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ABORIGINAL LANGUAGE RIGHTS

Brian Slattery

I would like to explore the question whether the indigenous languages of Canada occupy a special place in the *Constitution*. We know that the guarantee of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*[1] ensures our right to express ourselves in any language we choose, including, of course, any indigenous language.[2] I would like to look beyond that section and consider briefly the prospects for arguing that aboriginal languages are in some sense official languages of Canada.

If you turn to section 16(1) of the *Charter*, you find the flat statement that English and French are the official languages of Canada, with the definite implication that there are no others. However, this impression is dispelled by section 22, which provides that nothing in sections 16 to 20 "abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French." You also find in section 25 a provision that explicitly shields from the adverse impact of *Charter* guarantees "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", which would clearly cover language rights. But these two sections do little more than clear a constitutional space for aboriginal language rights; they do not provide a foundation for them. For that, I think, you have to look outside the *Charter*.

The obvious starting point is Part II of the *Constitution Act, 1982*,[3] which deals specifically with the rights of aboriginal peoples. Section

1. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, (U.K.) 1982, c. 11 (hereafter referred to as the *Charter*).
2. *Ford* v. *Quebec (Attorney-General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.).
3. *Supra*, note 1.

35(1) states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". And subsection (2) explains that the term "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada. The question is to what extent this section provides a constitutional foothold for aboriginal languages.[4] But since the topic is a large and complex one, I'm going to leave to one side treaty rights and focus exclusively on aboriginal rights. Treaty provisions would, at best, provide a partial, uncertain, and fragmentary basis for indigenous language rights. The category of aboriginal rights is much more promising.

There are two families of theories about aboriginal rights: we will call them "historically-based theories" and "principled theories". Historically-based theories argue that existing aboriginal rights are rights that can be identified by reference to particular historical practices, customs, laws, or contexts that existed in Canada prior to 1982 and continued to exist in some form at the time the *Constitution Act, 1982* came into effect. Principled theories, by contrast, suggest that existing aboriginal rights are rights that can be identified by reference to first principles or basic human goods, such as, in the case of language, the value of linguistic security or the value of being able to transmit one's culture and world-view to one's children.[5]

I do not mean to imply, naturally, that these families of theories are internally homogeneous; to the contrary, like human families, they include members with very different characteristics. And I should also note there is no compelling reason to think that section 35(1) allows for only one or other of these two basic approaches. In fact I am inclined to think that a blended approach, which makes use of both, might be the best of all.

4. For general discussion of this section see: Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 *Queen's L.J.* 232; Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 *Amer. J. Comp. L.* 361; Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in Tarnopolsky and Beaudoin, eds, *The Canadian Charter of Rights and Freedoms* (1982), pp. 467-88; Hogg, *Constitutional Law of Canada*, 2nd ed. (1985), c. 24; McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 *Supreme Court Law R.* 255; Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 *Can. Bar Rev.* 314; Emery, "Réflexions sur le sens et la portée au Québec des articles 25, 35, et 37 de la Loi constitutionelle de 1982" (1984) 25 *Cahiers de Droit* 145; O'Reilly, "La Loi constitutionelle de 1982, droit des autochtones" (1984) 25 *Cahiers de Droit* 125; Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982" (1988) 22 *U.B.C. Law Rev.* 21, 207. For recent jurisprudence on the section see esp.: *Sparrow* v. *R.*, (1990), 70 D.L.R. (4th) 385 (S.C.C.); *R.* v. *Agawa* (1988) 53 D.L.R. (4th) 101 (Ont. C.A.); *Denny* v. *R.*, (1990), 94 N.S.R. (2d) 253 (N.S.S.C.A.D.).

5. See, for example, the illuminating discussion in Leslie Green, "Are Language Rights Fundamental?" (1987) 25 *Osgoode Hall Law Journal* 639.

Here, I can only deal with historically-based theories, leaving others to deal with the rather quarrelsome family of principled theories. Let me cast a quick eye now over three historically-based theories and consider what promise they hold for aboriginal language rights. I will then conclude with some brief remarks on the proper bearing that principled theories have on their historically-based cousins.

The first historical approach argues that existing aboriginal rights are those rights that were affirmatively recognized in 1982 in Canadian law, which, on this view, is confined to European-derived systems of law. That is to say, in order to assert that something is an existing aboriginal right under section 35(1), you have to show that it was recognized in an existing enactment or, alternately, under English common law or Québec civil law. Only then, argues this approach, could you say that something is an existing aboriginal right.

Needless to say, this rather blinkered approach does not offer much solace for aboriginal language rights, or indeed for aboriginal rights generally. The kind of affirmative legal recognition it requires was, in 1982, patchy, niggardly, and often uncertain. Fortunately, there are good reasons for rejecting this approach, which I cannot pause to explain fully here.[6] Suffice it to say that it ignores the fact that section 35 speaks of the existing *aboriginal* rights of aboriginal peoples, and not simply their existing rights. The repetition of the word "aboriginal" is significant. It indicates that aboriginal rights are not just whatever rights happen to have been held by aboriginal peoples under the law in force in 1982. They are a particular kind of right, identified in a particular sort of way. More importantly, this approach fails to come to terms with the strong case that the words "recognized and affirmed" in section 35(1) have the effect of constituting new legal rights and not merely adopting old ones.

