life*, 41 CHINESE EDUC. & SOC'Y 15 (2008) (explaining the new strategy of *putonghua* promotion).

²³⁴ See generally Clothey, *supra* note 225 (explaining that ethnic groups may perceive language policies as harmful).

²³⁵ See *id.* at 393.

²³⁶ Minglang Zhou, *Linguistic Diversity and Language Harmony in Contemporary China*, 41 CHINESE EDUC. & SOC'Y 3, 5-6 (2008) (explaining that the new language order replaced the previous socialist model which envisioned minority languages as “satellites” each “having its own perimeter of functions and resources” around the majority Han language).

²³⁷ *Id.* at 6 (explaining that the 2001 Autonomy Law revisions require that *putonghua* be taught at earlier stages of education than was previously the case in minority regions).

²³⁸ Stephen Carney, *Learner-centred Pedagogy in Tibet: International Education Reform in a Local Context*, 44 COMP. EDUC. 39, 39 (2008).

methodology.”²³⁹

Another education policy that potentially impacts language rights (and implicates substantive equality) is the practice of sending Tibetan students to boarding schools outside of Tibetan regions.²⁴⁰ MacPherson and Beckett point out that this relocation of students dislocates Tibetans both culturally and geographically.²⁴¹ *Putonghua* is taught in these classes, and students may also be required to learn English as a foreign language.²⁴² While Tibetan is offered as a separate subject, the study of Tibetan language and literature has not been promoted.²⁴³ One student in Postiglione’s study remarked that Tibetan language did not seem “useful”; another felt that the language was not “a ‘common tool’ of communication in ‘modern society.’”²⁴⁴

C. China’s Interaction with Human Rights Treaty Bodies

When interacting with the Chinese government through the state reporting process, human rights treaty bodies such as the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have raised issues related to the implementation of autonomy as well as minority language and education policies.²⁴⁵ They have therefore

²³⁹ *Id.*

²⁴⁰ See Gerard Postiglione, *Dislocated Education: The Case of Tibet*, 53 COMP. EDUC. REV. 483, 483 (2009). *But see id.* at 484 (arguing that that Tibetan students sent to boarding schools “acculturated to the Chinese mainstream, but usually on their own terms. That is, they did not become less assertive in their ethnicity, though the paucity of knowledge about Tibetan language and cultural heritage provided by the schools made this a formidable challenge.”).

²⁴¹ MacPherson & Beckett, *supra* note 9, at 115; see also Gerard Postiglione, Ben Jiao & Manlaji, *Language in Tibetan Education: The Case of the Neidiban*, in BILINGUAL EDUCATION IN CHINA: PRACTICES, POLICIES AND CONCEPTS 49 (Anwei Feng ed., 2007).

²⁴² Postiglione, *supra* note 240, at 501; see also Feng, *supra* note 227, at 91 (discussing the impact of English language learning on minority education).

²⁴³ Postiglione, *supra* note 240, at 501.

²⁴⁴ *Id.* (explaining that other students felt that the schools should emphasize Tibetan language to a greater extent).

²⁴⁵ See generally Turkmenistan, *supra* note 68; CRC, *supra* note 14; Committee on the Elimination of Racial Discrimination, Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions), U.N. DOC. CERD/C/CHN/CO/10-13 (Sept. 15, 2009) (describing how China’s autonomy policies have functioned).

clarified that these measures implicate China's international human rights obligations.²⁴⁶

For example, in its Concluding Observations on China's report in 2009, the Committee on the Elimination of Racial Discrimination expressed concern in relation to ICERD Article 5 that "in practice [*putonghua*] is the sole language of instruction in many schools in the autonomous minority provinces, especially at secondary and higher levels of education" and that teaching in *putonghua* alone is connected to the "remaining disparities for ethnic minority children in accessing education."²⁴⁷ The Committee on Economic, Social and Cultural Rights asked questions about reports that the right to the "use and teaching of minority languages, history and culture" in the Tibetan Autonomous Region has not been fully realized.²⁴⁸ The Committee on the Rights of the Child recommended that China "take all necessary measures to ensure the full implementation of the Regional Ethnic Autonomy Act" and that it make "all teaching and learning materials for the primary and secondary level . . . available in ethnic minority languages and with culturally sensitive content."²⁴⁹

These comments about the impact of language and education on the ability of minority communities to enjoy human rights without discrimination further underscores the requirement that states interpret these instruments and their obligations according to a substantive theory.

V. Conclusion

Indeed, international human rights law elaborates a principle of substantive equality that can offer guidance to states when attempting to develop effective minority policies like self-government arrangements. This principle requires that states take positive measures such as those conceptualized by the ICERD to achieve substantive equality.²⁵⁰ Determining the existence of

²⁴⁶ *Id.*

²⁴⁷ Turkmenistan, *supra* note 68, ¶ 22.

²⁴⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations: People's Republic of China, U.N. Doc. E/C.12/1/Add.107, ¶ 38 (May 13, 2005).

²⁴⁹ CRC, *supra* note 14, ¶¶ 45, 77(d).

²⁵⁰ *See* ICERD, *supra* note 1.

discrimination, which measures might be needed, and how they should be implemented depends on the context, especially the degree of marginalization faced by a particular group, and can be analyzed with reference to substantive equality aims. Autonomy and self-government arrangements can enhance minority access to rights related to cultural identity and participation.

A system providing greater autonomy—devised according to international standards and measured against a substantive equality principle—could more effectively mitigate ethnic conflict in Tibetan regions. This may be the most appropriate response to the past and ongoing discrimination faced by the Tibetans—discrimination which has been exacerbated by the dominance of the majority culture and the state's political priorities, and which has undermined the Tibetans' equal enjoyment of identity rights. Autonomy that is properly framed and implemented would allow a community a greater degree of freedom to make and implement decisions affecting its culture, language, religion, and way of life. This type of autonomy could, perhaps ironically, enhance both inclusion and participation.

Substantive equality mandates both accommodation and full participation in a given situation.²⁵¹ These two objectives are not necessarily mutually exclusive, but, in fact, could be mutually reinforcing. Fostering Tibetan culture through accommodation, including a self-governing autonomy regime, could lead to greater “equalization” of the minority culture, and this could allow fuller participation and access more generally without assimilation. China's increasing interaction with the international human rights system creates possibilities that a substantive equality principle could influence the domestic discourse on minority rights. It could also provide support for Tibetan demands for greater autonomy and protection of their cultural heritage within the framework of the Chinese state while ensuring a right to participation for Tibetans in Chinese society generally.

²⁵¹ See generally FREDMAN, *supra* note 24 (arguing for accommodation and participation as objectives of substantive equality theory).