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COMMUNITY IN LIBERALISM: LANGUAGE RIGHTS IN QUEBEC

by

Pierre A. Coulombe

Department of Political Science

Submitted in partial fulfilment
of the requirements for the degree of
Doctor of Philosophy

Faculty of Graduate Studies
The University of Western Ontario
London, Ontario
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INTRODUCTION

In the context of the Québec-Canada duality, debates over language rights tend to lack conceptual clarity. Granted, the political arena, especially that of constitutional reform, may not be the proper place for the illumination of conceptual problems, and in any case a proper theorization would be unlikely to yield a quick improvement of the situation. Still, there is something to be said about the implications for our constitutional practice of having persistent ambiguities over the concepts which express some of our deepest values and convictions. Political theory, it would then seem, finds itself more urgently bound to our political conflicts and to their resolution.

Our problem extends beyond immediate language rights issues, though, and touches upon more permanent ones. It concerns the place of community in liberal society and, more specifically, the tension between the goods associated with communal membership and the goods secured through our belonging in the liberal citizenry. We know that liberal theory a priori does not reject the reasonableness of claims to the promotion of a communal identity, yet some of these claims can collide with

notions such as equal treatment and freedom of choice, and hence their validity may be challenged. Under such conditions a tension often arises between a person's communal membership and his or her status as a liberal citizen, between the 'homme' and the 'citoyen', and, in the case that interests us, between the French-speaking Québécois and their citizenship. A liberal system of rights and duties, as well as its formal expression often found in the constitution of the state, may sometimes be at odds with, if not disrupt, the distinct character of a community.

Thus the tension between community and liberal society is sometimes transposed to rights-discourse. On the surface it takes the form of the notorious conflict between the rights of the individual and those of the community, between individual rights and so-called collective rights. We can note two extreme positions. On one view, collective rights have no place in rights discourse since civil rights are for all purposes absolute, thus making it immoral to limit them through devices such as collective rights. Vernon Van Dyke captures well the charge against this atomist brand of liberal justice when he writes that

> [t]hose in a majority community can insist on individualism and the nondiscriminatory treatment of individuals, and can decry any differentiation based on race, language, or

> religion, knowing that this formula assures their dominance.[1]

The other extreme is no less unsatisfying. It conceives of communities as moral entities which must be treated as such, even if it means overriding individuals' claims in the process. It involves vesting rights in communities and construing the ensuing conflict as a tension between the individual and the community. As Justice Deschênes wrote in *Québec Protestant School Board v. Québec*, this entails illiberal conclusions as the individual's well-being becomes instrumental to that of the overall community:

> The alleged restriction of a collective right which would deprive the one hundredth member of the group of the rights guaranteed by the Charter constitutes, for this one hundredth member, a real denial of his rights. He cannot simply be counted as an accidental loss in a collective operation: our concept of human beings does not accommodate such a theory.[2]

Both atomistic and collectivist views imply dubious undertakings, to say the least, and have little use in clarifying the conceptual issue, let alone in improving our understanding of political debates about individual and communal claims in Canada. Moreover, they tend to nourish misinterpretations concerning support for different kinds of rights, whereby for example it is said that French Canadians supposedly support collective rights while English Canadians supposedly support individual rights. This idea was expressed by Marcel Rioux in 1969, and has since then hardly been questioned.[3] Conversely, we

find anglophones asking whether Québec wants to be an open society with the freedom to choose one's language and one's life plans, or a planned and regimented society where fundamental rights are abrogated.[4] Attempts at regulating language use by way of constitutional or legislative dispositions then become unreasonable restrictions of fundamental rights.

Underlying all of this is a basic tension between the value of personal autonomy and the value of community. This tension becomes conflictual when the support system of autonomy, namely a framework of individual rights, clashes with the promotion of community. Now, there are recent and interesting re-interpretations of liberal theory which attempt to account for community in a way that does not undermine autonomy as a core value of liberalism. On these views, community membership is construed as being essential to autonomous choices. In adjudicating hard cases where a communal practice appears incompatible with the respect for personal autonomy, we must remember the reason for taking community seriously in the first place, which is the expansion of autonomous choices. Significantly, this approach aims to reconcile autonomy with community by presenting community as an essential ingredient of our autonomy, thus leaving out the

possibility of a real conflict between opposing, yet equally valid, claims. I will argue an alternate position.

At this point, let me state the main objective of this thesis. It is, above all, an effort to redefine the nature of the tension between the conditions for the protection of autonomy and the conditions for the promotion of community. One way to approach this is to examine how this tension is expressed in rights-discourse. Adjacent to this, I wish to explore the possibility of there being a coherent conception of collective rights that would embody valid claims to communal goods, one which would in turn apply to language rights. Finally, my goal is also to assess the issue of language rights in Québec and Canada in light of these theoretical developments, which involves construing language as a communal good essential to the identity of French Canadians, one that could give rise to communal language rights. This obviously leaves a number of problems open and unfinished presentations, but I do think it gives a different perspective on the issue, one which might contribute to clarifying the debate and, somewhat optimistically, which could prevent us from making moral mistakes in our judgments about language conflicts in Québec.

This being said, Chapter I provides initial working definitions for the arguments that will follow. Since liberalism is the ideological context of this thesis, most of the discussion centres on what it means and implies. I also outline the main elements that make up community as understood here. Chapter II asks how, and to what extent, liberalism can account for community without undermining the primacy of autonomy. I bring out the problematic side of liberal accommodations and point to the need for a different interpretation.

The next two chapters deal with the use of rights-discourse to express communal claims. They cut across two analytically distinct, yet interrelated, issues: one is the worth of communal rights as a conceptual device used to support these claims, while the other concerns the proper moral weight that ought to be given to communal claims. To address these questions, Chapter III defines the meaning of communal goods, for they are central to our argument about justifying talking of rights that are communal rather than individual per se. Chapter IV turns to communal rights more specifically and asks whether they have intelligible foundations, and hence whether they can be rehabilitated into the language of rights.

Next, I discuss how language can be tied to identity, a notion which will have emerged as a central component of

our argumentation. This discussion allows us to situate language as a communal good which could give rise to valid moral claims because of its link with identity taken as a substantive value. Thus Chapter V puts into perspective some of the presumed links between language and identity and identifies some of the answers that can be given to the question 'why is language important?'. In Chapter VI, I ask this question in reference to French Canada.

Chapter VII addresses language rights as such and classifies various kinds of language claims. In particular, I examine the rationale and the justifications for holding far-reaching, or strong, communal language rights. Finally, Chapter VIII's discussion focuses on moral language rights in French Canada, drawing from the conclusions of previous chapters, and deals in more detail with the difficult task of adjudicating conflicting valid claims.

NOTES TO THE INTRODUCTION

[1] Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", The Journal of Politics, vol.44, no.1 (February 1982), 40.

[2] Quoted by Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 227.

[3] This belief can be traced back to the different land tenure system of the French. While the English saw land as a private capital good to be freely bought and sold, the seigneurial system had until mid-nineteenth century a communal dimension. Industrialization and urbanization brought the two communities much closer in organizational and ideological terms. Yet, the 60's revived this belief with language legislation in Québec. On one side, the French would defend the legislation on grounds of collective rights; on the other, the English would object to it on grounds of individual rights. Thus it was concluded that the French support communal rights while the English do not. See Dominique Clift and Sheila McLeod Arnopoulos, Le fait anglais au Québec (Montréal: Libre Expression, 1979), 55.

[4] Earle McLaughlin, when he was board director of the Royal Bank of Canada, quoted by Clift and McLeod Arnopoulos, Ibid., 57.

CHAPTER I - COMMUNITY AND LIBERALISM

Before addressing the problem of choice and communal membership, we need to define what liberalism and community mean in this context, for obviously choosing some definitions over others will determine the extent of their capacity to accommodate each other. Hence this chapter outlines the various conceptions of community and focusses on the normative claims which underlie the liberal community itself.

I

As in the case of other indeterminate concepts, there is no agreement over the meaning of community. As Raymond Plant notes, community can only be given a descriptive meaning against a particular ideological background.[1] While it should be possible to provide a formal concept of community acceptable to all regardless of ideological commitments, such concept would have no operational use in political analysis.[2] But once a move would be made beyond the formal concept, we would arrive at a contestable conception again.[3] For example, the formal 'concept' of justice as the absence of arbitrariness in the distribution of rights and duties will agree with various 'conceptions' of justice based on desert, or fairness, or

need, or moral worth.[4] Or again, the concept of freedom as always involving the freedom of someone, from something, to do something, will accommodate a number of ideologically opposed definitions as to who the agent of freedom is, what the preventing condition is, and what the action is or ought to be.[5] Here the point is not so much that community is a contested concept, but rather to keep in mind that the conception we opt for will necessarily be a normative one.

This becomes apparent in the manifestly wide divergences between the various conceptions of community that have been developed at one time or another in opposition to liberalism. Take for instance the conception of community common to early conservatives like Edmund Burke, Joseph De Maistre and Samuel Taylor Coleridge. It expresses a vision of community based on the belief in ineradicable differences in human capacities and powers and on assumptions about human beings' limited perfectibility.[6] Basic institutions are to be hierarchically structured to reflect these differences and "constrain man's propensity for brutishness and his disposition for anarchy".[7] The resulting order is usually held to be the expression of the will of providence or a matter of necessity in the cosmic order. De Maistre's views on the destructive power of the French Revolution

express such a notion that human beings are mere instruments of providence as they are inevitably carried by a superior force until order is to be restored, that is, until the return of the monarchy.[8] Similarly, Coleridge writes about the unfolding of an a priori revelation which limits human reason's capacity to influence positively the course of events.[9] Hence what characterizes the early conservative view of community is the mediation of transcendent principles in social relations and practices. Unity in the community comes from a system of mutual obligations reflecting traditional relationships, loyalties and expectations that are often vindicated by the fatalism of providence. These forms of social relations correspond to what Russell Keat calls relations of "undifferentiated unity", whereby there is no separate identity between individual A and individual B, thus a compatibility of interests.[10] To put it differently, whereas liberalism, as we shall see, builds on the distinctness between persons, we could say that conservatism is built on a distinctness between roles. These roles and functions are vindicated and reproduced by calling upon transcendental principles which originate outside the sphere of human experiences yet predetermine human activities and relations. The critique by early conservatives is therefore highly prescriptive in its view

of the ideal community and, it could be argued, aims at the reproduction of a priori given social rules and existing forms of relations that are characteristic of pre-modern society.

Perhaps closer to us is the Marxist critique of community in capitalism. The Marxist case against the impediments of capitalism to the growth of genuine community can be put roughly in these terms: in capitalist society community is an illusion, for individuals do not cooperate as social beings with mutual needs, but instead relate to one another as isolated and competitive individuals seeking to maximize their interests.[11] For that matter, pre-capitalist forms of society embodied more a sense of community than capitalist ones. But as was just mentioned about the early conservative view, the communal ties of feudal society were incompatible with personal autonomy and, though capitalist relations are said to be incompatible with genuine community, they are in some ways historically progressive in their liberating potential from traditional roles and structures of authority.[12] The socialist project, then, aims at reconciling the claim of autonomy with that of community. Socialist community, to borrow Keat's model again, here corresponds to relations of "differentiated unity", whereby A maintains his/her distinct identity from B, but no longer relates to B as a

potential constraint.[13] Significantly, what lies behind the Marxist version of community is the absence of instrumental relations at the structural level, namely within relations of production. In short the Marxist conception of socialist community is somewhat residuary of the claim that communist relations of production will put an end to the illusory capitalist community. In that sense, the Marxist conception of the ideal community is far more problematic than its critique of market-oriented forms of interaction.

A significant contribution to the concept of community is that of the school of English pluralists which comprised political theorists such as Harold Laski and G.D.H. Cole, as well as the religious scholar J.N. Figgis and the lawyer F.W. Maitland.[14] In response to both liberal and socialist theories, pluralists held in common a view about the centrality of group life and personality. They rejected the polarity state-individual found in Mill and Spencer's writings, for they believed groups have an existence of their own over and above the actions of individual members and not derived from the state.[15] Similarly, they rejected the dualism of state socialism versus laissez-faire and proposed instead a decentralized system of production such as that of guild socialists.[16] They thought liberty could be best achieved in a society

where power and sovereignty are dispersed among many groups and where individuals can be left to pursue their own goals in the context of voluntary associations.[17] Where pluralists disagreed was on the status of the state: is the state just one among many groups, as Laski claimed, or can the state act as an arbiter between conflicting groups, as Figgis suggested?[18] It should also be noted that pluralists had in mind voluntary associations (e.g. trade unions) as opposed to groups into which one is born (e.g. ethnic or linguistic groups). As a result, their framework was unprepared to address the question of cultural pluralism and focused instead on functional pluralism.[19] But what is sure is that pluralists took the viable polity to be a community of communities and that whatever the moral status of the state, the reality of groups would have to command new political and economic arrangements. Thus the English pluralists' contribution has been to recognize groups as necessary "structures of existence", as having an intrinsic value not derived from personhood nor from society.[20]

More recently, communitarian critics of liberalism[21] have centered on the claim that liberal theories of justice such as Rawls', by trying to "take seriously the distinction between persons"[22], neglect to take seriously the non-contingent social features that are constitutive

of a person's identity. As we shall see, liberals hold that the principles of justice that determine rights and duties and that regulate the distribution of social and economic benefits should not presuppose any particular conception of the good life. But a theory of justice, communitarians charge, cannot be construed as a framework of fundamental rights which is prior to the conceptions of the various shared goods persons may have. Theoretical constructions such as Rawls' therefore appeal to an unacceptable view of the self as unencumbered by social circumstances and attachments. As Michael Sandel puts it, the view of the unencumbered self denies the "possibility of membership in any community bound by moral ties antecedent to choice"[23]; to put it differently, it denies the possibility of a community that is constitutive of one's identity and allows only for 'chosen' memberships. Hence the problem with liberalism is that its appeal to a conception of persons as "self-originating sources of valid claims"[24] conflicts with our self-image as beings whose identities are tied to the community. The responses to communitarian critics of liberalism are interesting ones, not only for their attempt to show how communitarians fail to undermine liberalism, but also for their reassessment of the liberal view of community.[25] I shall return to these in the discussion of liberalism.

Along different lines is the neo-conservative conception of the ideal community. For neo-conservatives, liberalism has gone too far in two respects. First, they argue that the kind of liberty liberal society promotes has turned into moral libertarianism where everything goes, harming in the process traditional values and social conventions. Second, liberalism has evolved into welfarism with its excessive state intervention to offset economic and social inequalities, harming in the process virtues of individual responsibility and hard work. The remedy is correspondingly twofold: first, to increase state intervention in the sphere of morality to protect social roles and traditional family; second, to decrease state intervention in the economic sphere to protect market interactions against interference. Thus for our purpose we can note that one of the important characteristics of the neo-conservative community is the presence of a perfectionist doctrine of the good.

The views of community I have outlined roughly illustrate different substantive theses about the foundations of community. Roughly speaking, conservatives criticize the liberal view of community for its neglect of traditional roles, Marxists for its instrumental nature in the economic realm, pluralists for its neglect of group existence, and communitarians for its view of the

unsituated self. Out of these critiques emerge different conceptions of the ideal community, each with its own normative claims.

II

I now turn to the major features of liberal community. Liberals generally hold that there is disagreement as to which values are to be favored in the basic structure of society given a plurality of opposing and sometimes incommensurable conceptions of the good.[26] Therefore, liberty ought to be the adjudicating principle, or at least the guideline for a conception of justice, one that is congenial to our intuitive convictions about the value of personal autonomy. It does not mean that individuals are incapable of agreeing on a conception of the good or of arriving at a social consensus, but rather that the respect for their autonomy imposes constraints on perfectionist doctrines.

Liberalism according to this definition does not see the political order as the expression of what the ideal person is (although people may agree on, say, a list of Rawlsian primary goods), but as an accommodation among persons who may or may not hold different views about the good life. The fact that they may happen to hold similar conceptions of the good life entails the possibility of

community, but this remains a contingent factor. Liberalism then becomes essentially political, not metaphysical, as Rawls puts it; that is, the conception of justice is independent of controversial philosophical doctrines about human nature.[27] It also stresses the distinction between 'homme' and 'citoyen', as Charles Larmore suggests, for "we can have an unshakable attachment to some idea of the good life while at the same time the political realm treats us as citizens in abstraction from that ...".[28] We find the same distinction in Rawls' account of the person as a political being, with rights and duties attached to his/her public identity irrespective of that person's (changing) conception of the good, private identity, personal loyalties, and, we might add, irrespective of that person's communal membership.[29] Significantly, this also implies that liberalism is not a philosophical 'discourse', whereby one proposition wins over the other (with illiberal implications in the political sphere), but rather a 'concourse', whereby "society is conceived of as being experienced from multiple viewpoints which, whether diverse or not, are distinct".[30] In that sense, liberal theory does not pretend to provide human beings with a "horizon of meaning"[31], to use Charles Taylor's terminology, but rather to provide a system of rights and duties attached

to citizenship. A theory that would ignore the distinction and mix the two realms together would likely lead to antiliberal conclusions. On this view, the question of people's identities and shared moral sense being shaped through communal membership remains beyond the scope of liberalism's claims, which is not to say that liberalism rejects its importance.

One of the implications of this definition of liberalism is the need for some sort of state neutrality, namely to reject all use of perfectionist doctrines as a political means through which a single conception of the good is to be pursued. In short, it is to say that the proper role of the state is not the neo-conservative one of evaluating and promoting virtue in its citizens. Ronald Dworkin, for instance, argues that the state should treat individuals as equals, which presupposes an official neutrality amongst views of what the good life is.[32] This he believes to be the constitutive principle of liberalism. Elsewhere Isaiah Berlin writes of political pluralism, whereby incompatible but equally valuable moralities require the rejection of an imposed common good valid for all humankind, for the idea of a single perfect society is incoherent.[33] Therefore the case is one of "moral disestablishment"[34], that is, the proscription of the use of state power to enforce moral values, not

because questions of morality are unimportant, but "because we think them too important and recognize that there is no way to resolve them politically".[35] Not only do we not agree on what the good life is, but even if we did we also tend to think that the state is likely to distort or misfire, despite the best intentions.[36] To what extent can (or ought) the state become morally neutral is a difficult question in itself. Moral disestablishment, as Neil MacCormick explains, usually admits state intervention via criminal law where harm is done to individuals. State neutrality coupled with some intervention to prevent harm "appeal to the (moral) value of respecting persons as autonomous moral agents, and thus to the derivative value of protecting persons from invasions of their autonomy".[37] But, as MacCormick observes, the principle of harm is itself a morally loaded concept, for it involves some idea of what interests are to be protected against harm.[38] And as Joseph Raz convincingly argues, rejecting the monist view should not necessarily yield state neutrality, but rather a form of moral pluralism where the role of the state is to enable "individuals to pursue valid conceptions of the good and to discourage evil or empty ones".[39] This is different from the notion that government action ought to be neutral between acceptable ends and unacceptable ones, that it

should not hinder nor help valid ideals more than reprehensible and offensive ones. Thus, if state intervention grounded in monism is a moral mistake, and if state neutrality is undesirable, then we can opt for a plurality of perfectionist doctrines. In any case, the liberal condition of having either state neutrality or moral pluralism aims at preventing the use of the instruments of political power to impose a *single* conception of the good.

Such a definition of liberalism and its associated political morality is not unproblematic. One danger is that relations and structures that are not judged to be immediately within the political sphere may not be regarded as being the subject matter of liberal justice. Susan Okin makes the point about the institution of the family. Indeed, while Rawls agrees that the family is a major institution that affects the life chances of individuals, he evacuates the family from the scope of application of the principles of justice by assuming that it must "get to be just in some different way".[40] Or another issue is that of the system of property, which Rawls leaves deliberately open. Liberalism may present itself as being compatible with either private or public systems of ownership. But we cannot overlook the question of the economic structure which in its private form has

the capacity (similar to the capacity that the gender structure has) to subordinate social relations to its own dynamic. From a structuralist perspective, one could argue that the objectivity of relations of production can subsume our subjectivity as distinct persons and source of our own reasons. The charge here is one of inconsistency, for liberalism claims to give priority to autonomy and to independent judgment (and for this reason poses conditions to its acceptance of community), but surrenders some autonomy to 'outside' determinants such as the institution of the family and the economic structure. However, liberals can escape the charge by pointing out again the limited scope of liberalism, on one hand, and the absence of a necessary alliance between liberalism and capitalism, on the other hand.[41]

To be sure, liberal theory is not neutral in one respect: it is a moral theory committed to autonomy as a most fundamental good, that of being the author of one's life. Thus, it is safe to say that what characterizes liberal communities is their capacity to promote political arrangements --such as rights and freedoms-- which maximize autonomy.[42]

III

I will now provide a working definition of community which is relevant to our analysis. The sort of community we are interested in here is one where certain empirical characteristics such as a common ethnicity or language are shared, and where its members define their identity primarily through these shared circumstances, or at the least, that these are pre-conditions to a shared identity. The sociological characteristics can be wide-ranging and there is no reason to fix them a priori. What is important, it would seem, is that members of the community define themselves primarily through their belonging in one community rather than another because they identify with it. This implies that the community will likely have a set of internal relations based on common purposes and ends. The intuitive idea about the conditions for community, then, is that there be a sense of identity derived from sharing a certain good or from seeking its realization. Communities are therefore built on a combination of objective shared features such as a common ethnicity or language, and shared understandings and purposes derived from sharing that common ethnicity or language.[43] It should also be noted that community membership is not primarily voluntary, but natural, and hence is more likely to be inherited than chosen. Usually one does not choose

one's community in the same way that one chooses to join a wine-tasting club. The shared objective features that are pre-conditions to a shared identity are almost always involuntary and to that extent make it more difficult to revise one's community membership or to choose alternate memberships. Finally, I am here more concerned about communities that are in a minority position within a larger state since they normally are the kinds which require special protection. In that respect, Jules Deschênes has provided a useful definition of a minority:

> Un groupe de citoyens d'un Etat, en minorité numérique et en position non dominante dans cet Etat, dotés de caractéristiques ethniques, religieuses ou linguistiques différentes de celles de la majorité de la population, solidaires les uns des autres, animés, fusse implicitement, d'une volonté collective de survie et visant à l'égalité en fait et en droit avec la majorité.[44]

Taking this view, it appears that we should rule out contractarian arguments when trying to define the fundamental aspects of such a community. A contract "commands adherence on the basis of interested obligation"[45], and there are two main reasons why community normally does not satisfy this requirement. First as mentioned above, community is not necessarily a matter of choice whereby individuals come together into a voluntary association to pursue mutual interests. This has significant relevance in construing liberalism's account

of community, because the liberal condition of maximizing choices can sometimes clash with those communal relations that are not freely chosen and can even oppose a community's attempts at restricting extra-communal voluntary associations. Simply put, since communal membership is often not the result of a contractual obligation, so is joining or leaving a community not just a matter of making or breaking a contract. Second, the contractarian notion of mutual interest need not involve the presence of interests that are necessarily shared, such as those sometimes found in communal goods. It would appear that what characterizes communal relations from others is the presence of goods that are necessarily shared, such as language and culture, while contractarian relations need only involve an aggregate of mutual interests. I shall elaborate on this last point in chapters III and IV, namely to see if it can serve to justify the recognition of a category of rights that are inherently collective in their subject-matter.