Let me move on now to a second historically-based approach, which has the merit of looking beyond European-derived law for the source of aboriginal rights. It argues that existing aboriginal rights are those rights that were recognized under the customary law and practice of aboriginal peoples and that still survived in some form in 1982. This approach holds more promise for aboriginal language rights for the obvious reason that most aboriginal nations across Canada continued to speak their maternal tongues in 1982. It also gives full meaning to the word "aboriginal" in the phrase "aboriginal rights". But there is a possible deficiency in this approach, which I can refer to only in passing.

6. See: Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 *Queen's L.J.* 232; Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 *Amer. J. Comp. L.* 361

It seems both true and yet misleading to say that under the customary law of an aboriginal group its members had the *right* to speak their own language. For this is like saying that under customary law people had the right to breathe or eat or sing or dance. Such mundane matters did not ordinarily attract much attention at the level of law. They were simply assumed to be the natural ways in which members of the community carried on their lives. The right to speak one's own language, if it could be said to have existed in customary law, would have risen to a conscious level only when it was in some way challenged or threatened, most likely by forces from outside the group.

So aboriginal rights should perhaps be seen as stemming in part from inter-societal contact and conflict than simply from internal custom. Under this view, aboriginal language rights should be located in a body of legal principles governing the relations between indigenous groups and incoming settler groups. In other words, they are bound up with inter-societal norms.

This reflection brings us to the third historically-based approach. This maintains that aboriginal rights, or at least a range of such rights, are the product of customary practices that emerged to regulate the relations between the original nations of America and incoming European nations. This body of custom developed over a long period of time, extending from the first tentative contacts in the sixteenth century to the grand treaty settlements in the nineteenth. It was not exclusively English or French in origin, nor on the other hand was it purely aboriginal. Both aboriginal and settler groups contributed to its formation; so doing, they produced something genuinely new and distinctively Canadian.

This body of inter-societal custom secreted certain basic principles and rules, which in turn reflected certain rights. For example, as I have argued elsewhere, if you look at the period running up to 1763, you find that under the emerging practice of the time aboriginal peoples were considered the effective owners of the lands they possessed, unless or until they voluntarily transferred their title to the Crown by treaty, and that this viewpoint was reflected in the aboriginal Magna Carta, the *Royal Proclamation of 1763*.[7] This rule held true even if (as some have argued) under aboriginal legal systems land could not be owned or transferred, and under English and French legal systems title to land could not be gained simply by possession. This unique body of custom, whose roots lay in inter-societal dealings, passed into an autonomous body of Canadian common law, which is distinct from both English common law and the civil law of Québec, and which underpins the

7. See: Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar Rev.* 727.

Constitution.[8] A view similar to this was first presented by Justice Strong of the Supreme Court of Canada in the last century,[9] but it languished in near oblivion for nearly a hundred years. My reading of the Supreme Court's decisions in the *Guerin*[10] and *Roberts*[11] cases suggests that a version of the argument has now been officially accepted.

Coming now to language rights, can it be said that under inter-societal practice as it developed from 1500 onwards aboriginal languages were accepted in effect as official languages or as languages with a special constitutional status? The current state of my research does not allow for more than a tentative answer. But I would draw attention to the frequent parleys, negotiations, and treaties which took place between first nations and settler communities, and in particular to the ceremonial structure that gave these exchanges shape and meaning. This structure was in large part aboriginal in inspiration, although it also drew on European precedents. It usually involved the formal exchange of greetings, presents, ceremonial belts, statements of grievance or intent, and reciprocal oral promises. The negotiations were conducted in at least two languages and sometimes a number of languages, and so involved interpreters in important roles. Insofar as these exchanges can be seen as the forge of the constitutional structure that eventually bound first nations to the Crown as allied and protected nations, they can plausibly be seen as recognizing that aboriginal languages occupied a special constitutional status, consistent with the unique constitutional position occupied by aboriginal groups. On this view, this special status is now confirmed and guaranteed in section 35(1) of the *Constitution Act, 1982*.

But I am not one of those people who think that we can read history, much less understand it, without a grasp of the human values at stake or a sense of underlying narrative. Much less, then, can we hope to sift through the voluminous records of aboriginal-European relations in search of an historically-based theory of aboriginal language rights without some notion of the basic goods served by language and the principles that should inform relations between different linguistic groups. But if this realization draws us down the path toward the philosopher's den, we should be on guard lest we be devoured at the end of our

8. I have developed the general argument for a common law basis to the Constitution in "The Independence of Canada" (1983) 5 *Sup. Ct. L. Rev.* 369.

9. See *St. Catharines Milling and Lumber Co.* v. *The Queen* (1887), 13 S.C.R. 577 at 607-616.

10. [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321; discussed in Slattery, *supra*, note 7.

11. [1989] 1 S.C.R. 322, (1989), 57 D.L.R. (4th) 197; discussed in Evans and Slattery, "Comment: Federal Jurisdiction — Pendent Parties — Aboriginal Title and Federal Common Law" (1989) 68 *Can. Bar Rev.* 817.

journey. For I fear that that philosophical reflection pure and simple, apart from an appreciation of historical context, can be misleading and unhelpful. Reflection on basic goods and principles by itself can give us no grasp of the historical realities which must shape all human action. In a word, if history needs philosophy to give it meaning, philosophy needs history to save it from irrelevance. With that thought, I leave you to the tender mercies of the philosophers.