IV

This chapter has largely aimed at providing initial working definitions for the arguments that will follow. In short, I have put forth two kinds of communities: the 'liberal' community, with autonomy as its core value, and

the 'natural' community, based on identity. To be sure, the two realms are not easily separable, nor can they be mixed. What seems to emerge is that the liberal conception of community limits the extent to which constraints on choice might be justified. Let us examine this issue more closely.

NOTES TO CHAPTER I

[1] Raymond Plant, "Community: Concept, Conception, and Ideology", Politics & Society, vol.8, no.1 (1978), 83-88.

[2] Ibid., 83-88.

[3] Ibid., 83-88.

[4] Ibid., 83-88.

[5] Here I borrow Gerald C. MacCallum's definition of liberty in his "Negative and Positive Freedom", The Philosophical Review, vol.76 (1967), 312-334.

[6] See for example Edmund Burke, Reflections on the Revolution in France [1790] (Harmondsworth: Penguin, 1969); Joseph de Maistre, Considérations sur la France [1797] (Genève: Editions Slatkine, 1980); Samuel Taylor Coleridge, On the Constitution of the Church and State According to the Idea of Each [1830] (London: J.M. Dent & Sons, 1972).

[7] For an interesting account of Marxist, liberal and conservative views of community, see Plant, "Community: Concept, Conception, and Ideology", 79-107.

[8] J. de Maistre, Considération sur la France, 161.

[9] S.T. Coleridge, On the Constitution of the Church and State.

[10] Russell Keat, "Individualism and Community in Socialist Thought", Issues in Marxist Philosophy, eds. J. Mepham and D.H. Ruben (Sussex: Harvester Press, 1979), vol.4.

[11] Plant, "Community: Concept, Conception, and Ideology".

[12] Keat, "Individualism and Community in Socialist Thought", 133.

[13] Ibid., 135. Here it is important to note that Marx did not hold that individual conflicts would end in communist society, but rather that the fundamental

antagonisms within relations of production would disappear. As Will Kymlicka suggests, Marx allowed for conflicting ends among individuals and therefore did not assume away the need for some form of justice to solve competing claims. See Will Kymlicka, Liberalism, Community, and Culture (Oxford: Clarendon Press, 1989), 118.

14 L.S. Lustgarten, "Liberty in a Culturally Plural Society", Of Liberty, ed. A. Phillips Griffiths (Cambridge: Cambridge University Press, 1983), 91.

15 Ibid., 92-93.

16 Richard Vernon, "Introduction" of G.D.H. Cole, Guild Socialism Restated (New Brunswick: Transaction, 1980), xvi.

17 For a concise exposition of English pluralism, see David Nicholls, The Pluralist State (London: The Macmillan Press, 1975).

18 Ibid., 79-86.

19 Lustgarten, "Liberty in a Culturally Plural Society", 97-98.

20 On the intrinsic value of groups, see Ronald R. Garet, "Communality and Existence: The Rights of Groups", Southern California Law Review, vol.56, no.5 (1983), 1001-1075.

21 See for example Michael Sandel, "The Procedural Republic and the Unencumbered Self", Political Theory, vol.12, no.1 (1984), 81-96.

22 John Rawls, A Theory of Justice (Cambridge, Ma.: The Belknap Press of Harvard University Press, 1971).

23 Sandel, "The Procedural Republic and the Unencumbered Self", 87.

24 Rawls, A Theory of Justice.

25 See Kymlicka, Liberalism, Community, and Culture, and Amy Gutmann, "Communitarian Critics of Liberalism", Philosophy and Public Affairs, vol.14, no.3 (1985).

26 See for example John Rawls, "Justice as Fairness: Political not Metaphysical", Philosophy & Public Affairs, vol.14, no.3 (Summer 1985), 227, 248.

[27] Ibid., 223.

[28] Charles Larmore, "Michael J. Sandel: Liberalism and the Limits of Justice", The Journal of Philosophy, vol.81, no.6 (1984), 336-343 at 340.

[29] Rawls, "Justice as Fairness: Political not Metaphysical", 242.

[30] Richard Vernon, "Moral Pluralism and the Liberal Mind", Unity, Plurality & Politics, eds. J.M. Porter and R. Vernon (London: Croom Helm, 1986), 143-159 at 159. See also H.N. Hirsch, "The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community", Political Theory, vol.14, no.3 (August 1986), 425.

[31] Charles Taylor, "Why Do Nations Have to Become States", Philosophers Look at Canadian Confederation, ed. Stanley G. French (Montreal: The Canadian Philosophical Association, 1979).

[32] Ronald Dworkin, "Liberalism", Public and Private Morality, ed. Stuart Hampshire (Cambridge: Cambridge University Press, 1978), 113-143.

[33] Isaiah Berlin, "The Decline of Utopian Ideas in the West", Unity, Plurality and Politics, 120-139.

[34] See Neil MacCormick, "Against Moral Disestablishment", in his Legal Right and Social Democracy (Oxford: Clarendon Press, 1982), 18-38.

[35] Rawls, "Justice as Fairness: Political not Metaphysical", 230.

[36] Joseph Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986), 111.

[37] MacCormick, "Against Moral Disestablishment", 29.

[38] MacCormick proposes a limited moral establishment: "State powers may be and ought to be exercised so as to enforce moral requirements, but only those which are other-regarding duties of respect for persons, and only to the smallest extent necessary for securing to all the conditions of self-respect as autonomous beings". Ibid., 37.

[39] Raz, The Morality of Freedom, 133.

[40] Susan Moller Okin, "Justice and Gender", Philosophy and Public Affairs", vol.16, no.1 (Winter 1987), 42-72 at 49.

[41] Don Herzog tries to dispel the notion that liberalism and capitalism are but two facets of the same ideology. See his comment in his "Up Toward Liberalism", Dissent, vol.36 (Summer 1989), 359.

[42] See Donald Lenihan's point in "Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 406.

[43] See also Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", in The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 219.

[44] Quoted by Joseph Pestieau, "Minority Rights: Caught Between Individual Rights and Peoples' Rights", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 364.

[45] See David Gauthier, "David Hume, Contractarian", The Philosophical Review, vol.88 (January 1979), 3-38.

CHAPTER II - COMMUNITY MEMBERSHIP AND CHOICE: TWO PRIMARY GOODS?

For those who accept both principles of liberal justice and the good of community, any theory that would accept the impossibility of congruence between the two would be far from satisfying. It would also lead to moral mistakes. To be sure, we must avoid a dualism between community and liberal justice which fails to recognize that the two can indeed be consistent. That there exists a point of collision between community and liberalism should not foreclose recognition of the many points of meeting.

Still, the difficult question is to ask how, and to what extent, liberalism can account for community without compromising its core values. Numerous attempts have been made to show the weaknesses of the liberal tradition in providing a plausible account of community. In response to these critics, some liberals have re-examined the foundations of liberal theory with the aim of showing the critics wrong in their assessment of it, thus proposing novel ways of integrating community into liberal frameworks of justice. Here I intend to raise some of the difficulties involved in trying to bring about a coherent answer to the problem of community in liberalism. If the claim I am exploring is right, then liberalism will be

required to account for community in order to provide individuals with the communal goods that are essential to leading an autonomous life. But it will only accord with communities where the ability for individuals to choose and change their way of life is respected. Despite the obvious intuitive appeal of this revised view, the primacy of autonomy over other values as a foundation for liberal theory leads to political principles which can impose contraints on the promotion of worthy goods which, along with autonomy, are also central to our well-being. Thus my overall point is that we need a theory that would articulate the requirements for personal autonomy with those of other substantive values[1], namely identity. We shall also see that there is some sense to the idea that the reproduction of communities sometimes does not accord with the maximization of individual choices, especially when it comes to the parental transmission of a communal identity. This latter issue concerns the difficult problem of liberal education, which I will examine separately in section II.

I

We can begin by noting that liberals do not rule out the reality of community as the context in which one is born or as a voluntary association. It would be a mistake

to say that liberals like Rawls do not admit the importance of community, for they agree that it is partly through communal membership that individuals can shape and make choices among the various options open to them. Liberals generally admit that even in a pluralistic society, non-voluntary communal memberships cannot be avoided and shape personal identity through processes such as acculturation. The problem is that they do not consider community membership as a significant unit in the basic framework in which the terms and rules of liberal justice are defined. For example, Rawls does not include community in the original position as a primary good, which means that community membership is not considered during the deliberations in which the terms of justice are chosen. As Thomas Nagel notes, Rawls' original position is a neutral apparatus only insofar as all individualistic conceptions of the good are included in the deliberation.[2] By extension, the Rawlsian perspective could preclude shared community values that are central to one's identity.[3] Some communal goods could be more difficult to pursue within his framework of justice since their realization could require forms of cooperation (or forms of restrictions) that might be inconsistent with the principles of justice thus chosen. The original position, it would seem, serves to create a framework of rights which is inherently

individualistic and which cannot account for the pursuit of communal goods other than derivatively. Our communality may be irrelevant from a moral standpoint since it is a contingent aspect of the good, as Rawls himself explains: "For reasons of clarity among others, we do not want to rely on an undefined concept of community, or to suppose that society is an organic whole with a life of its own distinct from and superior to that of all its members in their relations with one another", and for this reason, the basic framework must be worked out first, "however individualistic it might seem", after which "we must eventually explain the value of community".[4] Granted, but as a result Rawls seems to reject the first-order desirability of communal goods because he considers these to be morally contingent, and by so doing his theory of justice may preclude the possibility of accounting for community as a primary good. Therefore the principles of justice and the terms of social cooperation thus chosen cannot account for community other than derivatively, and cannot deal adequately with the inevitable tensions that arise between the protection of autonomy and the preservation of a communal identity.

So the question is whether there can be an adequate liberal account of community as a good which can be

fundamental to individuals, and hence whether it can find proper protection in systems of rights.

Is the communitarian critique instructive in that regard? Communitarians charge that a theory of justice should not be understood as a framework of fundamental rights which is prior to the various conceptions of the good.[5] They argue that the self is constituted by its ends, and that it is therefore wrong to view it as being prior to its ends. To put it differently, communitarians believe that we discover our ends embedded in a social context, rather than choosing these as "unencumbered selves", and so they oppose the conception of a self who would be free from the social features of its identity.[6]

Will Kymlicka suggests that the communitarian critique is ill-founded for it misconstrues what liberalism is all about.[7] He challenges the view that the question of whether the self is prior to the good is a real issue. Liberalism, he convincingly argues, is about the freedom to question the beliefs that form our vision of the good life. This is why Rawls accords priority to liberty, not on the grounds that our ends are determined presocially, but rather on the grounds that our interests are formed within a social context in which individuals acquire and revise their ends.[8] Thus "the liberal view is not that we can perceive a self prior to its ends", but

rather that our ends are open to possible re-examinations upon critical reflection, yet always as selves who remain encumbered by a social system of values which underwrites our beliefs and actions.[9] That is, no *particular* end is given with the self, but there is always *some* end. This being said, I shall not try to assess the merits of the communitarian critique. The point here is that the view of the situated self is not inconsistent with the core principles of liberalism. On the contrary.

The issue, then, is whether the basic framework of liberal theory can adequately account for the value of communal goods along with the other goods which are grounded in the respect for personal autonomy. I will briefly examine some of the arguments that articulate liberal principles with the value of community.

(i) Recalling the English pluralists' contention that groups have a moral status not derived from the state nor from the individual, we can ask ourselves if communities could have been included in Rawls' starting assumptions. Vernon Van Dyke believes so, because for a theory of justice to be satisfactory it must reflect the realities of the world, and therefore must "concern itself with groups as well as with individuals" which means that groups "must somehow be represented in the original position".[10] The groups he refers to are "distinguished by

relatively fixed qualities such as race and language or by a set of fundamental beliefs and attitudes of comprehensive importance such as religion and nationalism".[11] The Rawlsian assumption seems to be that a society is a *polis*, that is, an association of people sharing a conception of justice, without any reference to its composition in terms of race, language, religion, etc.. In that sense, societies are falsely held to be basically alike, homogeneous, and not multiethnic. Van Dyke argues that there is no reason for the parties in the original position to be in "their separate personal capacities rather than in their capacity as members of ethnic and national groups".[12]

Van Dyke's position is instructive in many respects. For one thing, it insists that the problem of justice does not only relate to individuals, but to communities as well, communities which may wish to preserve their identity. Also, it is critical of the liberal premisses which prevent us from recognizing that "differentiation might have to occur between individuals depending on the group to which they belong".[13] Thus his point about Rawls' individualistic assumptions remains a valid one. However, it might be difficult to apply Van Dyke's suggestion to Rawls' framework, for it is not clear how groups could be represented as parties without undermining the purpose and

functioning of the original position. Would the groups be considered 'persons' and behave as Rawlsian individuals, thus not requiring a distinct process of deliberation? Would they need to know their views of the good already, the particular values that make them bind as a group, or would they be representative of groups as a concept, without knowing the specificities of their grouphood? We can see how groups and individuals would not work well together in the original position, since one process would lead to an individualist structure while the other could possibly engender some form of corporatism.

These difficulties are more than technical troubles involved in including groups in the original position. They show how the view that communities ought to be treated as moral agents, just like individuals, does not fit comfortably in a liberal framework. To be sure, Van Dyke succeeds in showing the weakness of a narrow individualistic position without suggesting an organic conception of communities.[14] Still, viewing communities as moral units inevitably raises the issue of the validity of communal claims over the claims of other equally important moral units, such as the individual. I shall return to this issue in Chapter IV. For now it should suffice to say that Van Dyke's argument consists in introducing new moral *agents* in liberal theory -- rather than recognizing the

moral weight of communal goods in relation to community members-- and by so doing muddles the issue of conflicting valid moral claims.

(ii) Joseph Raz's theory looks at the issue of community from a very different perspective. Community is valued because of its contribution to the good life, to human well-being, and is essential to attaining an autonomous life. To this end, we should have a sufficient range of acceptable, or morally valuable, options open to us, some of which require the existence of communal goods which are subject to the community's control, or at least to social conventions. Promoting these communal goods would therefore not constitute a limit on personal autonomy. On the contrary. And since the options available to us ought to be worthy ones --otherwise they would not contribute to the realization of autonomy-- then state intervention which promotes worthy choices over evil ones is morally desirable. Thus Raz hopes to answer communitarian critiques by presenting a view of community as something essential to realizing personal autonomy, while remaining liberal by deriving the good of community from the ultimate value of autonomy. It is, he writes, "an endeavour to argue for a liberal morality on non-individualistic grounds".[15]

One problem with this liberal morality is the incoherence of its claim that substantive values other than autonomy must remain derivative of autonomy, and yet that the value of autonomy itself depends on their worthiness.[16] As Margaret Moore notes, it makes little sense to derive the value of autonomy from its role in making worthy choices, and yet conceive autonomy as the ultimate value on which the value of communal goods is to be assessed.[17] Thus there would have to be values that are prior to autonomy, on which the value of autonomous choices can be gauged, but that would jeopardize the independent character of autonomy and possibly justify it being overridden by other values. For our purposes, this points to the necessity of showing that the provision of some communal goods is essential to both personal and communal identity, and that although this can collide with the conditions for autonomy, it remains essential to human well-being as well, that is, to our identity.

(iii) Will Kymlicka argues that cultural membership should be one of the primary goods.[18] He believes that the importance of culture would be recognized by the parties in the original position because the loss of cultural membership is a condition which undermines self-respect, Rawls' basic primary good. Don Lenihan sums up his argument:

> Kymlicka's argument is that cultural membership is a precondition for meaningful individual choice, and meaningful individual choice is crucial for the good life. As a marketplace for opportunities, a culture offers its members an adequate range of materials from which they may select in order to construct coherent and meaningful life-plans for themselves. Without this context, we would have no sense of value, no appreciation of what anything was worth.[19]

Cultural membership must occupy a central place in liberal society, for it is only within a secure cultural context that one can make significant choices.[20] Culture, viewed this way, is the context in which individuals form their beliefs and select their conception of the valuable life; thus, choosing meaningful ends depends upon the existence of a rich cultural environment. But the cultural context will have to be a context of choice, that is, it will have to allow individuals the freedom to endorse or reject the character of their community and its way of life.[21] Cultural membership must not undermine "the very reason we had for being concerned with cultural membership --that it allows for meaningful individual choices".[22] Kymlicka therefore concludes that "concern for the cultural structure as a context of choice ... accords with, rather than conflicts with, the liberal concern for our ability and freedom to judge the value of our life-plans".[23] As Frank Cunningham notes, people have the critical ability

> to reflect upon and even to reject some aspects of their traditions without necessarily thereby being entirely cut off from them, to reflect on and rank the traditional norms of several

> communities of which they may be simultaneously members ... and to affect the ways traditions of their communities might change.[24]

In short, free choice is regarded as being normatively prior to communal membership because culture as context is made to be commensurable with liberty by being a context of "ends-to-be-chosen".[25]

Why, then, did Rawls neglect to include culture as a primary good? According to Kymlicka, it is because he falsely assumes that there exists only one culture in each political community, a kind of public good somehow equally available to all.[26] We might add that this would perhaps explain why Rawls' apparatus cannot account adequately for minority communities that may not share with the larger nation-state the same vision of what constitutes a public good, or may not even share the same public space as such. Another reason could be that Rawls conceives community as an end, not as a means, and that therefore it does not belong in the list of primary goods. Indeed, if community --whatever its form, norms, values, etc.-- is to be an end to be pursued, then it would make no sense to include it as a primary means. But whatever the reason, it appears that Rawls has no place for communities, whether these be in a representative capacity among other parties (as Van Dyke suggests they should be) or else as a primary good to be considered in the parties' deliberations (as Kymlicka's theory implies).

As we can see, what underlies Kymlicka's compromise is a strategy to reconcile the value of community with the value of free choice. But in order to achieve this, he must opt for a definition of culture which has been emptied of its substance, of its 'character'. Indeed, he draws a distinction between the *character* of a community, that is, its values, beliefs, norms, etc., and the *function* of community, namely its function as a context of choice. On this view, the claims that a community would make to protect its character would have to be subordinate to the protection of a context of choice as required to maximize autonomy.

In sum, we can see why the assumption that the reality of communities commands respect in the same way the reality of individuals does (Van Dyke) creates considerable difficulties when adjudication between conflictual claims becomes necessary. And granted that liberalism could plausibly account for cultural membership and community (Raz and Kymlicka), it becomes clear what the conditions are for such an accommodation given the primacy of autonomy. It would seem that this revised liberal theory accepts the proposition that community -- ultimately any worthy community-- is central to autonomous choice and can be defended *only if it promotes autonomy*; otherwise, communities have very little ground to claim

protection. They must not, as Kymlicka argues, defeat their purpose, which is the promotion of autonomous choices.

II

We have seen in our initial definition of liberalism and its core values that there is a plurality of sometimes opposing conceptions of the good, and for this reason the framework of liberal justice must respect the autonomy of persons to make their own choices (whether or not these choices are shared). Therefore the extent to which liberal theory can account for community is limited to situations where the conditions for autonomous choices within the community exist, as Kymlicka's compromise implies. This way conditions for the autonomy of the individual are improved, since the importance of the cultural matrix to making significant choices is recognized, and at the same time the potential restrictive effect of the community on the individual's choices is rejected. It meets our intuition about accepting the good of community while avoiding the tyranny of groups. Or does it?

Is there a sense in which the very existence of communities does not accord with maximizing individual choices? For example, to what extent should a community's views of what the valuable way of life is justify

foreclosing children's ability to participate in the wider society, or even to opt out?[27] It is likely that the education the Hutterite child receives diminishes his or her chances of making certain life-plans. On the other hand, we cannot a priori reject the validity of the claim that the Hutterite community must restrict some opportunities for its members on the rationale that the community must reproduce itself. This points to a difficult issue, for if liberalism can accept that community, though not a distinct moral unit, should at least be considered a primary good, then should it not also accept that the survival of some communities requires limiting individual choices? It cannot, for otherwise it would mean accepting that community members be treated as instruments serving the imperatives of their community's reproduction.

There are a number of problems. By doing so, does not liberalism likely foreclose the opportunity of an individual to choose the Hutterite way of life during adulthood, since that individual will have been educated to perform in technical occupations and socialized in leading the fast and materialist life? As Michael McDonald writes,

> [t]his not only threatens the existence of some groups, but it paradoxically diminishes individual choice while increasing it; for the creation of a new set of options for the child

> either eliminates the earlier option of remaining within the traditional culture or dramatically raises its costs.[28]

In principle, the charge of inconsistency does not hold here, since the liberal conditions of maximizing choices aim at expanding the range of possible alternatives rather than deliberately contracting choices, all other things being equal. But this is a moral standpoint. From a sociological perspective, we can still ask whether indeed liberalism is not partly self-defeating in effect, that is, by decreasing the chances that the traditional way of life will be 'chosen' once all alternatives have been examined.

Modern pluralistic society operates on the grounds that people have the rights of association and dissociation, that minority groups ought to be freely created and freely questioned, and thus supports a set of individual rights which partly serve this function. But as McDonald notes, modern mass culture has had a destructive effect on some marginal communities as the exercise of individual rights has at times contributed to their disintegration. And as he adds, "once such a community is shattered it cannot be put back together again". Thus the disintegrating / assimilating effect of pluralism --with its associated individual rights-- on vulnerable communities cannot be overlooked.

The problem appears most acute in education where the transmission of values to children is often justified on paternalistic grounds. From a Rawlsian perspective, Amy Gutmann suggests that "if there are certain primary goods that adults would choose to have had provided to them as children, then we might justify paternalistic interventions that supply these goods".[29] Thus if children have a right to certain primary goods, then parents and the state have paternalistic duties towards them.[30] According to Gutmann, one such parental duty includes allowing children to choose among a range of conceptions of the good life that differ from the parents' own conception or from that of their community.[31] This does not mean that parents cannot forbid their children to perform actions which are judged uncongenial to their sense of the good life or to their system of values. For instance "parents certainly have a right ... to forbid their children to eat pork within their home", but "they also have the duty to allow their children to be exposed to the knowledge that eating pork is considered a reasonable way of life by many other people".[32] Transmitting a particular way of life to one's children then goes hand in hand with transmitting them the knowledge of alternative ways of life. We can see that the

standard of paternalism here consists in maximizing choices for children and educating them for autonomy.

What if this parental duty is not followed by parents? In this case, Gutmann argues that the state has the right to impose some level of education (although the question of how much compulsory education is acceptable remains open) despite the parents' desires because education allows children to realize their freedom to choose.[33] She admits that there are grounds for respecting parents' values since state education itself is not neutral and favours *some* view of the good life over others.[34] But for Gutmann the problem is not so much *whose* values should be imposed, but rather *what* values ought to be imposed. Here the liberal principle of maximizing choices resurfaces as the criterion, as "[w]e are required to choose those [values] that are most neutral among competing conceptions of the good, standards that expand rather than contract a child's future ability to exercise meaningful choice".[35] The state therefore has the duty to guarantee that every child has equal citizenship through education.

So according to the modified liberal view, children should inherit their parents' and community's way of life as well as the knowledge of alternative ways of life. The problem with this is that if their heritage happens to

coincide with mainstream culture, it is more likely that they will stick with it. However if they inherit a marginal way of life, it is more likely that they will succumb to, or *choose*, mainstream culture. Thus, if the Hutterite mother has the right to make her daughter wear the distinctive dress, she also has the duty to inform her that other people dress differently, perhaps by showing her fashion magazines. When she becomes an adult, the daughter will then be free to choose alternate ways of dressing, question communal practices and even reconsider her membership in the community. If this satisfies the liberal, the Hutterites might raise the point that the mother ought to restrict her daughter's access to such fashion magazines in order to avoid envy. In other words, they might argue that children's education should not aim at widening the range of choices if this means that the community will later be faced with losses in membership. Thus there is an intuitive appeal to the idea that minority communities cannot afford to maximize choices while trying to strengthen allegiance and conformity, especially where group coherence is threatened by the larger society. The liberating effect of liberalism brings people closer to the boundaries that separate their community from mainstream society where communal values

and practices are most vulnerable. There, communities cannot always afford to be liberal.

We can infer from this that liberal theory only admits primary goods that insure the greatest range of reasonable choices for children when they become adults. Or at the least, the supplying of primary goods should be in accordance with the respect for autonomous choices. Assuming that community could qualify as a primary good, a problem arises in transmitting the value of community through education. Given that one's identity is partly rooted in one's community and its distinct values, how is the good of community to be transmitted? Normal processes of socialization and ideological forces will serve that function in cases where the community has a considerable power of attraction to a majority of people. But in cases where a community holds a marginal position relative to mainstream culture, maximizing the range of reasonable choices through education may erode the community insofar as opting out becomes an attractive alternative. There is a danger that "[c]ollective autonomy for the minority will be diminished in order to advance the autonomy of individual members of the minority".[36] The liberal separation between citizenship and communal membership therefore can work at the expense of the latter, since the provisions for acquiring autonomy through a set of rights

attached to one's citizenship may contribute to the demise of the communal matrix in which identity is shaped.

Moreover, if it is usually agreed that for individuals to flourish they must live in *some* community, that does not answer why there is a case for preserving *one's* community and transmitting it to future generations.[37] It is one thing to argue that a cultural context, any cultural context, will do. But why do we insist on transmitting our culture? For one thing, should someone see the good of one's community for one's self-identity, then perhaps there is a case for preserving the integrity of the community and passing on its values to one's children. One line of argument would be that we care about our offspring because we identify their interests with our own, and hence future generations have claims on us in the same way that we can claim a particular good in the present.[38] A variation of this argument would be that people have interests in what happens after their death, and thus may attach a legitimate interest in passing on the community's goods to the next generations.[39] Also, paradoxically, the logic of maximizing choices can also be stretched to include a claim for restricting choices. Freedom of choice can lead more vulnerable communities to disappear or integrate into the dominant society. Particular values and conceptions of the good, and even

whole communities, may be lost in the process, thus reducing the actual number of alternatives for future generations. Restricting choices in a community could therefore prevent the loss of alternatives in the long run. How far parents and communities are justified in restricting choices on those grounds shows just how tangled the question of justice between generations is.

A different set of reasons can be examined for finding grounds for the restriction of choices. So far we have taken for granted that those who see their freedoms limited by their community do not share the community's values in the name of which their freedom of choice is being limited. To put it differently, we are talking about a communal good being imposed on a community member who does not see any goodness in the 'good' in question. But there exists another category of restrictions altogether, that is, when a community member is in agreement with the goodness of the good, and yet decides to take a free ride. A person could enjoy a communal good without the burden of having the duty to contribute to the preservation of that good. I may enjoy the language I speak as a member of a minority, and yet insist on having my children educated in the language of the majority to increase their chances of upward mobility. Knowing this, my community might feel justified in forcing a duty upon me to have my children

educated in the language of the minority instead of my counting on the others to preserve it. Labour union membership is an analogy:

> [I]f a union is permitted to be coercive, that is, to require membership as a condition or consequence of employment, then all members gain bargaining power. Rational employees devoted to their individual self-interest in higher wages, job security, and effective grievance procedures would not create, join, and pay for a labor union, unless there were some coercive membership rule to prohibit nonunion employees from taking a 'free ride' on the union's efforts.[40]

Coercion is here justified on the basis that agreeing to something as a good --and as a right-- means agreeing to the enforcement of obligations for all those who benefit from it. We therefore have two different situations. First we have a community member who has his choices restricted even though he does not see any goodness in the collective good. But then we have a community member who has her choices restricted because although she sees the goodness in the good, she would rather free ride. If there may be illiberal conclusions to the first instance, it appears that the free rider problem can be solved without illiberal implications.

III

So much then for defining some of the problems of community in liberalism. The discussion attempted to raise

some of the difficulties involved in accepting the good of community without compromising one of the core values of liberalism, that of autonomous choice. The main difficulty seems to arise from the initial reasoning behind liberal theory which cannot fully integrate claims about the value of community. Thus the principles of liberal justice are likely to reflect a view in which the conditions for community remain contingent upon personal choice. This can in turn undermine a community's attempts to survive and grow. Indeed in construing the thesis that individuals ought to be authors of their own lives, with its pluralistic counterpart, liberals fail to account adequately for the preservation of the context in which identity-related communal goods are fostered, goods which give meaning and substance to individual choice.

In response to this critique, some liberals have offered provocative new ways of interpreting liberalism consistently with the need for community. On one account, communities ought to be treated as moral units. I have suggested that this evades the need for validating the moral claims that a community could make, and hence cannot address adequately the inevitable collision of such claims with those of individuals. On the other account, the parameters of autonomy have been adjusted to include the need for community. Here I have suggested that the view

which emphasizes the primacy of autonomy needlessly avoids the ascription of other substantive values to human well-being, such as the value of identity. Once this is done, I believe we can reinterpret the worth of some communal goods in a way that appeals to our acceptance of both. In the next chapters I will explore one part of the fuller theory that this would require. Finally, I have argued that liberal education may threaten the existence of some communities, especially if it operates in a context of mass acculturation. Again, a better understanding of the substantive value of communal identity may improve our ability to manage the point of tension with autonomy.

NOTES TO CHAPTER II

[1] See Margaret Moore's point in "Liberalism and the Ideal of the Good Life", The Review of Politics, vol.53, no.4 (Fall 1991), 682-683.

[2] Cited in Joseph Raz, The Morality of Freedom , 118-120.

[3] Given the constraints of mutual disinterest in choosing the principles of justice behind the veil of ignorance, this appears even more probable.

[4] Rawls, A Theory of Justice, 264.

[5] On this subject, see Sandel, "The Procedural Republic and the Unencumbered Self", as well as "Justice and the good", Liberalism and its Critics (Oxford: Basil Blackwell, 1984). See also Alasdair MacIntyre, "The Virtues, the Unity of a Human Life and the Concept of a Tradition", Liberalism and Its Critics.

[6] Sandel, "Justice and the Good", 170; MacIntyre, "The Virtues, the Unity of a Human Life and the Concept of a Tradition", 142.

[7] Kymlicka, Liberalism, Community, and Culture, 13.

[8] Ibid., 16-17.

[9] Ibid., 53.

[10] Vernon Van Dyke, "Justice as Fairness: For Groups?", The American Political Science Review, vol.69, no.2 (1975), 607.

[11] Ibid., 607.

[12] Ibid., 609.

[13] Ibid., 608.

[14] Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", 22.

15 Raz, as quoted by Robert P. George, "The Unorthodox Liberalism of Joseph Raz", The Review of Politics, vol.53, no.4 (Fall 1991), 658.

16 Moore, "Liberalism and the Ideal of the Good Life", 687.

17 Ibid., 688.

18 Kymlicka, Liberalism, Community, and Culture, 162-178.

19 See Donald Lenihan's point in "Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka", 407.

20 Kymlicka, Liberalism, Community, and Culture, 169.

21 Ibid., 172.

22 Ibid., 172.

23 Ibid., 167.

24 Frank Cunningham, "Community, Tradition, and the 6th Thesis on Feuerbach", Analyzing Marxism: New Essays on Analytical Marxism (Calgary: The University of Calgary Press, 1989), 220.

25 See Peter Benson's discussion of this in "The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 257.

26 Kymlicka, Liberalism, Community, and Culture, 177-178.

27 See L.S. Lustgarten's point about Amish education in "Liberty in a Culturally Plural Society", 104-105.

28 Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 236.

29 Amy Gutmann, "Children, Paternalism, and Education", Philosophy & Public Affairs, vol.9, no.4 (1980), 340.

30 Ibid., 341.

31 Ibid., 343.

32 Ibid., 353.

33 Ibid., 350.

34 Ibid., 353.

35 Ibid., 350.

36 McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 236.

37 Brian Barry, "Self-Government Revisited", The Nature of Political Theory, ed. David Miller and Larry Siedentop (Oxford: Clarendon Press, 1983), 149.

38 For a similar argument see D. Clayton Hubin, "Justice and Future Generations", Philosophy and Public Affairs, vol.6, no.1 (1976), 70-83.

39 See Barry, "Self-Government Revisited", 145-153.

40 Garet, "Communality and Existence: The Rights of Groups", 1053.

CHAPTER III - ARE THERE ANY COMMUNAL GOODS?

Part of our objective is to show that much of the debate about so-called collective rights is oversimplified. It is often presented as an opposition between individualism and collectivism, and, in the case of language rights in Québec, between those who favour collective rights for Québec society and those who value the individual and his rights. I want to argue that communal rights can be conceived in a way which rests on the individual, and that the conflicts that could arise between valid moral claims are a reflection of the tension between the value of autonomy and that of identity. Thus construed, the debate between individual rights and communal rights can be seen as a matter of divergent interpretations of what the conditions for autonomy and identity require, and its resolution as a delicate balancing act.

But before going any further, a sound discussion of communal rights would have to incorporate a definition of communal goods, for it appears that the two concepts are intimately linked. In this chapter, I shall examine various definitions of collective goods many of which are problematic, either because they are muddled or because

they are not really conceptually any different from individual goods. I will then propose a definition of collective goods which applies more specifically to communities, namely, communal goods. This will serve as a basis for the next chapter's discussion of the structure of communal rights and their moral foundation.

I

To begin with, I should like to comment on the notion of good in general. It usually makes sense to talk of a good in two ways. The first is to conceive it as an end in itself which makes intelligible instances of the human activity involved in its pursuit.[1] For example, John Finnis' "basic goods" are in this category. They constitute what he believes to be the basic purposes of human action: life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness (to choose and pursue our life plans in a free and responsible manner).[2] These goods, he argues, are the first-order values from which other goods are derived:

> First, each [value] is equally self-evidently a form of good. Secondly, none can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others. Thirdly, each one, when we focus on it, can reasonably be regarded as the most important. Hence there is no objective hierarchy amongst them.[3]

There are countless other forms of goods, but he suggests that they are derivative of the seven basic values enumerated above. The point is that the goods Finnis talks about are ends in themselves for they give a purpose to human action.

This is different from the second sense which is sometimes given to the notion of goods. In this case, a good is a means to an end. To use Finnis' example, if knowledge is a basic end, then a sound brain is a means for the pursuit of knowledge.[4] Rawls' primary goods are in this category. They constitute what every person can be presumed to want in order to execute a rational plan of life: social primary goods such as liberties, opportunities, wealth and self-respect, and natural primary goods such as health, imagination and intelligence.[5] Here the goods are not primary in the sense of being basic ends, but primary because they are believed to be some of the necessary means to advance our aims, whatever these are. As Rawls explains, "once we establish that an object has the properties that it is rational for someone with a rational plan of life to want, then we have shown that it is good for him".[6]

Although the distinction between means and ends is by itself clear enough, it is a difficult task to discern those goods that are ends from those that are means. Some

object in my life plan may be an end for me, yet be considered a means for someone else who has an equally rational plan of life. Something may have all the properties to be called a good, though it remains contingent whether the good is primarily a means or an end. To sidestep these difficulties, I will simply talk of a good as something which is valuable, although it may be so to different degrees, as an end in itself or as a means to achieve a higher good. The concept will take shape as we look at examples in this chapter and others.

II

Now with these preliminary stipulations in mind, what makes a good collective rather than individual? One often invoked criterion is that a collective good, unlike an individual good, does not have a zero-sum character. In his discussion of public goods, David Braybrooke writes that

> limitative benefits are characteristic of private goods, the consumption of which in any instance is to the benefit of one person and to the detriment of anyone else. ... By contrast, the benefits characteristic of public goods (like a light-house, ... a safe environment) are such that consumption by one person does not impair or limit consumption by others.[7]

Staughton Lynd argues that goods in a capitalist society, somewhat like the private goods Braybrooke defines, are mostly seen as a kind of individual property, therefore

involving a zero-sum game. These goods are such, he argues, that "what is accessible to one person is therefore unavailable to another".[8] By contrast, some goods are non-limitative. One example Lynd gives is concerted labour activity for mutual aid or protection. It has the attribute of a positive-sum good since one's gains are everyone's gains.[9]

By extension, could it be concluded that a collective good is a good which benefits everyone and need not be enjoyed to the detriment of others? Enjoying a clean environment is indeed not a limitative benefit in the sense that one's enjoyment of it does not require impairing someone else's enjoyment of the same.[10] A clean environment, therefore, would be an example of collective good, much like Braybrooke's public goods. To put it differently, collective goods would be another way of expressing the idea behind public goods.

But, one might object, how is this different from individual goods? My enjoying the individual good of not being arbitrarily detained does not require impairing someone else's enjoyment of the same. Similarly with the freedom of conscience, of belief, of expression, of mobility. Since individual goods can be limitative *or* non-limitative, as opposed to always involving negative-sum benefits, it is a false assumption that a specific

characteristic of collective goods is the positive-sum benefits they bring. Yet could it be that collective goods, unlike individual goods, *always* involve positive-sum benefits? Before answering this question, we need to make a distinction between *shared* goods and goods *in common*.

Goods in common need only involve parallel interests. Braybrooke writes that parallel interests are "solitary interests that are served by a common scheme of co-operation".[11] As Lynd puts it, they are no "more than just an updated version of the social contract through which each individual undertakes to assist others for the advancement of his or her interest."[12] This is somewhat like the contractarian idea of having mutual, yet inherently individualistic, interests. This is also not unlike welfarist calculations which are individualistic "in that the ultimate particle of satisfaction is the satisfaction of individual preferences" and social "in that the preferences are voiced collectively and addressed in the aggregate".[13] Thus parallel interests of the kind found in the forms of contracts and social choice packages appear to be sufficient grounds for the first kind of collective goods, namely goods in common.[14]

Viewed this way, that is, as an aggregate interest, goods in common may indeed apply to a collection of

individuals, but not in the same sense as goods which *must* be shared by people. Indeed, collective goods of the second kind involve shared interests. Consider again the following example. As noted above, enjoying a clean environment does not hinder someone else's enjoyment of the same. But nor does it help it. A clean environment can be enjoyed in solitude in the sense that someone else need not enjoy clean air for me to enjoy it. Were I the last person left on the planet, I would still --if not more-- benefit from clean air. In that particular sense, a clean environment involves parallel interests, not shared ones. By contrast, the good of national sovereignty cannot be experienced alone, since a nation is required for there to be a need for sovereignty in the first place. The same can be said about the freedom of peaceful assembly, the enjoyment of culture, and, as we will see later, language use. What makes a good specifically collective in that second stronger sense, then, is that it is necessarily shared inasmuch as it cannot be experienced in isolation in any meaningful way. Waldron argues similarly:

> Some goods are not privately enjoyable because to enjoy them one must be doing so in the company of others and with the assurance that they are enjoying them as well. ... [A] communal good [is] experienced as such by people only to the extent that they are participant members of a group to which the benefit of the good accrues at a collective level.[15]

Significantly, these "non-excludable" goods "cannot be secured to individuals one at a time: securing G to X involves securing it also to Y and Z".[16]

Thus, can it be that collective goods, unlike individual goods, *always* involve positive-sum benefits? Here the notion of shared goods takes on a particular meaning. Both collective goods and individual goods, as argued above, do not automatically involve a zero-sum game in the sense that to enjoy either one does not necessarily involve impairing someone else's enjoyment of the same. But the difference is that individual goods do not require positive-sum benefits, for they can be enjoyed in isolation. By contrast, a good that is necessarily shared must necessarily involve positive-sum benefits, for one person's enjoyment of it is required for the other person's enjoyment of the same. The main point is that this kind of collective good is one that is not available and which has no value to an individual outside collective participation. As Leslie Green argues, the public aspect of a shared good is not a contingent feature of its production, but is its constitutive value.[17]

III

So far we have discussed collective goods without any specific reference to community. What I wish to suggest

now is that there are collective goods as defined above which apply specifically to communities, and I will call these *communal* goods. Correspondingly, there are communal goods in common and shared communal goods. Let us take an example.

We will assume that a given community, say community X, is characterized by its unique religious practices, and that these practices are central to the community's identity, hence are a good to that community (this latter qualification concerns the worth of goods and shall be examined in the next chapter). In community X, the main religious ritual in question is inherently individualistic, that is, community members practice the ritual alone, in isolation. All members of the community have this ritual in common though, and they identify with the community for that reason. In this case, the good of religion is a communal good because it is central to membership in the community and plays a central role in identity. But it is a good in common, rather than a shared good, since members have in common a ritual which is basically individualistic.

The second case concerns community Y. The identity of this community is also based on unique religious practices. But unlike members of community X, those of community Y must practice their religion together. For the

ritual to have any meaning, it must be shared. Again we can say that the good of religion is a communal good because it is central to membership in the community and plays a central role in identity. But in this case, the communal good is a shared one, since members have in common a ritual which is fundamentally shared.[18]

Thus communal goods are distinct from individual goods because they are constitutive of the identity of individuals as members of a community, rather than having a value to individuals *qua* human beings. In some cases, the good is individualistic but can still be said to have a communal dimension since it is common to members of a community and defines membership. In other cases, the good involves necessarily shared interests and therefore has an additional communal dimension. This latter distinction represents more than a nuance, for it could serve to argue that *some* coercion by the community towards its members may be justified when the communal good is constitutively shared. In any case, whether we are talking about the necessary participation involved in shared goods or the presence of identity-related goods in common, the link between communal goods and community is clear for community is often formed as a result of a collective participation in the pursuit or enjoyment of a good

(whether that good is 'chosen' or 'natural'), and in turn membership becomes a precondition to such participation.

IV

The objective of this chapter has been to make sense of the claim that some goods can be conceived as communal rather than individual. Given that some things are valuable because they are central to community membership and identity, we can say that they are communal goods. They are different from individual goods which are not related in any meaningful way to communal identity. The link between communal goods and communal identity will be examined further in the next chapters. But for now, we can say that communal goods are twofold, some being characterized in terms of their worth to community members taken alone, others having meaning only in shared participation. Keeping in mind these distinctions, we can now turn to the question of communal rights.

NOTES TO CHAPTER III

1 John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), 60-62.

2 Ibid., 86-90.

3 Ibid., 92.

4 Ibid., 81-85.

5 John Rawls, A Theory of Justice, 62.

6 Ibid., 399.

7 David Braybrooke, "A Public Goods Approach to the Theory of the General Will", Unity, Plurality and Politics, eds. J.M. Porter and R. Vernon (London: Croom Helm, 1986), 77.

8 Staughton Lynd, "Communal Rights", Texas Law Review, vol.62, no.8 (May 1984), 1422. It should be noted that Lynd is also critical of 'collective' rights if they are property-oriented. This is why he prefers to use the term 'communal' to designate rights that are not property-oriented, whether exercised by groups or by individuals. I too will use the term communal, though in a different sense as we shall see.

9 Ibid., 1423-1430.

10 It should be noted, however, that enjoying a clean environment may require imparing someone else's enjoyment of another good. The actions that have to be done in order to maintain a clean environment may erode other benefits, such as reserving to this end a portion of the taxroom which otherwise would have gone to the improvement of, say, the health care system. Similarly, it may be true that in the case of labour solidarity there is no zero-sum game within the group. But is there not a zero-sum game between the labour group and the business sector? We may presume that corporate profits would increase were it not for labour unions' activities. Of course the fact being that resources are limited, the point is that the condition of non-limitative benefits seems only valid within the group, not between groups. The criterion for

identifying a collective good would therefore have to be the presence of *inclusive* positive-sum benefits.

11 Braybrooke, "A Public Goods Approach to the Theory of the General Will", 81.

12 Lynd, "Communal Rights", 1427.

13 Ronald R. Garet, "Communality and Existence: The Rights of Groups", 1053.

14 It might be useful to note that shared interests do not have to be relations based on love, compassion or some kind of sympathetic concern. Following Rousseau, Braybrooke defines shared interests as involving in part a sympathetic concern with other people's interests. See his "A Public Goods Approach to the Theory of the General Will", 81-82. However desirable this may be, it does not appear to be a fundamental element of collective goods. The first violinist in an orchestra can only enjoy fully the concerto when all the musicians are playing; the fact that he dislikes the oboe player is irrelevant to their shared enjoyment of playing the concerto. The point is that shared interests can be reconciled with self-interest.

15 Jeremy, Waldron, "Rights, Public Choice and Communal Goods", Legal Theory Workshop Series (Toronto: University of Toronto, 1986), 15. Also consider Charles Taylor's distinction between "mediately common goods" and "convergent common goods". The former include those goods whose value comes from their being shared. But the latter include goods that need to be collectively provided, though they would have the same value for the individual alone were it possible to afford or obtain them alone. See his "Cross-Purposes: The Liberal-Communitarian Debate", Liberalism and the Moral Mind, ed. Nancy L. Rosenblum (Cambridge, Ma.: Harvard University Press, 1989), 168-169.

16 Waldron, "Rights, Public Choice and Communal Goods", 12.

17 Leslie Green, "Two Views of Collective Rights", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 321.

18 Waldron writes that in these cases, "something is said to be valuable for a human society without its value being adequately characterizable in terms of its worth to any or all of the individual members of the society considered one-by-one". See his "Rights, Public Choice and

Communal Goods", 16. See also Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", 22.

CHAPTER IV - COMMUNAL RIGHTS

Vague invocations of collective rights often obscure the implications that claims to a right carry and the reasons for taking individual rights seriously in the first place. Perhaps this should not be surprising, for although the notion captures some of our intuitive beliefs about the value of community, it can render rights-talk unintelligible. Still we may bear in mind C.A. Wringe's point that

> a most fertile source of confusion and conflict regarding the rights of individuals is the assumption that a definition of a right can be given which is at once simple and informative, and that claims to rights which do not fit such a formula are to be rejected out of hand.[1]

Similarly we can ask whether communal rights should be rejected out of hand. Here I wish to consider the proposition that some rights could be conceived as communal rather than individual. Of the many senses that can be given to this proposition, I shall defend a version which could remain compatible with principles of liberal justice alongside individual rights. If correct, this version would imply that the well-known conflict between individual rights and communal rights in fact reveals an inevitable tension among valid moral claims themselves. My

overall aim, then, is to rehabilitate communal claims into the language of rights.

I

Let us assume that most rights have the following basic structure: A has a right to X in relation to B, giving rise to B having a duty Y towards A. A is the right-holder, B the duty-holder, X the object of the right, and Y the correlative duty. A right generally entails a corresponding duty from other persons or institutions to act (or to refrain from acting) toward the right-holder in accordance with the requirements of the right.[2] "To have a right", J.S. Mill wrote, is "to have something society ought to defend me in the possession of".[3] Moreover, as H.L.A. Hart puts it, "[t]o have a right entails having a moral justification for limiting the freedom of another person and for determining how he should act".[4] To assert a right is to assert that there is such a justification. If I have a right to not being arbitrarily detained, it entails that people and institutions have the duty of not detaining me arbitrarily, that they do not have the freedom to do so. Rights are, as Jan Narveson puts it, "duty-creating properties".[5]

The above-mentioned version of the relation between rights and duties suggests that rights normatively precede duties, that duties are inferred from rights. Indeed, rights and duties are not "different names for the same normative relation, according to the point of view from which it is regarded".[6] Where there is a right, there is a duty. However, if rights imply duties, not all duties are derived from rights, that is, not all duties are duties of justice. There are for example duties of benevolence, for which there are no clearly identifiable rights. Parents no doubt have an obligation to love their children, though children do not have a right to this. But children do have a right against their parents injuring them, which entails a duty of justice on the part of parents. The relevance of this distinction is that not all moral considerations are to be expressed in the language of rights, either because they go beyond strict duties of justice (as in supererogatory acts) or because they are of a nature not easily expressed in the language of rights.

It is also worth noting that this formal account of rights is not one of prima facie rights, though in a sense one of prima facie duties. If B fails to do his duty Y towards A, it does not mean that A's right X that justifies duty Y is non-existent in this particular case or did not exist in the first place; rather, A's right

remains, though it is limited for some other reason. Thus if a right is overruled, it does not mean that the right is a prima facie right:

> The right remains, even though we may wish to describe the duty to accord or fulfil it as a prima facie duty, that is, the right may be a reason for a certain course of action being someone else's duty, though other reasons may prove overriding.[7]

Thus there must always be a justification for overriding a moral right; but should there be one, it does not entail that the right was not an actual right.[8] This might leave the impression that the purpose of rights is defeated, or at the least that we are left without a clear principle to decide when a duty is to be fulfilled or not; but as W.D. Ross argued, "[t]here is nothing arbitrary about these prima facie duties. Each rests on a definite circumstance which cannot seriously be held to be without moral significance".[9] The answer may not be fully convincing, but it seems difficult to avoid the prima facie nature of most duties when considering the presence of competing claims and particular circumstances. Thus the rights thesis endorsed here is not interpreted as an absolute, for although as a general rule of action traditional individual rights ought to be respected, there are other valuable determinants of political action which I will now argue for.[10]

II

A well-known difficulty is to determine the class of subjects that qualify as right-holders; living human beings obviously come to mind, but so may dead people, animals and trees. How about communities? Is it both sound and useful to talk of communal rights?

The assertion of a right is not self-validating. What we need to do is to postulate the principles from which it makes sense to talk of A being a right-holder and X being something worthy enough to give rise to a right. The latter question concerns the worth of goods and will be discussed more fully in relation to the language-identity link, though we will touch upon it in this chapter. For now, let us ask if a community can bear rights. My inclination is to seek an answer by ruling out the strong version of collective rights and seeing whether a weaker version is defensible.

I agree with the following postulate: that the justifying principle for being a right-holder is that of inherent value; that because human beings are "subjects-of-a-life", they have an inherent value, and thus ought to be treated justly and with respect. Tom Regan writes that

> individuals are subjects-of-a-life if they have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in

> pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests.[11]

He goes on to say that "[t]hese individuals ... are therefore due, as a matter of strict justice, treatment that is respectful of the kind of value they have, and all are owed this treatment equally".[12] Essentially it comes down to saying that the necessary condition --though not sufficient-- for holding others duty-bound is to be a subject with an inherent value. So we can say that rights can be validated in part on the grounds that human beings have an inherent value which makes them distinct sources of valid claims.[13] But the notion that all individuals have an inherent value is not only derived from some attributes having been shown to be universal, such as the capacity to experience pleasure and pain; more than an empirical observation, the notion is a presupposition whose moral relevance cannot be doubted. The implications are twofold: first, that the inherent value of all human beings is a condition for human beings having rights; second, that those things that do not have an inherent value, though they may be valuable, cannot be right-holders in the strict sense.

On these grounds, communities do not qualify as right-holders. If a community could bear rights, it would

sustain interests of its own, be the source of its own worth and, consequently, could hold its individual members duty-bound to respect its claims. Moreover, a community could claim a right against outside interference on the grounds that its actions are *self*-regarding even if they have undesirable effects on the lives of its members.[14] Against this view, a community may have interests, but they are ultimately reducible to the interests of its members. Michael McDonald argues similarly:

> We could not morally defend a right whose purpose is to benefit a collectivity as such ... but not to benefit the individual members of the collectivity... . [A] collectivity does not in the relevant sense have interests independently of its members, even though ... the collectivity can be the concernee of a right. For what constitutes having an interest is having certain sorts of experiences, viz. hedonic or affective reactions, and only individuals can be said to have experiences.[15]

And from a liberal point of view, individual members of a community cannot have their own goods sacrificed on the grounds that the community has a good of its own. What is good for the whole, we can reasonably assume, must be good for the constituent parts.[16]

Now this does not mean that communities, nations, or peoples do not exist, or are as such simple aggregates of individuals, as "[t]here can indeed be no denying that the concept of a people corresponds to a fact observable in the course of history, whose relevance in the modern world

is plain to all".[17] Also, it is not to say that there is no validity to the notion that communities are valuable and that members may have collective interests, but rather that these are derivative of the value and interests of individuals. So rights are meant to secure goods for individuals, not for some other entity. It could therefore be said that because

> rights express 'individualized' moral considerations[,] they are properly used when it is thought morally compelling that some individual should benefit or somebody's individual interest should be advanced in some particular respect; they are not properly used to express moral considerations whose substance cannot adequately be characterized in this way.[18]

The strong version of communal rights is thus rejected on the grounds that only individuals, not communities, can be distinct sources of valid claims. It is because human beings only are moral agents that they can bear rights. Of course, having the status of a moral agent does not magically transform the uttering of any claim by that agent into a right, but only points to the *capacity* of being a right-holder. What counts as a right is a different question as it relates to views about what kinds of interests justify holding others duty-bound.

From this perspective, treating communities as moral agents with the corresponding status is not a satisfying approach to addressing whether a given community can have

rights. An argument to determine the basis for collective rights must therefore proceed differently.

One way is to begin with a formulation of collective goods and reverse the starting assumption: that if X is an individual good, it could give rise to an individual right, and if X is a collective good, it could give rise to a collective right. In the preceding chapter we saw that there are goods which are unlike individual goods inasmuch as they are central to communal membership and identity. Two kinds of communal goods were distinguished: those that involve parallel interests and those that involve shared interests. Now if this account of communal goods is correct, what are the implications for rights-talk, if any? For one thing, it could be concluded that only a collectivity can have a right to a collective good. Consider Joseph Raz's example of self-determination:

> Self-determination is a typical collective good. Its satisfaction imposes far-reaching demands on the life of whole communities. Arafat's interest by itself does not justify imposing such far-reaching duties on so many other people. So he does not have it. ... Whereas a person does not have a right to the self-determination of the community to which he belongs, nations do have such rights. Collective rights are typically rights to collective goods.[19]

According to Raz, one of the conditions for a community having a collective right is that "the interests of no single member of that group in that public good is sufficient by itself to justify another person to be

subject to a duty", since far-reaching duties cannot be recognized for the sake of one person's interests.[20] If someone or some institution has a duty to secure a collective good, the duty is not grounded in one person's interests alone, but on the interests of the collectivity of individuals that benefit from the right.[21] However, the satisfaction of all goods, whether individual or collective, has the potential of imposing far-reaching demands on other people. That some rights impose far-reaching duties may explain why they are often claimed collectively. Self-determination may indeed be such a right, yet the satisfaction of some individual goods can also involve far-reaching demands, such as the duties involved in the respect of welfare rights. Conversely, we can also imagine some communal right which would not require important duties.

So why, then, could only a collectivity claim a right to a collective good? A plausible answer is that because some collective goods are necessarily shared, then only a collectivity can have a right to them;

> It is because X, Y and Z enjoy the good together, and because the participation of each in that enjoyment is partly constituted by the assurance that the others are participating in it too, that the good is worth pursuing. So since no adequate account of its desirability can be pinned down to either X or Y or Z, there can be no point in saying that it ought to be pursued as X's or Y's or Z's right.[22]

Because national self-determination is a good which is necessarily shared, it makes less sense to talk of an individual right to sovereignty. *I* alone could not reasonably claim a right for my nation to become sovereign since the good in question is inescapably one that is shared. Why? Could it be because "[a] case brought by X to secure G for himself would necessarily raise the issue of its being secured to everyone else..."?[23] It would seem not, for individualized goods of a universal nature -- notably those that give rise to human rights-- also imply that securing them to X raises the necessity of securing them to all others. Hypothetically, a newly-discovered basic human good, the kind that undoubtedly gives rise to an individual right, would raise the necessity of securing it to all human beings.

The argument is problematic for another reason. Freedom of association is a good that cannot be exercised or enjoyed alone; yet, I have an *individual* right to freedom of association. The right is vested in me, not in the collectivity of individuals who wish to associate. Similarly with the institution of marriage. Thus even if the good is necessarily shared, it is not clear why a single individual could not claim a right to it. Of course having a critical mass of individuals to claim a particular good gives force to the claim, but this is not

characteristic of communal goods only. Individual rights too are more easily enforceable when they are claimed by an important number of claimants. This is obvious if we think of countries in which a mass of people claims basic human rights. We must therefore look elsewhere for a plausible account of communal rights.

Another approach is to argue, as Waldron does, that there may be a point in saying "that the group has a right or that the members collectively have a right to that good", but that "[w]hether or not this is a sensible thing to say will depend ... on whether there is a context in which it is appropriate to treat the group as an 'individual' vis-a-vis some larger whole".[24] Here Waldron does not preclude the idea of group rights but includes them in the category of individual rights, in the sense that a group can be considered a person.

I think it unhelpful, however, to have recourse to group personhood in order to fit individualized considerations. One way to bypass the difficulty of justifying collective rights is to regard communities as persons and therefore give them rights persons would be entitled to have.[25] By analogy, collective entities would be like juridic persons, having the rights and duties associated with a legal personality, distinct from that of its 'natural' members. Consider the example of

corporations, which have the legal capacity to own property, incur debts, and even be convicted of crimes.[26] The philosophical version of group personhood would be that communities, like persons, can be considered 'selves' and claim the rights that come with being self-determined and autonomous. One could say that a community becomes a self when it experiences a "we-ness" and shows evidence of some objective identity.[27] This version I have already ruled out. Now there may be some sense in the idea that communities can hold rights by virtue of their personhood, but only from a legal point of view. There might be cases where communities should be considered legal persons so as to facilitate representation in legal procedures, especially where liability is concerned. There might even be cases where communities are the trustees of their members' rights, especially when the rights involve goods which can only be collectively provided. However, since it is impossible to conceive groups as persons other than by analogy or metaphorically[28], we still need to go beyond the semantics and ask the real question, namely, if a community can be a moral right-holder in a way that individuals cannot. To answer "no", yet state that communities could perhaps be considered metaphysical persons, and hence be right-holders, somewhat evades the point.

Why, then, do we talk of communal rights? I would suggest that communal rights have two aspects which make them different from individual rights. First, the nature of the claimant is such that it is as a member of a community that he or she can claim a particular good. Other rights, it seems, can be claimed by an individual qua human being, without any relation to community membership. One's status should not have any bearing on the right to not being arbitrarily detained. These rights are individual rights, that is, they are vested in all individuals as citizens of a given polity, if not as citizens of the world. But one's status does have bearing on special hunting and fishing rights in Canada since they can only be held by people as members of given aboriginal communities. These rights are communal rights, that is, they are vested in individuals as members of a particular community.

Second, and related to the first point, communal rights differ from individual rights because of the nature of the good which is claimed. Communal goods are such that they are important to the definition of community membership and identity, and so they tend to be claimed by individuals as community members. The Aboriginal who claims the right to not being arbitrarily detained is not claiming a communal good, but an individual one. But that

same Aboriginal who claims special hunting rights is claiming a communal good, since the good is central to communal membership and identity. On this view, then, a right is communal if the duties involved in respecting it are justified not on the interests of *all* individuals qua human beings, but rather on the interests of *some* individuals as members of a community who hold a good as being central to their community membership and identity. Simply put, what is involved in communal rights are the communal goods of community members. There may be exceptions to this categorization, but I think it corresponds to a clearer understanding of what is distinct about communal rights.

III

The concept of a moral right emphasizes the belief that rights involve matters of such importance that they ought to be taken seriously in any society. We always need a moral justification for limiting a moral right, that is, "it is always wrong unless some other moral consideration outweighs its wrongness".[29] About moral rights, Wringe writes that

> [f]ar from being derived from positive rules..., our most important moral rights rest on the assumption that the prior condition of Man is not one of subordination in which he has to have rights conferred on him, but one of moral independence in which he has certain rights

> whether they are recognized by society and its structures of authority or not.[30]

So whether or not moral rights are recognized, they can be said to be meaningful. One could even go as far as saying that even though cultural diversity --that is, the fact that "[p]eople of different cultures display an almost fantastic diversity of behaviour, attitude, and belief"[31]-- may be a reason for some people not recognizing universal moral rights, they do have these rights in any case. In short, moral rights are rights to basic goods which are essential to human well-being.

However it should also be noted that quite often a moral right is understood as being universal and hence as applying equally to all.[32] Such a right, for instance, would exist in the same degree regardless of where one lives or who one is. It is reminiscent of a human right, which Maurice Cranston defines as

> a universal moral right, something which all men, everywhere, at all times, ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human simply because he is human.[33]

We can therefore assume that there are moral needs which are universal in the abstract and which impose imperative duties.

The question is, could some communal rights have similar universal grounds? One objection to communal rights is to say that true rights are universal, and that

whatever rights are bestowed on one community ought to be bestowed on all other communities. Since this makes little sense, then we can conclude that there are no communal rights. Conversely, the only kinds of rights that can be held by all individuals are those that are held qua human being, that is, individual rights. The objection, however, misses the point.

What I want to suggest is that some communal rights are characterized by having a two-level justification. It was mentioned above that a right could be conceived as being communal because the duties involved are grounded in the interests and needs of individuals as members of a community. What could be the nature of those needs? The need that concerns us is that of preserving the conditions of a communal identity in which personal identity is formed. It is a universal interest, though it appears formal and abstract. What must be determined is the concrete shape it will take, which will vary according to circumstances, both in time and space. This dimension given to communal moral rights implies that they also "arise as the result of the *creative activity of human beings*"[34], and hence naturally reflect diversity, namely diversity based on different histories. In the abstract, everyone has a right to preserve the conditions that are central to communal identity, but these conditions will

vary from community to community, and the force of the claim will be variable according to historical circumstances, among others. To put it differently, we must have a process of interpretation of what this abstract entitlement will mean in practice.

This approach supports the idea that moral rights, whether individual or communal, ultimately have a universal justification. If they did not, it would logically imply that some individuals do not have a legitimate claim to goods which are central to their well-being, while others do. However, if universal justifications are abstract by definition, they have concrete applications where they take particular shapes. This suggests that not all individuals can claim the same communal rights. These rights are necessarily exclusive: they concern a community, not everyone, and therefore are not universal in application. Since communal rights often arise from the need to secure a communal good to a certain community, which excludes other communities who do not share the good in question, then a special justification must be invoked. That right has a moral basis --for otherwise it would not be adequately expressed as a right-- but still requires a special justification due to its exclusive nature. In short, the duty involved in special communal rights is morally imperative, but, unlike

straightforward universal rights and duties, may require a supplementary --though not independent-- justificatory basis.[35]

Consider the following example. If there is a right against being tortured, then I do not have to justify my claim to not being tortured: hopefully being a human being is a sufficient reason. Such a right, one can reasonably assume, is individual, universal, and has a moral substance which is difficult to doubt, that is, it implies a duty which is morally imperative. But significantly, it is also a claim which requires little interpretation, for the good of not being tortured is determinate enough, far from being abstract. On the other hand, claiming the right to the preservation of our identity requires interpretation. For members of community X, it may mean the right to protect their unique religious practices, for those of community Y, the right to protect their unique culture, and so on. The claim of community X members does not stand on its own *as a right* without being linked with the universal right to preserve the conditions of our identity. Their claim, to put it differently, is a concrete token of a universal abstract claim. Thus, communal goods by nature are shared by some people and not by others (*their* religion is important to *their* identity, but not to mine), but the fact that they are not universal

does not make them less justifiable. So if it surely makes it more difficult for a community to claim a right to a good if others do not share the good in question, it does not mean that there is no possible justification. A two-level justification allows us to link diversity and universality and reconcile the special character of some justifications with their universal grounds. The promotion of the French language in Canada, I will argue in Chapter VIII, should be understood in light of this.

Are communal rights the only kinds that can have this two-level justification? It would appear not, for rights such as the right to freedom of expression also require interpretation. It is quite abstract, and could include/exclude a number of activities. Significantly, this means that there are conflicts of rights which lead to a less obvious resolution because of their undefined character. Should a conflict arise between someone's right to freedom of expression and someone's right to preserve the conditions of his identity, adjudication will have to involve an interpretation of what each claim means in practice in each specific case.

IV

Before concluding this chapter, I shall make a few remarks concerning communal rights.

There are two main reasons other than the moral weight attached to communal rights for imposing the duties that correlate with the promotion of communal goods: attaching obligations to communal membership and coercing free riders. The first one is that community membership implies certain duties to respect the good of the community, especially if non-respect leads to the disruption of the community's values that are central to its identity. This could justify *some* constraints on unwilling members on the grounds that membership implies certain obligations. Some form of coercion may become even more necessary when the central communal good is one that is necessarily shared, and thus one which requires a sustained network of participants. Liberals are not necessarily unsympathetic to this, for they recognize that goods such as tolerance, economic well-being and a clean environment, goods which come with membership in a given society, justify setting limits to members' choices and freedoms.

Similarly, a community could be justified in imposing duties on its members who *benefit* from the good in question. A shared communal good would imply particular obligations on the part of those who enjoy the good. If I am going to enjoy a shared communal good at all, it logically implies (following one of our definitions) that

there be people with whom the good can be experienced, or else I will not be able to enjoy it. Consequently, does it not impose a duty on those who share the good to preserve and promote it? Assuming that the said communal good in question has value to community members who voluntarily share and experience it, there might be some validity to the idea that some coercion is justified in order to address the free rider problem. It is not clear whether communal rights themselves justify imposing such duties, that is, whether such duties are duties of justice.

My second remark concerns the compatibility of duties of justice attached to communal rights with those attached to more traditional individual rights. One liberal charge is that if communal rights are moral rights in the same way individual rights are, then what we are really doing is undermining the latter. However, the inclusion of communal claims within liberal frameworks of rights seems legitimate insofar as they are moral claims to enhance individual well-being. Thus the conflict which is likely to arise between the exercise of individual rights and the exercise of communal rights is not a conflict between individual claims and communal claims per se; rather, it is a conflict among moral claims themselves, no different than those which arise among various individual rights.[36] This does not make rights-talk any more harmonious, but it

does point to the idea that both individual and communal claims are moral considerations to be taken seriously, and that their collision essentially is not the expression of a conflict between the individual and the community.

Thirdly, from a collectivist perspective it may be true that even this modified account of rights remains inherently individualistic, thus making it difficult to integrate fully the worth of communal claims. For instance, it could be objected that the justification for rights rests on the principle that only individuals have an inherent value, that only they can be distinct sources of valid claims, and thus that the resulting communal rights merely have a derivative value. Ronald Garet, for example, believes that individuals, groups and society must all be recognized as having an intrinsic value because they are all "structures of existence", that is, "components of human being which are necessary to it".[37] To him, communality is the inherent value of groups which is not reducible to the value of individuals, and which therefore constitutes the basis for group rights. Moreover, Van Dyke argues that the recognition of collective entities, distinct from individual members, justifies their having moral rights.[38] Another example is Michael McDonald's suggestion that group autonomy is valuable in its own right: the idea, he writes, that group

autonomy is only valuable insofar as it fosters personal autonomy "should not lead one to think that collective autonomy is valuable only as a means of enhancing individual autonomy ... for collective autonomy like individual autonomy is valuable in its own right."[39] But again, it would appear that the objection falls short if the distinction between the right-holder and the validation of the right is considered. The value of communal goods is not rejected by our analysis. On the contrary, for there are goods whose value comes from the bonds they create between people and their community, and which are not individualistic per se. But the validating principle of this claim is not that the community has gained an inherent value by virtue of its members enjoying a collective good. The individual members are those who have an inherent value, and only on this basis are they distinct sources of valid claims. To put it differently, the account is individualized because benefits go to individuals as opposed to a collective entity over and above them, and non-individualized in the sense that it does recognize the existence of communal goods and rights.

On the other hand, some individual rights advocates could charge that communal rights defeat the reason why we have rights in the first place, that "a claim of political right is a claim to a trump over the general welfare for

the account of a particular individual".[40] Translating the "general welfare" in the language of communal rights does little good to those urgent individual claims that still need to be resolved. In reply, however, communal rights are not to be construed as a way to voice such social preferences, but as a way to voice those interests that are naturally relational. Since communal rights are only justifiable if they serve to improve the condition of individual persons, they are, in fact, claims to a trump over the common good. This is apparent when communal rights are claimed by a minority as against policies that are based on the welfare or common good of society at large. The purpose of such rights is grounded in the recognition that individuals need communal goods to live a worthy life, not on principles of common good.

V

Faced with a scepticism about the use of rights to express such claims, some would tend to reserve the language of rights for those claims which on the surface appear inherently individual and universal, and perhaps therefore more easily adjudicable. On this view, the promotion of communities and communal goods could consist instead in the judiciable task of setting reasonable limits to the exercise of traditional individual rights,

thus indirectly accounting for the value of non-individualized goods.[41] This normative discourse, the argument goes, could express communal claims without creating a new category of rights.

To be sure, there is something unappealing to the idea that all moral requirements ought to take the form of rights. As Jeremy Waldron notes, "rights-theorists have wisely resisted the idea that every important consideration affecting public decision-making should be expressed in the language of rights".[42] Not all conflicts between interests, he argues, should be understood as conflicts over rights, for some interests cannot be adequately expressed in terms of rights. Moreover, even if a certain moral consideration other than a traditional individual moral claim could be adequately expressed in the language of rights, some say that there still remains the problem of saturating rights-discourse to the point where it loses force and credibility.

However, I have argued that the objection that "rights do not exhaust the whole of political morality"[43] and should therefore be reserved to express individualized claims need not exclude communal claims from the language of rights. For one thing, rights impose duties, and for those minorities who wish to protect their community, an appeal to the goodwill or moral concern of the majority

offers few guarantees. Rights allow us to discern amongst moral considerations those that have an urgency and hence ground the correlative duties.[44] We also know that moral considerations that matter most are often expressed in the language of rights. Our sense of what justice and human dignity requires can be translated into a set of rights which have moral weight in the face of various other considerations. Rights give us grounds for imposing constraints on other people's actions that would treat us as means to some end, however appealing the end might be. We value rights because we see ourselves "as beings whose wishes may not be lightly set aside, however great the benefit to be derived from so doing".[45] Rights discourse is therefore a powerful normative device to claim the goods that are central to our autonomy and identity. Not using rights-talk to express our most fundamental moral claims relegates them to a subordinate position where they can be trumped by established rights.

Thus my objective has been to provide an argument that justifies talking of communal rights. In mainstream liberal theory, communities cannot be right-holders because they are not moral agents, that is, they do not have an inherent value making them self-originating sources of valid claims. Yet I have argued that there is a sense to be given to communal rights. The basis for this

argument is that some claims are inseparable from the community in which they arise, both in terms of the good being central to the community's life and of the claimant being a community member who values the good. Moreover, it is generally accepted that an individual good may give rise to a right if it is central to the respect and well-being of persons taken as distinct and autonomous beings. No differently, a communal good may also give rise to a right on the grounds that it is central to human well-being. "[O]n this view", writes Leslie Green, "what matters urgently in human life is not merely our individualizable interests, but also our collective ones, those public goods and shared goods that are so vital to human well-being that they warrant holding others duty-bound."[46] The justification for such a claim is based on a recognition that there are communal goods which in the abstract have a universal worth because they are essential to identity, just as there are worthy universal individual goods related to autonomy. However, the concrete shape that communal goods take depends on spatial and temporal circumstances, and so the corresponding right will also have a justification that is rooted in a particular time and place. Communal goods, like individual goods, can therefore have a central importance to a person's well-being and thus ground the correlative duties of justice.[47]

However it must be emphasized that although a communal good is enjoyed and sometimes shared by community members, so that there is some sense in saying that the right is communal, the claim is not validated on the grounds that the community has an inherent value, but rather on the grounds that its members have an inherent value. As Hartney argues:

> [I]t is conceivable that members of communities could have individual moral rights to the preservation and protection of their communities. ... My objection is to the claim that moral rights can inhere in collectivities as such, and the objection is grounded in the belief that the use of this terminology leads to confusion and to moral mistakes.[48]

By arguing that the validation of communal rights is no different than the validation of individual rights, we can attempt to integrate the notion of communal rights with principles of liberal justice. To accept this is to reject the strong version of communal rights, namely, that communities command respect as moral agents in the same way that individuals do.

Finally, our account of communal rights distinguishes itself from other attempts to reconcile collective rights with the notion that only individuals can bear moral rights. Leslie Jacobs, for example, argues that communities can be right-holders, but that such rights are derivative of the abstract individual right to integrity.[49] Our need for integrity can validate

collective rights which contribute to it, rights which could not be held by individuals. Thus there is no real gap between collective rights and individual rights, he argues, since "even derivative collective moral rights must in some sense protect individuals as sources of value".[50] One problem with this view is that it confuses goods-management with rights-holding. He argues that

> [w]hat gives this right its collective character is that fact that it cannot be understood as an aggregate or sum of individual rights; the fact that the Indian band councils have the power to pass by-laws for the preservation, protection, and management of this resource base ... is evidence of this. This right provides Indian bands with a significant amount of control over a very important traditional resource base which enables them to maintain their distinct identity and resist assimilation... And by bands maintaining their distinct identities, the integrity of their individual members is protected.[51]

Perhaps this view explains why a community, rather than an individual, can be better placed to manage a resource which is central to the identity of community members, and thus why a community could even be the trustee of its members' rights. But it does not show why the right to such a collective good must be held by the community. After all, we can imagine a number of individual goods (e.g. a minimum standard of living) which give rise to individual rights (e.g. a welfare right), yet which must be managed by the community (e.g. compulsory redistribution). Moreover, to say that we are justified in

speaking of communities as right-holders because they ultimately aim a promoting the integrity of individuals brings us back to square one: either communities can bear moral rights, in which case they can truly conflict with individual rights; or they cannot hold moral rights, in which case we should not be speaking of community rights as such. Finally, Jacobs claims that "since only individuals can be the bearers of abstract rights, there are no grounds to worry that individuals might be threatened when a collective right triumphs over an individual right which conflicts with it".[52] But why? The answer could only be that communities, in the end, are not *really* right-holders, whether ultimately or derivatively. But Jacobs insists that community rights "are natural extensions of the abstract right" individuals have to their integrity, albeit in a derivative way.

Our account of communal rights does not fall into the same traps. It too assumes that only individuals have an inherent value, and are thus the ultimate bearers of moral rights. But it conceives communal rights (rights to certain communal goods) as rights held by individuals in their capacity as members of a community of identity, rather than rights held by communities, be it for the ultimate good of their members. That the supplying of such goods might sometimes be controlled by the community makes

no difference. Moreover, our distinction between general and specific rights does not aim at showing that individuals have general (or abstract) rights while communities can have specific (or derived) rights. Rather, our two-level justification aims at justifying why some community members hold some rights, while others don't, yet why such rights can be grounded in the universal right we all have to protect the conditions of *our* identity, which is bound to reflect diversity, hence exclusivity. Finally, the view I have elaborated leads to the conclusion --one I shall explore further-- that conflicts of rights *cannot* be reconciled through conceptual devices such as 'abstract' and 'derivative' rights under a single substantive value (i.e. integrity, or agency). It points instead to the need for managing a real conflict between different claims derived from different substantive values.

Our account of communal goods and rights therefore operates on the basis of individual rationality and so does not reach beyond the satisfaction of the individual's rational desire.[53] But it can properly express claims to the protection of communal goods derived from the value of identity alongside those that are derived from the value of autonomy.

NOTES TO CHAPTER IV

[1] C.A. Wringe, Children's Rights: A Philosophical Study (London: Routledge & Kegan Paul, 1981), 37.

[2] Alan Gewirth, "The Epistemology of Human Rights", Human Rights, eds. E.F. Paul et al. (Oxford: Basil Blackwell, 1984), 1; Joel Feinberg, Rights, Justice, and the Bounds of Liberty (Princeton: Princeton University Press, 1980).

[3] Quoted by Tom Regan, The Case for Animal Rights (Berkely: The University of California Press, 1983), 269.

[4] H.L.A. Hart, "Are There Any Natural Rights", Theories of Rights, ed. J. Waldron (Oxford: Oxford University Press, 1984), 83.

[5] Jan Narveson, "Collective Rights?", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 330.

[6] See Wringe's discussion of this point, in his Children's Rights, 25.

[7] Ibid., 34.

[8] See also William K. Frankena, "Natural and Inalienable Rights", The Philosophical Review, vol.64 (1955), 221.

[9] W.D. Ross, The Right and the Good (Oxford: Clarendon Press, 1930), 20.

[10] See also Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 221.

[11] Regan, The Case for Animal Rights, 243.

[12] Ibid., 277.

[13] See Gewirth's "Epistemology of Human Rights" for a thorough discussion of the various justificatory bases of human rights.

[14] Michael Hartney, "Some Confusions Concerning Collective Rights", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 297.

[15] Michael McDonald, "The Rights of People and the Rights of a People", Philosophers Look at Canadian Confederation, ed. Stanley G. French (Montreal: The Canadian Philosophical Association, 1979), 336.

[16] Hartney makes a similar distinction between "value-individualism", whereby "only the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings", and "value-collectivism", whereby "a collective entity can have value independently of its contribution to the well-being of individual human beings". See "Some Confusions Concerning Collective Rights, 297.

[17] Jean-Bernard Marie, "Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", Human Rights Law Journal, vol.7 (1986), 200.

[18] Jeremy Waldron, "Rights, Public Choice and Communal Goods", 7.

[19] Joseph Raz, The Morality of Freedom, 208.

[20] Ibid., 208. Note that Raz does not agree with the notion of collective rights. He only uses the argument to prove that morality is not right-based since some collective goods are morally desirable, yet escape the language of rights. Also see his "Right-based Morality", Theories of Rights, ed. J. Waldron (Oxford: Oxford University Press, 1984), 194-195.

[21] Raz, "Right-based Morality", 190. Leslie Jacobs, following Raz, mistakenly defines collective rights similarly. It leads him to argue for collective rights partly on the grounds that the duty they involve could not possibly rest on one individual's interest, but would have to be based on the interests of the people who together make up the community. See his "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 384.

[22] Waldron, "Rights, Public Choice and Communal Goods", 17.

23 Ibid., 12.

24 Ibid., 18. He writes that "[t]he French-speaking community in Canada can be considered as an individual vis-a-vis the federal government, other language groups and so on.", 7.

25 See Garet, "Communality and Existence: The Rights of Groups", 1036-1040, in which he distinguishes various conceptions of group rights.

26 Van Dyke defines collective entities in a similar way as corporations. See his "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", 22. See also A Concise Dictionary of Law (Oxford: Oxford University Press, 1983), 89, 178, 198.

27 See Virginia McDonald, "A Liberal Democratic Response to the Canadian Crisis", Philosophers Look at Canadian Confederation (Montreal: The Canadian Philosophical Association, 1979), 328-329.

28 Garet, "Communality and Existence: The Rights of Groups", 1039. He writes that group-personhood is a notion that "buries under the avalanche of allegory".

29 Frankena, "Natural and Inalienable Rights", 230.

30 Wringe, Children's Rights: A Philosophical Study, 43.

31 Stuart M. Brown, "Inalienable Rights", The Philosophical Review, vol.64 (1955), 200.

32 Regan, The Case for Animal Rights, 267.

33 Maurice Cranston, quoted by C. Michael MacMillan, "Language Rights, Human Rights and Bill 101", Queen's Quarterly, vol.90, no.2 (Summer 1983), 345.

34 I borrow this expression from Regan, The Case for Animal Rights, 267.

35 There is, however, another approach which I do not favour. It is to say that not all moral rights have a universal justification, and thus that it is false to assume that only universal rights have a moral basis. On this view, it is possible to conceive of moral rights which are not based on universal grounds, but rather which have a *distinct* and independent justification. Special circumstances --historical, social, etc.-- would give grounds to certain rights, rights which involve acquired

duties since they are limited in time and space. The existence of these rights, unlike universal rights, would depend on their being recognized. They would also involve acquired duties in that being the result of particular circumstances, they require special justification. Thus amongst the various justifications for moral rights we would find universal justifications and special justifications. Different moral rights would find themselves in one category or the other. This approach would give grounds to the idea that individual rights tend to be universal rights insofar as all individuals hold them, regardless of their position in society. On the other hand, communal rights would by nature be special rights since only some individuals hold them, namely those who are members of a given community to which the right is associated. But whether they are universal or not, communal rights could be moral rights.

36 Jacobs concludes similarly, though from a different perspective. He argues that collective rights are derived from the abstract right to integrity --which includes both elements of autonomy and identity-- and that conflicts between collective rights and individual rights are in fact conflicts between different derivative rights, ultimately validated on the value of individuals and their integrity. See "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity", 385-386.

37 Garet, "Communality and Existence: The Rights of Groups", 1002.

38 Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", 22. Michael McDonald also argues similarly: "What the liberal takes as basic and unquestionable is the idea that the individual is the measure of everything; hence, the liberal believes that correct normative principles treat the individual as the fundamental unit of value and the ultimate focus of rights. Individuals are regarded as valuable because they are choosers and have interests. But so also do communities make choices and have values. Why not then treat communities as fundamental units of value as well?" See "Should Communities Have Rights? Reflections on Liberal Individualism", 237.

39 McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 236.

40 Ronald Dworkin, quoted by Waldron, in "Rights, Public Choice and Communal Goods", 3.

[41] See McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 228. Also see Leslie Green's point concerning the idea of incorporating "collective moral concerns within the general model of [individual] rights]", in "Two Views of Collective Rights", 326-327.

[42] Waldron, "Rights, Public Choice and Communal Goods", 1.

[43] I think this is what Waldron argues. See his "Rights, Public Choice and Communal Goods", 1.

[44] J.S.Mill, it would seem, argued that "rights concern the most urgent kind of utility. See Green's comment in "Two Views of Collective Rights", 318.

[45] Wringe, Children's Rights: A Philosophical Study, 36.

[46] Green, "Two Views of Collective Rights", 326.

[47] Recalling Chapter II, consequently there seems to be no reason not to include communal goods in the list of Rawlsian primary goods.

[48] Hartney, "Some Confusions Concerning Collective Rights", 312.

[49] Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity".

[50] Ibid., 385.

[51] Ibid., 384.

[52] Ibid., 386.

[53] Furthermore, this account of rights provides theoretical underpinnings to the notion that some rights can be considered simultaneously individual and communal, that some rights can be individual in their justifying basis and communal in their subject matter. See Marie, "Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", 199; and Hector Gros Espiell, "The Right of Development as a Human Right", Texas International Law Journal, vol.16, no.2 (Spring 1981), 193

CHAPTER V - LANGUAGE AND IDENTITY

Identity says something about who we are and who we think we are. It is both an individual and a relational condition: individual, since it implies that people are distinct persons, whether or not they are different[1]; relational, since it involves an ongoing process of identifying with others, where we define ourselves in "conversation"[2] with our community. Thus if the 'I' and the 'We' are obviously separate entities, they are nevertheless profoundly intertwined as they both form the complex facets of our identity.

Part of our objective consists in emphasizing the value of identity to human well-being, thereby articulating the reasons why language can be a good, and why it could give rise to rights. Thus in order to understand how language can be a good, we must interpret how it relates to identity. Indeed, when trying to discern the importance of language for people, we are led to the deeper problem of identity. The suggestion, then, is that one's particular language can be a good by virtue of its link with identity. What is the nature of that link?

One difficulty lies in the fact that there are many different manifestations of these ties, and those selected

here, although they bear upon particular circumstances, may not enable us to reach an overall judgment. But my aim here is the limited one of identifying answers that can be given to the question 'Why is language important?'. Again this will provide grounds on which to substantiate the claim about language sometimes being a communal good, that is, one that is central to the identity of community members.

While it is somewhat of a truism to state that language can influence the shaping of identity, it remains useful to see more precisely what senses can be given to this assertion. Thus the objective of this chapter is to put into different perspectives the various claims about the relationship between language and identity. In particular, we must consider how language plays on perceptions of who we think we are. Also, at the basis of the language-identity link is the contentious claim that language patterns impose a specific structuring of reality and determine the way we look at the world. This is a difficult question, but it remains relevant to sketch its main elements. Moreover, the problem of translation is sometimes invoked as an additional reason for identifying mainly with one's language; we shall see if there is evidence to support this claim. Finally, the question of language in the context of nationalism is of particular

interest here and merits some attention, for it often hinges on the notion of 'national identity'.

Of course, to say that language is a good does not require much demonstration. After all, language is a universal method of communication, the primary medium used to express thoughts, so it can easily be imagined what life would be without it. In this general sense, language is seldom subject to institutional arrangements or constraints, as opposed to what is being expressed by the faculty of language. Thus when people claim rights, it is to freedom of expression, not to language. So the difficulty resides elsewhere: given that language in general is a good, can we say that one's *own* language is also a good? Recalling Chapter II, there exists a case for defending a right to a cultural context, and for saying that culture in general could even be included in the list of Rawlsian primary goods. However, various difficulties arise when trying to defend a right to preserve and promote a particular culture, more so when that particular culture clashes with principles of liberal justice. Here we face a similar obstacle. Clearly language in general could be considered a natural primary good. But what of particular languages? The problem is made more acute by the fact that particular languages, unlike the faculty of

language in general, are indeed subject to institutional and ideological limitations.

I

One of the questions of interest to sociolinguists is the relation between language and ethnic identity. Part of the difficulty in examining this relationship stems from the vagueness involved in the concept of 'ethnicity'. Consider how Joshua Fishman describes it:

> Ethnicity is rightly understood as an aspect of a collectivity's self-recognition as well as an aspect of its recognition in the eyes of outsiders. ... [I]t is an avenue whereby individuals are linked to society, i.e. to social norms and to social values. Like them, ethnicity represents an avenue whereby understandings of the 'world at large' are arrived at, that is to say, through ethnicity ordinary individuals are not only linked to collectivities --and social integration is attained thereby-- but to notions of 'life', 'society' and 'the world' as well.[3]

Ethnicity, then, seems like a powerful mediator for shared values and understandings. A distinction is also made between inherited aspects of ethnicity, which Fishman calls 'paternity', and acquired aspects of ethnicity, which he names 'patrimony'. Paternity, in the sense of biological origins, often appears as the central dimension of ethnicity since it defines one's descent-related existence.[4] Patrimony, on the other hand, is acquired behaviour. Thus paternity is a state of being, whereas

patrimony is behavioural, or, as Fishman puts it, "[p]aternity defines those who inherit a heritage", while "[p]atrimony is the bulk of that heritage".[5] Also important is the subjective dimension of ethnicity, namely, the meanings that one attaches to one's ethnicity, whether acquired or inherited[6] and, we might add, whether real or imaginary. Similarly, we can distinguish between surface behavioural aspects of ethnic identity, more easily disposable, and primordial aspects of ethnic identity, more durable.[7]

So we see that ethnicity can denote many different features: objective biological origins, cultural artefacts, subjective perceptions about our belonging, etc. Even though the notion of ethnicity abounds in the literature on language, for the purpose of this chapter I will only refer to it indirectly, not because it has no value as a concept, but because its meaning remains diffuse.[8] Indeed as J.A. Ross argues, "[w]hen ethnicity is at best a fuzzy concept, it becomes rather difficult to convincingly establish its relationship to language".[9] Let us instead ask how language influences perceptions of ourselves and of what group we think we belong to. This captures better the relation between identity and language and sidesteps the problem of ethnicity which interfaces in complex ways between the two. I shall first examine two

sets of arguments: those that suggest a weak link between language and identity, and those that support the claim about language being central to identity.

After having studied perceptions of identity in the face of language change, Carol Eastman has come to the conclusion that there is no necessary link between language and identity. She notes that "when we stop using the language of our ethnic group, only the language use aspect of our ethnic identity changes; the primordial sense of who we are and what group we think we belong to for the remainder remains intact".[10] For example, a French person living in New York may stop using the French language and even lose the ability to speak it, but that person remains French until all factors of that identity change (namely, until his perception of ancestry changes). As she writes: "If the group can get what it needs to maintain itself using its associated language it will. If it can get what it needs wearing ethnic dress it will. However, necessary changes in dress and language use need not change group identity".[11]

Thus according to Eastman, language change and changes in identity are two separate processes. Even when the surface behavioural aspects (*speaking* French) have disappeared or are no longer used, the primordial identity (*being* French) may remain over a long period of time:

"Hence we don't have to speak French to act French and believe we are French".[12] In sum, "we change the language we know and use without changing our ethnic primordial identity...".[13] Language would therefore be a surface marker of identity that can be altered without fundamental changes to the way we perceive ourselves, or, more precisely, language shift would only affect the language use aspect of our identity, which Eastman sees as a "very low level of manifestation of our cultural belief system".[14] But significantly, if linguistic assimilation need not mean total assimilation but only loss of a surface marker of identity, then policies aiming at protecting a given language may lose their relative urgency. As Eastman admits, "there is no need to worry about preserving ethnic identity, so long as the only change being made is in what language we use".[15] The implications of this can be far reaching in the context of language planning in multilingual societies, for preserving primordial identities, it would seem, does not require preserving languages. In any case, the point is that there appears to be no necessary connection between the language we speak and who we think we are.

Another indication that identity and language are linked only contingently is found in the integration of immigrants. Looking at this question in the United States,

John Edwards observed that some markers of identity (such as a particular way of dressing) are discarded while others (such as religious practices) are preserved.[16] His observations also indicate that immigrants make voluntary efforts to speak English, which suggests a desire to avoid segregation from mainstream life, or the need to assure upward mobility.[17] This shows that some markers of identity (in this case a particular way of dressing, and even the mother tongue) may not be primordial, and thus can be partly discarded without suffering any true loss of identity. Leaving one's language at home in exchange for public acceptance indeed may not be a bad trade off. (Still, language being necessarily communicative, it loses much of its value when relegated to home use.) Other markers of identity, however, may not be as superficial (in this example religious observance), and thus do not sit well with policies of integration. What Eastman and Edwards' observations suggest is that language has no fixed rank within the order of what constitutes a primordial factor of identity and what constitutes a surface marker of identity. So the notion that language is necessarily related to our identity in a primordial sense is not substantiated.

Still, Eastman and Edwards' point does not mean that language can never be a constitutive factor of our

primordial identity. Indeed for others, language is a key factor of identity, an "identification badge", as Muriel Saville-Troike puts it: "Having a shared culture, having a native name with which members identify, having a social network for contact, and having common folklore or history are all largely dependent on having a common mode of communication."[18] In a similar vein, Sélim Abou argues that language is the condition for culture: "elle [language] médiatise tous les autres sous-systèmes en leur conférant nom, sens et valeur et, de ce fait, elle en vient à symboliser la culture dans sa totalité".[19] Similarly, as Fishman suggests, since language carries, records and calls forth other factors of identity (dress, food, worship, etc.), it is likely that it will be singled out as the main marker of identity.[20] By extension, real or perceived threats to one's language can be felt as threats to one's distinct existence, as Kelman writes: "Since language is so closely tied to group identity, language-based discrimination against the group is perceived as a threat to its very existence as a recognizable entity and as an attack on its sacred objects and symbols".[21] There are numerous cases of communities whose prime marker of identity is their traditional language. For example, B.B. Khleif mentions that the Welsh word *Iaith* originally meant both 'community' and

'language'; the word to designate a 'foreigner' is *Anghyfiaith*, meaning 'not of the same language', while the word to designate 'compatriot' is *Cyfiaith*, meaning 'of the same language'.[22] Or consider the case of the Basques:

> That their language is an essential part of Basque cultural identity is to be seen in terms such as 'Euskalherria', referring to the region as the place where Euskera, or the Basque language is spoken, 'euskaldunes', those who speak Basque and 'erdeldunes', those who speak other languages such as Castilian or French. It is not surprising, therefore, the Department of Education and Culture of the Basque Government, which provides the main impetus behind the Basque language teaching programme, should have accounted for 45.7% of the Government's total budget for 1982-3...[23]

These various statements link language with culture, history, and other artefacts in such a way that language acquires highly symbolic properties in the definition of self-identity. But as argued above, there is nothing essential about these links for they remain contingent upon particular circumstances.

The importance of language in defining identity also varies in degree and in kind. For instance, the majority/minority factor influences perceptions of self and others. Being conscious of boundaries between one's smaller linguistic group and society at large may reinforce linguistic identity.[24] Indeed, individuals may have a stronger linguistic identity when their minority status contrasts with the dominant language. Jean Laponce

argues that the individual in a linguistic minority position "aura tendance à mettre cette faiblesse à l'abri dans des identités spécifiques bien définies, identités spécifiques qui font fonction de cages protectrices empêchant la diffusion, l'affaisement, l'effritement d'une personnalité vulnérable." He goes on to say that "lorsque la langue est le clivage, ou du moins un des clivages qui séparent le groupe dominé du dominant, il faut s'attendre que le minoritaire soit particulièrement conscient de l'importance de sa langue lorsqu'elle définit sa spécificité minoritaire et marque les limites de son champ d'action."[25] Here we see that language acquires the property to establish boundaries that serve to differentiate and protect oneself from the majority. It is often argued that language serves to maintain boundaries that mark off one community from another, or, to put it differently, that determine identity insofar as identity is rooted in social and even spatial boundaries. As B.B. Khleif writes, "[i]f boundaries define belonging, if identity itself is anchored in boundaries, then a decreasing emphasis on, or a blurring of, boundaries would be regarded as a threat to group existence...".[26]

Furthermore, the kinds of attachments people have to language vary. As Eastman suggests, there are "instrumental" attachments to language, namely when a

group learns the language that opens the doors to the good life. Problems can sometimes arise when a given speech community cannot use its own language for instrumental purposes, perhaps because it lacks prestige, or else because it is only spoken by a small minority. This type of situation can be perceived as an attack on the very existence of the speech community in which people have a "sentimental" attachment to their language.[27] These examples show that the language-identity link cannot be understood in isolation from other factors of identity and from the specific conditions in which it is experienced. Indeed, the relationship between language and identity is far from being a static one because collectivities give different meanings to the role of language depending on their relations with other groups, their stage of development, or simply the presence of other and stronger factors of identity.[28]

So far I have tried to make the point that the relation between language and identity is contingent upon subjective factors and particular circumstances. The language we speak can be crucial to our identity if we define ourselves by it, or it can be a superficial marker of our identity, one that can be abandoned without any real loss of the sense of who we are. "In other words,", writes Alan Anderson, "if an ethnic group has tended to

emphasize maintenance of its own traditional language, loss of that language will be equated largely with loss of group identity".[29] Conversely, it is possible for a group to lose its distinctive language without losing its identity. Therefore, we should not fall prey to the claim that language is necessarily the primary feature of identity, nor should we subscribe to the view that language is always a disposable marker of collective identity. The language-identity interface is far too variable to posit a definitive conceptual scheme so that one must be cautious in examining the different roles that language carries in different communal identities.[30]

II

Also of interest to sociolinguists is the relationship between language and thought, more specifically, the question of how language influences world outlooks. To be sure, language and thought interrelate in complex ways, as there is a general agreement among linguists that "different languages name and grammatically code different categories, order words differently in sentences, and use different sounds".[31] The question centres on whether the structure of a given language can structure perceptions of reality itself, and thus whether language has a constitutive role --though not

an exclusive role-- in the building of cognition. In other words, semantic content would be dependent upon linguistic form so that a diversity of languages would necessarily imply a diversity of cultural contents.[32] We can take notice of two different views: on one hand "linguistic determinism", which states that a given language determines the thought of those who speak it, and on the other hand a set of more moderate claims about the influences of language on thought.[33]

Many of the theories that espouse some form of linguistic determinism are based on the so-called Sapir-Whorf thesis, after Edward Sapir and his disciple Benjamin Lee Whorf. Essentially, the hypothesis states that the structure of a given language imposes a certain perception of the world. The belief that languages "are dissimilar because they refer to dissimilar facts" is challenged by the idea that "facts are dissimilar for speakers whose linguistic background gives a dissimilar formulation of them".[34] The realm of phenomena appears to us in a flux of impressions which are "organized by the system of concepts embodied in the patterns of our language".[35] Significantly, this would imply that knowledge and understanding are determined by the forms of language.[36] Sapir's point was that the language a people speaks shapes its universe because its experience is organized by

language, and consequently each language represents a distinct world view: "We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation".[37] Interestingly, Sapir did consider language as a cultural product, but he argued that language, as a social product, also influences the way a speech community conceives reality.[38] Language is conditioned by and is the product of experience, but it also shapes this experience because its built-in categories and values are projected into the world of phenomena. In other words, there is a dialectical relation between language as a "stock of experience" and language as a "creative system".[39] Following Sapir, though more radically, Whorf argued that the formulation of ideas is not independent from the language being used, for a given language cuts up experience according to its grammar structure, categories and types. Therefore there would be no universal logic, but rather different systems for screening impressions and organizing concepts.[40]

In short, the implication of the Sapir-Whorf hypothesis is that people speaking different languages may have different cultural outlooks even if they share the same environment, since the particular structure of each language imposes a specific structuring of reality. Posing

such an intimate relationship between language and world views is not without consequence to the question of identity. For if the way we look at the world and at ourselves is determined in part by the language we speak, then the preservation of our way of life and of our identity requires (at the least) protecting the language we speak. The link between language and identity would therefore be an objective and necessary one. "Extending this thought", writes Eastman, "becoming a speaker of a different language would change a person's self-identity".[41] Cultural practices would be determined in part by language structure, so "the claim is that a language can be 'sexist', 'classist', or 'racist' within itself, predisposing its speakers to have certain attitudes to others within society"[42], as well as towards themselves.

The main question, then, looks like this: Given the reasonable assumption that one's thought is closely related to the formation of one's identity, to what extent can we say that language, by virtue of having an influence on thought, shapes identity? If we took the language determinist view, it would follow that language is a primary and objective factor of identity.

I do not wish to debate this question, for it is a difficult matter better left with sociolinguists. I

believe that nothing essential for our purposes depends upon the solving of this question. It should be noted, however, that the consensus which has emerged from most recent studies points to the lack of evidence to support the language determinism thesis in full. There seems to exist no close relationship between linguistic forms and cultural characteristics, which leads many to conclude that the language people speak does not bind them to a particular world view.[43] It should also be stressed that theories concurrent with the language determinist view tend to compare language systems that are significantly different, i.e. European languages versus American Indian languages. It is argued that these two language families do not share the same basic characteristics, that is, they have dissimilar modes of classification of events and dissimilar categories of time and space.[44] Thus it is difficult to see how the Sapir-Whorf hypothesis could be supported by comparing, say, French and Castilian. In any case, it is worth noting the implications of the language determinism thesis on the building of cognition and hence on the formation of identity.

But whether or not ideas are determined by language, there is a different set of considerations which relates to the problem of translation. Are languages perfectly translatable? For if not, some ideas expressed in one

language could not be expressed in another language. Some of the thoughts about ourselves and our environment would be, to some extent, bound to the language we speak. The subtleties in meanings and understandings could only be shared by those who speak the same language, or the same version of it. Our identity would be bound not only to our experiences, but to the language which expresses these experiences in a genuine way, without loss of meaning.

On the surface, it seems that the problem of translation is not insurmountable. As Jane Hill writes, "[w]ork on problems in intercultural communication ... shows that very different cultural patterning can be expressed in the same language ...".[45] This can be explained by looking at the resources that every language has to allow its speakers to express virtually any idea. Elaine Chaika sums up well the objection:

> So far as linguists know, all languages are mutually translatable. What can be said in one language can be said in any other --somehow. All languages are so constructed that new thoughts can be expressed in them. To be sure, it is easier to express some ideas in one language than another. This is because the vocabulary of each language develops partly according to the priorities of its culture. The objects, relationships, activities, and ideas important to the culture get coded into single words which are often highly specialized to express subtle nuances. ... In fact, although it may be difficult to express a given idea in one language rather than another, there has never been any proof that it is impossible.[46]

We must therefore mitigate the claim that languages are not truly translatable, and thus that the expression of one's experiences loses meaning through translation. However, there is still something to be said about the problem of translation. For one thing, even though languages can somehow be translated by experts in the field, it remains to be seen whether people in general have this capacity, as Edward Stewart argues:

> The capacity exists in any language to say whatever is said in any other language. What I can say in English can be said in French, Russian, Urdu, or Hindi. There are procedures of translation and back translation, and specialists exist in these areas who can demonstrate with exquisite skill that the capability of English is precisely that of Urdu or Farsi.[47]

But,

> [n]ormally a speaker does not deliver the full capability of the language on a given occasion. The speaker selects, forgets, distorts linguistic features of language capability to create a message.[48]

Assuming that most people express themselves better in one language than another, then the optimal transmission of a message (one that carries meanings about one's being and experiences) will be partly confined to that language. Some emotions and intimate meanings are not easily translatable, especially those that are identity-related, and thus require a shared understanding which only the subtleties of a common language can provide.[49]

Another reason for taking the problem of translation seriously stems from studies on bilingualism. It is suggested that uniliguals and "subordinate bilinguals"[50] (those that show more proficiency in one language) equate a word learned in the second language with the word in their native tongue, rather than with the object the word refers to. For example, a Spanish person would associate the newly-learned French word 'livre' with 'libro', as opposed to both words being independently associated with their referents.[51] What this situation seems to imply is that the native language has a dimension which goes beyond its function as a sign since it can be intimately linked with what is being signified. This fusion of word and object suggests that one's experience of the world and of oneself (among unilinguals and "subordinate" bilinguals) is closely associated to one's native language. This further supports the idea that the language we speak can be part of our views of the world and of our identity.

It should also be stressed that as language is rooted in a specific reality, it contains various cultural, social, political and economic elements of this reality. To translate the language implies de-rooting it, or at least evacuating some of its content. As Fishman explains, language is

> not merely a carrier of content, whether latent or manifest. Language itself is content, a

> referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the larger-scale value-laden arenas of interaction that typify every speech community.[52]

The point is that language contains a reality in itself; to transform the language is to transform the reality, or at least the image of this reality.[53]

In view of these three remarks, we see that the problem of translation cannot be completely discarded, for our identity is to a certain extent part of the language we speak.

III

Another often invoked link is the one between language and nationalism, especially since many language planning efforts are guided by nationalist ideology. To begin with, I take it that a nation denotes an association of a wider scope and complexity than other associations. As Fishman writes, a common nationality expresses "a more advanced degree and inclusive scope or scale of effective organization and of elaborated beliefs, values, and behaviours than those that obtain in the case of ethnic groups per se".[54] We must also distinguish the concept of nationality from that of citizenship, which implies a constitutional dimension in the defining of rights and duties attached to state membership. It is in that sense

that state and nation are different, though the two may overlap. Moreover, I define nationalism as the attempts of a nationality to pursue or maintain sovereignty of the nation, or at a minimum "the making of claims in the name or on behalf of the nation".[55] It often involves a movement by a nationality --or its leaders-- to gain more power over the public dimension of its existence by finding a more congenial correspondence with its existing citizenship, or else by seeking to create a new one. In the latter case, nationalism involves demands that challenge the fundamental structure of the state's constitution since political independence is sought by a distinct nationality.

I should like to comment in passing that I do not mean to link language and nation as did late nineteenth century romanticism, which, not unlike Herder, held the view that a national language is the expression of the nation's soul, that it is the guardian of an authenticity inherited from glorious ancestors and to be handed down to future generations.[56] Needless to say, several other features can play the same role in themselves or in combination: culture, religion, race, history, ideology, etc. So there is no single objective criterion that defines what a nation is, but rather various preconditions

that unite people for a reason or another. Ernest Renan defined the nation as follows:

> A nation is a grand solidarity constituted by the sentiment of sacrifices which one has made and those one is disposed to make again. It supposes a past, it renews itself especially in the present by a tangible deed: the approval, the desire, clearly expressed, to continue the communal life.[57]

This "everyday plebiscite"[58] is compatible with many different circumstances. So "language may invite us to unite, but it does not compel us to do so".[59] This being said, it would be misleading to discard objective features such as a common language, ethnicity, or religion as conditions for nationhood. Indeed, the will of the people may be essential for nationhood, but this subjective factor often arises because of such preconditions as a common language, ethnicity, or religion.[60]

Also as Fishman points out, if a common language is not a necessary feature of nations, we still need to explain why language is sometimes believed to have a central role in nationalism and why some modern nationalist movements have taken the linguistic line.[61] First, nationalism and communal identification are not unrelated. Indeed, nationalism may seek to "derive unifying and energizing power from widely held images of the past in order to overcome a quite modern kind of fragmentation and loss of identity".[62] In that sense

nationalism can be a response to the loss of traditional markers of identity by providing a redefinition of community-shared purposes, and, as Fishman writes, to "make modernity sufferable...".[63] Also, Charles Taylor argues that nationalism is a modern form of communal identification where the members of a nation find a community of interests and feelings that goes beyond the interdependence involved in the production and exchange of commodities.[64] The nation, he suggests, can be central to its members because it is through the nation that they have access to their identity, to a "horizon of meaning".[65] This would explain why the nationalist line emphasizes the need for the nation to express itself, to achieve things of its own, and to be recognized as having a distinct experience.

Now what of the language-nationalism link? To be sure, "[c]ontrastive self-identification on the basis of language is a very ancient human proclivity".[66] Language is indeed an essential part of the identity of some nations and can serve nationalist ideology in the confrontation with the wider state or with other states. One example is Catalonia in North Eastern Spain. The Catalan language has been central to the nationalist movement as it has become a political force:

> The fact that [Catalan] had been the sole language and at times officially recognized

> interwove the political movements for greater recognition of Catalonia as a distinct cultural region (and one capable of managing its own affairs) with attempts to make Catalan into the official language for the area, if not actually the sole recognized form of communication.[67]

Another example is the Turkish nationalist movement which after 1922 dismantled *Osmanlija*, the official language of the Ottoman Empire, to replace it with modern Turkish.[65] The same could be said of Galician nationalist ideology, and, as I will discuss in Chapter VI, of French-Canadian and Québécois nationalisms.[68] The point is that there are cases where nationalist ideology and the national language go hand in hand because people identify themselves and their nationhood with the language they speak, or else because nationalist leaders use language as a tool to regenerate the nation.

We see that nationalism is about power and control by a nationality over the public sphere, and that these relations of power are sometimes contained in language issues. In that regard, Taylor's argument is inspiring.[69] If it is through community that we have access to a horizon of meaning, to our identity, and to a network of common understandings, then it is essential for us that our language be preserved. The national language needs to gain "expressive power" by being used in various sectors of life, namely the economy, the arts, the government, management, and technology. But more importantly, for the

nation to express itself it must achieve things of its own, because "[i]f the important realizations are brought about by other peoples, then the language of public life, of economic-management, of technology, etc., will almost inevitably be a foreign one".[70] If this be the case, and given the premiss that we define ourselves through collective eyes, then members of the said nation may depreciate themselves and lose their self-respect as they depreciate their language for its lack of achievements and power. This would explain, continues Taylor, why the nationalist position will be to value that language/culture so that members will value themselves and regain their self-respect. It will also involve gaining some form of recognition, for it is difficult for anyone to maintain an identity if the conditions for that identity are denied by others. Taylor's argument illustrates well how language and identity can be construed in relation to notions of power and control over the public sphere.

In sum, the language-nationalism link is also a contingent one. Circumstances and particular histories will dictate the source of nationalism and the role of language, if any. The point I have tried to make is that there are cases where language and identity do meet in nationalism, namely because nationalist ideology offers

the possibility to exercise power over what constitutes the national identity.

IV

So far in this chapter I have discussed briefly some of the answers that can be given to the question 'How is language important?'. In general, they revolve around the observation that language is not an inherent good, but a good that is derivative of the good of identity. One's language contributes to giving a concrete shape to one's distinctness as a person, while at the same time providing a matrix for communal identification. Four points were emphasized. The first one brings out the significance of language as either a marker or a constitutive factor of identity. Though there is no necessary relation between language and identity, we cannot discard the fact that there are individuals and communities who find in language the source of their distinctiveness. The second relationship points to language both as a social product and as having a role --however limited-- in the building of cognition. It suggests that language is more than a means of communication for, it would seem to a certain extent, it also plays a role in shaping our understanding of the world. The third point notes that however surmountable the problem of translation is for

sociolinguists, it remains a real difficulty for most of us. Our identity, therefore, remains bound not only to our experiences, but also to the language which best expresses these. Finally, the fourth point evokes some of the ties between language and nationalist ideology. Again, one does not necessarily lead to the other, yet some modern nationalisms are founded on a claim to a distinct language which marks or even constitutes the distinctiveness of the nation. In short, language gives access to, and is one of the creative forces of, shared meanings and understandings, which together contribute to define identity. This dynamic can find a concrete form in nationalist ideology which offers solutions to provide the national language with expressive power over the public sphere. Needless to say the intricacies of these questions are oversimplified, but I think it puts into perspective some of the presumed links between language and identity. If a conclusion can be drawn, it is that language situations are the result of particular histories and circumstances, so that it remains a venture to generalize how language relates to identity. Each case warrants a special attention to determine the nature of the relationship between language and identity, if any. In cases where the link does apply, there is little doubt

that language encompasses more than a means of communication.

Moreover, the circumstantial nature of the language-identity link is to be related to our argument concerning the circumstantial nature of what 'preserving the conditions of our identity' can mean in practice. It provides us with a clearer understanding of why some communities have valid claims to the protection of their language, while others don't, and how these claims are ultimately founded on the universal right to protect the conditions of our identity.

NOTES TO CHAPTER V

[1] See the distinctions in Vernon, "Moral Pluralism and the Liberal Mind"; and in Wringe, Children's Rights, 49.

[2] See Charles Taylor, "Atomism", in Philosophy and the Human Sciences (Cambridge: Cambridge University Press, 1985), 208-209.

[3] J.A. Fishman, "Language and Ethnicity", Language and Ethnicity in Minority Sociolinguistic Perspective (Clevedon: Multilingual Matters Ltd, 1989), 24.

[4] Ibid., 25-27.

[5] Ibid., 27-29.

[6] Ibid., 31.

[7] Carol M. Eastman, "Language, Ethnic Identity and Change", Linguistic Minorities, Policies and Pluralism, ed. John Edwards (London: Academic Press, 1984), 263.

[8] Michael Keating argues that the problem with the concept of ethnicity is that it "is not defined independently of the phenomenon which it is supposed to explain". He suggests it would make more sense "to talk simply of identity". See his State and Regionalism: Territorial Politics and the European State (London: Harvester Wheatsheaf, 1988), 15-16. However, the suggestion that ethnicity is not a clear explanatory variable should not be misread to mean that ethnicity is a "pre-modern phenomenon" doomed to wither away with advanced industrial society, a sort of "societal fossil[] destined for little more than the dusty shelves of ethnographers...". See Jeffrey A. Ross' point in his "Language and the Mobilization of Ethnic Identity", Language and Ethnic Relations, eds. Howard Giles and Bernard Saint-Jacques (Oxford: Pergamon Press, 1979), 1-3.

[9] J. A. Ross, "Language and the mobilization of Ethnic Identity", 3.

[10] Eastman, "Language, Ethnic Identity and Change", 261.

[11] Ibid., 263.

12 Ibid., 270.

13 Ibid., 270.

14 Ibid., 275.

15 Ibid., 275.

16 J. Edwards, "Language, Diversity and Identity", Linguistic Minorities, Policies and Pluralism, ed. John Edwards (London: Academic Press, 1984), 281.

17 Ibid., 281, 292-293.

18 M. Saville-Troike, The Ethnography of Communication (Oxford: Basil Blackwell, 1989), 20.

19 Sélim Abou, "Eléments pour une théorie générale de l'aménagement linguistique", Actes du Colloque international sur l'aménagement linguistique (Québec: Les Presses de l'Université Laval, 1987), 7.

20 Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 31-33.

21 Carol M. Eastman, Language Planning, (San Francisco: Chandler & Sharp, 1983), 35.

22 B.B. Khleif, "Insiders, Outsiders, and Renegades: Towards a Classification of Ethnolinguistic Labels", in Language and Ethnic Relations, eds. Howard Giles and Bernard Saint-Jacques (Oxford: Pergamon Press, 1979), 160.

23 Christopher H. Cobb, "Basque Language Teaching: From Clandestinity to Official Policy", Journal of Area Studies, no.11 (Spring 1985), 7.

24 Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 33.

25 Jean Laponce, Langue et territoire (Québec: Les Presses de l'Université Laval, 1984), 40-41.

26 B.B. Khleif, "Insiders, Outsiders, and Renegades: Towards a Classification of Ethnolinguistic Labels", 159.

27 Eastman, Language Planning, 34-35.

28 J.A. Ross, "Language and the mobilization of Ethnic Identity", 4.

29 Alan B. Anderson, "The Survival of Ethnolinguistic Minorities: Canadian and Comparative Research", in Language and Ethnic Relations, eds. Howard Giles and Bernard Saint-Jacques (Oxford: Pergamon Press, 1979), 68.

30 See J.A. Ross' discussion about the objectivist and subjectivist views in his "Language and the mobilization of Ethnic Identity".

31 Eastman, Language Planning, 76.

32 Peter Pernthaler, "Modes d'action juridique dans le domaine linguistique", Minorités linguistiques et interventions: essai de typologie (Québec: Les Presses de l'Université Laval, 1978), 72.

33 For a description of these two views, see Eastman, Language Planning, 75-76.

34 P. Ghils, Language and Thought (New York: Vantage Press, 1980), 1.

35 Ibid., 2.

36 J.H. Hill, "Language, Culture, and World View", Linguistics: The Cambridge Survey, Vol. IV: Language: The Socio-cultural Context, ed. Frederick J. Newmeyer (Cambridge: Cambridge University Press, 1988), 15.

37 Sapir, quoted by Jay Kettle-Williams, "On Bilingualism", Journal of Area Studies, no.11 (Spring 1985), 4.

38 Ghils, Language and Thought, 3.

39 Ibid., 5.

40 Ibid., 7.

41 Eastman, Language Planning, 47.

42 Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 285.

43 See for example Ronald Wardhaugh, The Contexts of Language (Rowley: Newburry, 1976), 74.

44 Ghils, Language and Thought, 7.

45 Hill, "Language, Culture, and World View", 16.

[46] Elaine Chaika, Language: The Social Mirror (Rowley: Newburry House, 1982), 195.

[47] Edward C. Stewart, "Talking Culture: Language in the Function of Communication", The First Delaware Symposium on Language Studies, eds. Robert J. DiPietro et al. (Newark: University of Delaware Press, 1983), 24.

[48] Ibid., 24.

[49] Donald M. Taylor and Howard Giles, "At the Crossroads of Research into Language and Ethnic Relations", Language and Ethnic Relations, eds. Howard Giles and Bernard Saint-Jacques (Oxford: Pergamon Press, 1979), 232.

[50] Kettle-Williams, "On Bilingualism", 5.

[51] Ibid., 5.

[52] Joshua Fishman, The Sociology of Language (Rowley: Newburry Publishers, 1972), 4

[53] Consider for example *joual*, which can of course be translated into some kind of international French and into other languages as well. But the translation would not be able to fully capture the reality behind *joual*, that of a disadvantaged social class whose language style not only results from this disadvantaged position, but also serves to maintain it. Since the two are intimately linked, a translation would bring much distortion to this socio-economic condition.

[54] Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 107.

[55] François-Pierre Gingras and Neil Nevitte, "The Evolution of Quebec Nationalism", Quebec: State and Society, ed. Alain G. Gagnon (Agincourt: Methuen, 1984), 2.

[56] Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 277.

[57] Ernest Renan, quoted by Brian Barry, "Self Government Revisited", 136.

[58] Renan, again quoted by Barry, "Self Government Revisited", 136.

[59] Quoted by Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 284.

[60] Carl Friedrich, "The Politics of Language and Corporate Federalism", Les Etats multilingues: problèmes et solutions (Québec: Les Presses de l'Université Laval, 1975), 228, 231.

[61] Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 270.

[62] Ibid., 113-114.

[63] Ibid., 114, 318.

[64] Charles Taylor, "Why Do Nations Have To Become States?", 23-25.

[65] Ibid., 23-25.

[66] Fishman, Language and Ethnicity in Minority Sociolinguistic Perspective, 285.

[67] Tim Connell, "Language and Legislation: The Case of Catalonia", Journal of Area Studies, no.11 (Spring 1985), 12.

[68] On the Galician case, see Catherine Davies, "The Early Formation of a Galician Nationalist Ideology: The Vital Role of the Poet", Journal of Area Studies, no.11 (Spring 1985), 17-21.

[69] Taylor, "Why Do Nations Have To Become States?".

[70] Ibid., 26.

CHAPTER VI - LANGUAGE AND IDENTITY IN FRENCH CANADA

The last chapter examined the nature of the language-identity link in general. Here the objective is to define this link in French Canada, mostly in Québec. Again it seems like a truism to say that language and identity are closely linked in French Canada, and yet it is relevant to examine more precisely what sense can be given to this statement. Hence this chapter hinges on the question 'How is language central to French Canadian identity?'. It is an ambitious question, and so I shall only briefly sketch how the French language came to be a central pole of identification. Then I will examine some of the reasons why the language-identity link has suffered, which will later serve to provide justifications for claiming far-reaching language rights (Chapter VIII).

I

In the previous chapter, I discussed the contingency of language as an essential factor to the preservation of an ethnic and cultural identity. The Laurendeau-Dunton Commission made similar remarks, pointing out that in some cases one's language can be sacrificed without any essential loss to one's ethnic identity. Many Aboriginals,

Acadians, and Welsh, it would seem, have 'adopted' the English language while preserving cultural traits and without abandoning their pride in their ethnic identity.[1] But the Commission also properly noted that the remaining cultural identity, deprived of its link with language, often becomes more vulnerable to further acculturation as generations pass.[2] Furthermore, the view that language is not an essential feature of identity confronts deep-rooted beliefs among French Canadians whose communal membership equates with the French language. Thus the Commission came to the conclusion that cultural identity "is much more than the persistence of a few psychological traits or expressions of folklore" and that the life of the French Canadian culture implies the life of the French language.[3]

Common sense tells us that the language-identity link is strong among French Canadians and French-speaking Québécois today. But it remains difficult to assess when that identity began to interface primarily with language rather than with other markers of identity. For sure, one can trace back the existence of a distinct *Canadien* identity to New France when isolation from France saw the emergence of a colonial identity distinct from that of the metropolis.[4] Although it was too early for the French language to be at the root of this growing distinct identity, it has been argued that "[r]einforcing this

sense of difference was the emergence of a new dialect particular to New France, an amalgam of various dialects that immigrants had brought to the colony".[5] The Conquest only served to strengthen the budding Canadien identity whereby the severance of ties with France combined with a growing immigration from Great Britain reinforced contrastive self-identification.

Moreover, the British soon abandoned their policy of assimilation. As we know, the initial policy of the new British administration was expressed in the Royal Proclamation of 1763 whereby the French land tenure system was to be abolished, English law imposed, and the Church of England established. Catholics would have to renounce their faith in order to assume office and the Roman Catholic Church would not be allowed to collect tithes. However, the need to ensure loyalty from the Canadien elites and the openness of Governor James Murray[6] to the French fact convinced the imperial authorities to abandon this policy for a new one under the Quebec Act of 1774. It re-established civil law and the seigneuries, gave the Church the right to collect tithes, and abolished the oath of allegiance to the Church of England as a requisite for assuming office. This amounted to leaving in place the necessary matrix for the growth of a Canadien identity, that is, a society wherein the Church would emerge as the

main institution through which the Catholic faith and the French language would be preserved. The new policy was also more in tune with the attitude of the British authorities, whose use of the French language not only as a way of communicating with their new subjects, but as a language of work within their own administration and correspondence, was apparently not an unusual occurence.[7]

Another event that shaped the French Canadian identity was the Constitution Act of 1791 insofar as it created new territorial boundaries to French Canada. The growing Loyalist population who had settled along the Great Lakes pressured the Colonial government into transforming their status from a minority to a majority. Moreover, members of the British Parliament felt that dividing the colony would allow the Canadiens to make laws in their own language according to their own customs and particular needs.[8] In response, the 1791 Constitution Act divided the Colony of Quebec into Lower and Upper Canada, thus creating an English-Protestant majority in Upper Canada and a French-Catholic majority in Lower Canada, each with its own representative assembly. Although there was no responsible government but rather an English-controlled executive, this gave the French Canadian majority an assembly in which they would begin to exercise influence, pressure Britain for allowing responsible

government, and frustrate the assimilatory attempts of the anglophone minority.[9] In a sense, the Act created a security zone and a territorial enclave for the French Canadian identity to mature into what was to later become the post-Confederation Québécois political identity. It is worth noting that at the same time Loyalist immigrants brought along with them sourness and suspicion towards anything French and Catholic, and they soon accused French Canadians of plotting against them with Republicans on one hand and papists on the other.[10] This contributed to the erosion of the amicable relationships that had existed so far between the French and the English, thereby creating new tensions between the two communities.

Despite the crushing of the 1837 Rebellion and the union of the Canadas that ensued, French Canadian statesmen succeeded in preserving some of the structures of Lower Canada and the Catholic Church continued to build social and educational institutions. The new regime having failed to absorb French Canada --partly because of the modus vivendi which developed soon after the Act of Union-- combined with a political deadlock and a desire to expand capitalism coast to coast, political elites opted for a federal structure that would give French Canada a provincial status with powers over those matters that were considered central to the preservation of the French

Canadian identity, notably propriety rights, the administration of justice, hospitals, education, and the celebration of marriage. As for French Canadian minorities who now fell into other jurisdictions, their fate was left to the authorities who abolished most of their rights and privileges and actively pursued policies of assimilation.

Until the late 1940's, we could say --with obvious oversimplification[11]-- that the French Canadian identity was bound to the isolationist ideology of *la survivance* of which faith, traditional values and the French language were the main strands. Indeed, the defeat of the reformist Patriotes allowed the Church to gain considerable influence and to reach deep into the main components of society (the family, the school, the parish) and control various institutional functions (education, health care and social services).[12] It would be difficult to isolate the French language from the other factors of identity tied to the survival ideology for the conception of that identity was foremost an organic one with the interpenetration of faith, anti-materialism, rural idealism, and a siege mentality.[13] Each of these ideas was a necessary part of the whole, and the centrality of the French language was but one of those parts.

However, the Quiet Revolution saw language become the central element of the identity of the French-speaking

community in Québec. The ideological shift from survival to control meant for one thing that the Clergy lost its power over education and social services in the face of growing state intervention, namely with the creation of a Ministry of Education. The Québec state became the motor of a new secular order and, unlike the defensive stances that had been taken against the central government's intrusions into provincial jurisdiction, successive Québec governments would now make more substantial demands on the Canadian federal system. This 'coming of age' represented an erosion of those values that had formed the French Canadian identity, but left language intact. Significantly, the transformation of Québec society through factors such as industrialization, urbanization, education and openness to the world via radio and television contributed to the growing awareness among francophones of their particular situation in North America, and thus may have contributed to the definition of an identity through differentiation.[14] As Québec society became a modern society not unlike the others, its identity reshaped itself around the French language. One could even argue that the French language, which had been one of the markers of an overall distinct identity, became the constitutive element of the new identity as the other elements faded away:

> La langue restait donc seule comme véhicule de l'identité collective et comme symbole de la société française du Québec. Après que la mystique de la terre eut sombré dans l'histoire, et que celle de la race eut été désavouée par tous, celle de la langue vint à occuper tout le terrain.[15]

Indeed, we can conjecture that the likelihood of language being recognized as a central pole of identity increases as the other markers of ethnic identity disappear, thus making language a prime value in and of itself.

This would partly explain why the Quiet Revolution was also the period when the first important pieces of language legislation were enacted. Indeed, nationalist discourse reflected one way or another the idea that the promotion of the French language in Québec is indistinguishable from the promotion of the Québécois identity. As René Lévesque wrote in 1968:

> Being ourselves is essentially a matter of keeping and developing a personality that has survived for three and a half centuries. At the core of this personality is the fact that we speak French. Everything else depends on this one essential element and follows from it or leads us infallibly back to it.[16]

The father of the Charter of the French Language, Camille Laurin, also construed language and identity as being necessarily linked in Québec:

> This policy [Bill 101] was a priority, since language is the very ground under a people's feet: by it they know themselves and are known; it is rooted in their hearts and allows them to express their identity.[17]

Not surprisingly the preamble of Bill 101 points out the strength of the language-identity link in Québec: "Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity". The main point here is that although language in Québec has always been viewed as one of the features of identity, the value of language as a good has increased over time because language is no longer merely a vehicle or a marker of some identity, but *is* identity itself. Transformations in Québec society eroded the Roman Catholic way of life and left language as both the source and the marker of the Québécois identity. Thus if language is lost, identity is lost.

The view expressed so far is that language is the major constitutive element of the French Québécois identity. Yet it must be remembered that the Québécois identity encompasses more than language to include a sense of we-ness defined by psychological borders and protected by the national government.[18] Language remains central of course, but also serves as a marker that fixes these borders and helps to maintain the integrity of the Québécois space. Thus conceived, the Québécois space becomes territorialy-based and assumes the status of a distinct civil society. So when immigrants integrate, they

integrate into a *society* in which the ability to communicate in French defines membership in that society rather than a primordial belonging to an ethnic group.[19] Moreover, along with the evolution from a French Canadian identity to a Québécois identity came a change in the majority/minority self-perception as the French Québécois increasingly see themselves as a majority on their territory. Conversely, Québec anglophones increasingly perceive themselves as a minority in Québec rather than as members of the English Canadian majority.[20]

This would also entail that the French Québécois identity distinguishes itself from that of French Canadians living elsewhere in Canada. The French Canadian identity evolved differently, having its own structures and institutions --or lack of-- though its development was not always unlike that of the Québécois identity. For one thing, as in Québec the Church lost its hold on the daily life of French Canadians. But urbanization and industrialization had a different impact for it meant the disruption of homogeneous French communities and increased levels of assimilation.[21] While the former becomes increasingly territorially-based, French Canadian identity is founded on ethnicity and language alone. Territorial spacing of language, of course, cannot be possible to the same degree for French Canadians outside Québec. Yet

interestingly, the French Canadian identity appears to be splitting along provincial lines. Francophones increasingly see themselves as Acadiens, Fransaskois, Ontarois, Franco-Manitobains, etc., rather than as French Canadians.[22] In any case, although the language-identity link is strong in both French Québécois and French Canadian personalities, the two are growing apart as the Québécois personality becomes rooted in a territory with clear psychological borders, thus excluding French Canadians from its sense of we-ness. For some, this exclusion cannot last for the two personalities are ultimately bound together through the language-identity link:

> ...'l'identité québécoise comporte une part canadienne, plus ou moins consciente', et [il] s'agit d'une sorte de portion taboue de cette identité qu'il faudra bien reconnaître un jour. ...[N]on seulement les Canadiens français sont-ils présents dans tout le Canada, mais encore ce dernier est-il présent aussi dans l'identité québécoise, qu'il a contribué à façonner, ce que plusieurs refusent de reconnaître.[23]

Having sketched a general picture of the language-identity link in French Canada, I now wish to say a few words about the state of this link as it helps us understand why far-reaching language rights are claimed in Québec.

II

The reasons for state language planning in Québec are primarily socio-economic: despite its majority status, French was subordinate to English, especially in the economy where English was the language of those who held economic power. Before state intervention, the linguistic situation was one of diglossia whereby "linguistic affiliation tends to split up according to position in the economy and social ranks".[24] Simply put, French was used in the lower echelons of economic life, while English was used in the upper echelons, and so bilingualism was experienced differently depending if one was French or English speaking: "The social pressures for using French as a language of communication at work are more strongly felt by lower status anglophones, while the pressures to use English increases as francophones rise in the corporate world".[25] In this cultural division of labour, the subordinate position of the French language and the subordinate position of French Canadians appeared as two sides of the same coin since francophones and anglophones were not equals in the economic realm. In short, French would tend to be relegated to the private sphere, or as one historian put it, in kitchens, churches, confessionals and courts.[26] Elsewhere, its status would be secondary, as Tocqueville noted about the language of commercial signs

during his visit in 1831: "Dans cette portion du Canada, on n'entend point l'anglais. La population n'est que française, et cependant lorsqu'on rencontre une auberge, ou un marchand, son enseigne est en anglais".[27]

This situation was compounded by the belief in both English- and French-speaking communities that even in Québec English was the language of prestige, at least before 1970. As Gérard Bergeron puts it,

> [c]hez un peuple habitué depuis des générations à considérer que l'important, obligatoirement, se passe et se dit en anglais, et que la connaissance de cette langue forge la première clé de toute espèce de réussite, c'était bien cette inversion linguistique qui constituait la normalité.[28]

Moreover, a study comparing French- and English-speakers of equal education and job status revealed that English-speakers were perceived by both anglophones *and* francophones as being more intelligent, having a better job and a higher education.[29] The inferiority complex of French Canadians, which led some to despise their origins and identify with the Anglo-Saxon lifestyle, reflected the presence of a wounded self-esteem.[30] In short, there was some truth to the idea that capital spoke English and labour spoke French, and linguistic identity and self-esteem were certain to suffer from it. Not surprisingly, diagnosing this disequilibrium motivated a corresponding intervention.

Another reason for state language planning remains the need to respond to demo-linguistic factors which threaten Québec's relative weight in the federation and which create cultural insecurity. The decline of Québec's population relatively to the Canadian whole translates itself into a greater minority status of Québec within the federation. Québec's share of members of Parliament went from 33,5% in 1867 to 25,4% in 1990, and is expected to go down to 20% or less in about a century.[31] In addition to weakening Québec's political power in the federation, the demographic decline of the Québécois population of French origins creates a cultural insecurity insofar as traditional cultural characteristics are lost.

Three demographic problems are often cited. The first one is that the birth rate of the Québécois (1,6 children per couple) is inferior to the required rate for replacing generations (2 children per couple).[32] As a result the population is growing old. A second problem is the high emigration rate towards other provinces. Anglophones leave Québec at a rate fifteen times higher than francophones, allophones at a rate five times higher.[33] This means that immigration, despite what is often believed, contributes little to counteracting the low birth rate since Québec must accept three immigrants in order to keep one.[34] A third problem relates to the difficult integration of

immigrants in Montreal, in part because of the attraction of the English language.[35] English is still the language which most immigrants adopt, although the situation is changing. Before Bill 101, immigrant parents would choose English as the language of schooling for their children. In 1970 in Montreal, 8.3% of students in English schools were French, while only 1.9% of students in French schools were English. Significantly, 22.5% of students in English schools were allophones, compared to merely 0.9% in French schools.[36] Again in Montreal in 1961, "language transfers were made toward French in the proportion of 23.2% as compared to 56.6% in the rest of Québec".[37] In sum, between 1945 and 1966, 80% of immigrants integrated into the anglophone community of Québec, the great majority of them in Montreal.[38] The 1968 events in Saint-Léonard, in that regard, acutely raised the urgent need to integrate immigrants into French Québec.

Various studies and governmental reports have concurred that these concerns are legitimate, and thus that there are grounds for taking steps to assure that the French language is protected in Québec, namely by sending a clear message to immigrants. Even in the *Brown's* case, the Supreme Court argued that the factors discussed above "favored the use of the English language despite the predominance in Quebec of a francophone population ...

prior to the enactment of the legislation at issue [Bill 101]...".[39] No one seriously challenges this view; what is at issue is the scope of such legislation and its impact on other language rights, which we will examine in Chapter VIII.

III

In the previous chapter I suggested that the existence of some of the presumed links between language and identity depends on particular circumstances. No doubt many French-speaking Québécois today link their communal identity to their language. It may explain why there is sometimes a tendency among Francophones to associate other peoples' identities with language when other factors of identity are more salient.[40] It may also explain why studies have shown that Québec francophones rate English Canadians who speak English as being 'more similar to them' than French Canadians who speak English. This suggests that French Canadians "may react negatively to members of their own group who evidence strong assimilation to English Canadian modes of life".[41] In any case, the number of references to the French language in politics, academia, media, film and literature --to name a few-- leaves little doubt as to its link with the communal identity of the Québécois. There is also little doubt that

the identity of francophones outside Québec is also linked with the French language as it is central to their survival as a community. What is more, we can explain partly on those grounds the motivation for state intervention in linguistic matters, and relate it to the discourse on language rights. We can also explain the rationale underlying claims to exclusive strong language rights, yet claims which have a universal foundation.

NOTES TO CHAPTER VI

[1] Royal Commission on Bilingualism and Biculturalism, Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages (Ottawa: Queen's Printer, 1967), xxxvii.

[2] Ibid., xxxviii.

[3] Ibid., xxxviii.

[4] Kenneth McRoberts, Quebec: Social Change and Political Crisis (Toronto: McClelland and Stewart, 1988), 41.

[5] Ibid., 41.

[6] Dominique Clift and Sheila McLeod Arnopoulos, Le fait anglais au Québec, 76.

[7] Emile Gosselin, cited by Clift and McLeod Arnopoulos, Le fait anglais au Québec, 77.

[8] Reported by Chartier de Lotbinière, cited by Clift and McLeod Arnopoulos, Le fait anglais au Québec, 79.

[9] McRoberts, Quebec: Social Change and Political Crisis, 49.

[10] Mason Wade, cited by Clift and McLeod Arnopoulos, Le fait anglais au Québec, 78.

[11] Indeed, for recent research proposes a different reading of Québec's evolution. For example, liberal individualism appears to have been a central strand of Québec society since late nineteenth century, coexisting with the clerico-nationalist ideology of survivance. See Fernande Roy, Progrès, harmonie, liberté: le libéralisme des milieux d'affaires francophones à Montréal au tournant du siècle (Montréal: Boréal, 1988).

[12] François-Pierre Gingras and Neil Nevitte, "The Evolution of Quebec Nationalism", 4-5.

[13] Ibid., 5.

14 André Bernard, La politique au Canada et au Québec (Sillery: Les Presses de l'Université du Québec, 1982), 94-95.

15 Clift and McLeod Arnopoulos, Le fait anglais au Québec, 88.

16 René Lévesque, An Option for Québec (Toronto: McClelland and Stewart Limited, 1968), 14.

17 Camille Laurin, "Charte de la langue française", Revue canadienne de sociologie et d'anthropologie, vol.15, no.2 (1978), 121.

18 See Simon Langlois' analysis of this view in his "Identité nationale", La société québécoise en tendances: 1960-1990 (Québec: Institut québécois de recherche sur la culture, 1990).

19 Ibid., 642.

20 Ibid., 642.

21 Ibid., 643.

22 Ibid., 644.

23 Simon Langlois' interpretation of Gérard Bergeron's views. Ibid., 642.

24 Denise Daoust-Blais, "Corpus and Status Language Planning in Québec: A Look at Linguistic Education", Progress in Language Planning, eds. J. Cobarrubias and J.A. Fishman (Berlin: Walter de Gruyter & Co., 1983), 208.

25 Pierre Laporte, "Status Language Planning in Québec: An Evaluation", Conflict and Language Planning in Québec, ed. R.Y. Bourhis (Clevedon: Multilingual Matters, 1984), 57.

26 Cited by Gérard Bergeron, Pratique de l'Etat au Québec (Montréal: Québec/Amérique, 1984), 120.

27 Alexis de Toqueville, quoted by Bergeron, Pratique de l'Etat au Québec, 120.

28 Bergeron, Pratique de l'Etat au Québec, 120.

29 Daoust-Blais, "Corpus and Status Language Planning in Québec: A Look at Linguistic Education", 210.

[30] Vito-S. Minaudo, "De la noyade dans la molasse", L'oiseau-chat: roman-enquête sur l'identité québécoise, ed. Hervé Fischer (Montréal: La Presse, 1983), 193-195.

[31] Rodrigue Tremblay, Commission sur l'avenir politique et constitutionel du Québec, Document de travail # 4 (Québec: Bibliothèque nationale du Québec, 1991), 1014.

[32] Jacques Henripin, Commission sur l'avenir politique et constitutionel du Québec, Document de travail # 4 (Québec: Bibliothèque nationale du Québec, 1991), 454.

[33] Ibid., 454.

[34] Notice the paradox here. On the cultural survival front, is it not incidentally a 'good' thing that anglophones and allophones exit Québec, thus leaving 'intact' the French-speaking community? On the other hand, is it not also true that the French-speaking community of Québec has a vested interest in slowing down the decreasing demographic weight of the province in the federation? This explains the challenge that faces the French-speaking community of Québec with the linguistic integration of immigrants.

[35] Henripin, Commission sur l'avenir politique et constitutionel du Québec, 454.

[36] Laporte, "Status Language Planning in Québec: An Evaluation", 57.

[37] Daoust-Blais, "Corpus and Status Language Planning in Québec: A Look at Linguistic Education", 209.

[38] Bergeron, Pratique de l'Etat au Québec, 122.

[39] Supreme Court of Canada, The Attorney General of Québec v. La Chaussure Brown's Inc.., 72.

[40] Take the notions of 'French Canada' and 'English Canada'. More and more Canadians living outside Québec resist using the expression English Canada, for they feel it does not reflect their multicultural character. Francophones, of course, focus on language and thus mean English-*speaking* Canada.

[41] Donald Taylor et al., "Dimensions of Ethnic Identity: An Example From Quebec", The Journal of Social Psychology, vol.89 (1973), 191.

CHAPTER VII - LANGUAGE RIGHTS, INDIVIDUAL AND COMMUNAL

We have established that communal rights make sense because some goods are necessarily communal and 'concern' a community, that is, they concern individuals in their capacity as members of a community who share a given good. In this chapter we will examine language as a subject-matter of communal rights. I shall explore the possibility of advancing arguments in support of two kinds of language rights: individual language rights and communal language rights. In conjunction with this, we will see how far-reaching language rights can be, and whether weak or strong rights are equally defensible. I will suggest that there are grounds for stronger communal rights, and that these must be balanced with other moral language rights.

I

If the analysis explored in previous chapters is correct, then rights can be partly justified on the grounds that human beings need certain goods in order to lead an autonomous life as distinct sources of valid claims. And I have already postulated that one's identity is worthy of respect as a substantive value in contributing to human flourishing as well. This provides a

preliminary basis for saying that individuals can claim language rights, given that language is sometimes constitutive of identity or at the least constitutes the means to express that identity. To put it differently, language can be the subject-matter of rights because it can be an essential component of one's identity, and because one's identity is intimately linked with the sense of one's well-being as a person.

In a similar vein, Michael MacMillan has argued that language rights share some common features with human rights.[1] For example, language would be essential to human life since it "plays a critical role in defining individual identity, culture and community membership"[2]. Of course because of the contingency of the language-identity link, language is important in different degrees to different people, if at all.[3] Nonetheless, there are enough cases where language does indeed play a central role in defining identity, and so it is reasonable to assume that it falls into the category of things that may be essential to a decent existence and hence that may give rise to rights.[4]

I shall now consider more precisely the senses that can be given to the notion of language rights. For one thing, we must ask whether an account of language rights

should distinguish between *individual* language rights and *communal* language rights.

What sorts of moral claims qualify as individual language rights? According to our definition, we have an individual right when we claim an individual good simply as a human being rather than as a member of a given community. It would seem that a definition of individual moral language rights would therefore have to be restricted to the right against undue interference and discrimination, that is, the right not to be interfered with within one's private sphere of language activity and that of not being discriminated against on the basis of language. These rights can be justified on the interests of X qua human being, regardless of community status. In this case, the rights in question are derived from the right to privacy and fairness respectively. Were X the last person speaking a given language, he would still have the individual right against undue interference and discrimination. Such rights are indeed recognized in an 1966 international pact on civil and political rights as part of the United Nations Charter. Section 26 states that civil and political rights are guaranteed without discrimination based on language, and section 27 affirms the right of linguistic minorities to use their own language among themselves.[5]

What about communal language rights? These would be the kinds of rights that are claimed by members of a given community on the grounds that the protection of their language is central to communal membership and identity. It will be recalled from Chapter III that a communal good is a good in common or a shared good enjoyed by community members. To a large extent, language use --in the sense of speaking and being understood in one's language-- fits into this category. Indeed, it is difficult to imagine how X's enjoyment of his language could be separable from Y and Z's enjoyment of it too.[6] Thus language is in that sense a shared communal good. Consequently, when community members claim the right to protect their language on the basis that it is a communal good, then we can say that the right is communal. It is generally accepted that the idea of language rights is a "hybrid concept", as MacMillan argues,

> because the justification for such a right is based upon the requirements of individual development. Yet it remains that membership in the group is a pre-condition to the development which ultimately justifies the right.[7]

In contrast with other conventional rights, language rights are

> preeminently *social*, in that they are only comprehensible in relation to a group of other human beings with whom the language is shared and from which personal and cultural identity is achieved.[8]

Moreover, it will be noted that individual language rights here would appear to protect some of the conditions for personal autonomy, such as the right to freedom of action within one's own private affairs. Conversely, communal language rights seem to be more supportive of the conditions for a communal identity. This illustrates how the framework of traditional (language) rights is derived from the need to promote autonomy, while the addition of communal (language) rights points to the need to promote identity.

II

This being said, the extent of the duties involved in language rights is wide-ranging. At a minimum, language rights would include those discussed above, namely the rights against undue interference in private language use and discrimination on the basis of language. In practice, this means the right to speak our language at home and on the streets, to use it in letters and on the telephone; to keep our native names and surnames; to use it within our cultural and religious institutions, including newspapers, radio stations and community centres, etc.[9] These are typically rights *against* the state[10] which involve negative correlative duties. Supporters of linguistic laissez-faire will usually argue that these language

rights are sufficient, and that no one can claim additional language rights on the grounds that they are members of a particular community. The problem, of course, is that the rhetoric of linguistic laissez-faire often hides an hegemonic project. So there are instances where the basic right to sustain one's language requires state intervention at various levels. The forces of competition within the free market are not conducive to the growth of a minority language nor to the harmonious coexistence of a plurality of languages. As Sélim Abou writes, "l'attitude libérale laxiste, qui abandonnant la diversité des langues à la seule pratique anarchique, risque d'exacerber la concurrence jusqu'à susciter les conflits".[11] And as Jean Laponce argues, "les langues en contact, dans la mesure où elles ne peuvent s'ignorer, se stratifient", and thus "la langue dominante tendra, et réussira la plupart du temps, à devenir langue unique".[12] State neutrality is not neutral, he argues, since it favors the dominant language in terms of its use and prestige. Moreover, in Fishman's words,

> [T]here is no 'free marketplace' anyway, but rather a variety of contending and unequal forces. The 'free marketplace' is a locally acceptable myth if the forces in operation lead to one's own victory; otherwise, it is merely a variety of 'survival of the fittest', ... the law of the jungle rather than the rule of human decency, mutual acceptance and cultural democracy.[13]

Also, the discourse on individual rights allows the dominant linguistic group to perpetuate its superior position by depicting communal claims as an illiberal attack on universal moral rights that protect autonomy. As Camille Laurin wrote,

> The dominant group benefits from the state's laissez-faire policy. Universalism is the language of dominance in business, technology, science, and the rest. It has always been so. Abstract humanism must inevitably serve the interests of the dominant group. It prefers to limit itself to formal rights and claims it can ignore the determining social factors, the concrete influences that regulate and condition the exercise of those rights. ... It has become plain that the respect for individual rights, as understood in this liberal ideology, turns into fraud and hypocrisy if the social disparities that affect its exercise are not taken into account.[14]

It is in that sense, he adds, that between the powerful and the powerless, liberty oppresses and law sets free. Indeed, when concealed in the guise of moral rights, the free market assumes an air of untouchability, for "[t]here is ... a certain homology between the anonymity and impersonality of the moral law and the impersonal network of market and exchange relations governing modern civil society".[15] The point, then, is that the laissez-faire attitude does not offer much to minorities who wish to sustain their languages --and can in itself lead to their assimilation-- if the only recourse compatible with laissez-faire is an appeal to the right against

interference and discrimination. *Some* degree of state intervention appears inevitable if languages are to be sustained.

Moreover, a variant of the laissez-faire attitude is to say that if someone or some institution has the duty to protect a weaker linguistic community, it is community members themselves. Promoting a language may be commendable, but the state and outsiders surely have no duty to intervene in that respect. After all, if a linguistic community is on the decline, community members have only their own actions and behaviour to blame, not the free market of languages.[16] On this view, strong language rights presumably are not precluded, so long as the correlative duties be imposed exclusively on community members, without any impact on non-members or use of public funds. However, appealing to the individual's responsibility for preserving his own language has proved unsuccessful, as Jean-Claude Corbeil argues:

> [N]ous avons constaté que l'individu, laissé à lui-même, est incapable d'influencer l'évolution d'une situation de multilinguisme, qu'au contraire, il subit la dynamique des forces en présence; lui tenir le discours de sa prétendue responsabilité ne peut que développer chez lui le sentiment de son impuissance, d'où une frustration qui peut devenir explosive sur le plan politique, ou l'abandon pur et simple de son identité linguistique.[17]

It could also be argued that language differs from other markers of identity against which discrimination

often occurs. Because language is necessarily communicative, non-interference and neutrality do not have the same effect on language as they have on, say, ethnicity or religion. As Laponce explains:

> Il est facile et raisonnable de dire 'vous serez admis ou promu quelle que soit votre race ou votre religion' sans pour cela rien changer aux institutions existantes; mais comment pourrait-on dire la même chose, dans les mêmes conditions de statu quo, lorsqu'il s'agit de la langue parlée? Une langue ... ne saurait se penser autrement qu'en terme de locuteurs capables de se comprendre. Zolberg le dit fort bien: l'Etat peut jouer l'aveugle, non pas le sourd-muet.[18]

One could object to Laponce's point that it is not clear how race or religion might be different from language. After all, the state can be 'deaf' in its hiring policies. But as Laponce notes, a policy that provides for 30% of public employees to be hired from a minority language group does not entail that the thirty percent actually works in its own language.[19] But again, how is this different in kind from religion or ethnicity? Surely I can be hired *regardless* of my language, my race or my religion; this is quite different from actually speaking my language at work, working in accordance with my ethnic patrimony, or expecting a working environment that is compatible with my religious beliefs. Nonetheless, I think the point is still a valid one: language practice, unlike racial origin or religious beliefs, *always* requires a social relationship, thus involving greater demands on

others. As Kenneth McRae writes, "[s]ocieties characterized by linguistic pluralism differ from those characterized by racial, religious, class or ideological divisions in one essential respect, which stems from the pervasive nature of language as a general vehicle of communication".[20] Therefore language use cannot be respected by anti-discrimination policies alone.

The objections discussed above show that sustaining one's language clearly requires more than non-interference or conventional non-discrimination. As MacMillan writes,

> [r]ecognition of a minimal right requires some degree of public support... . At a minimum, this involves the recognized right to communicate with one's government in one's language. Thus one could claim a right to a trial in one's language, a right to pay taxes, file for automobile licences and so on in one's maternal language.[21]

Thus, if reliance on weak language rights is often insufficient, our account of language rights must consider whether there can exist circumstances in which more extensive language planning is justified. Typically, this would involve policies such as state funding for minority language education to the more far-reaching ones associated with a community's right to live in its own language. Let's examine this more closely.

MacMillan points to a useful distinction between the right to *live* in one's language and the right to *sustain* one's language. The latter, he writes, "would, at a

minimum, involve rights to individual [language] use in private life, and private association, and to its use in schools".[22] On the other hand, the stronger sense would require that one's language be used and understood in a variety of everyday situations, both private and public.[23] Presumably it would also involve considerable financial and human resources, whereas the right to sustain one's language might only require directing limited public funds to specific institutions. Borrowing this distinction, we therefore end up with three basic kinds of language rights: 1) the right against undue interference in private language use and against discrimination on the basis of language; 2) the right to sustain one's language, and; 3) the right to live in one's language.

An obvious problem arises. Is not the exercise of some of these stronger language rights mutually exclusive? Indeed MacMillan writes that

> [w]hen a government seeks to acknowledge a strong claim to A's language rights, it necessarily involves a denial of B's claim. By legislating that all public speech must be in language A, it prevents language B from attaining the status of a *lived* language.[24]

Extending this argument, some could say that extensive language use as a good could not give rise to a moral right since securing a language context to X would raise the issue of securing it to Y, and to X, and so on. Fulfilling such duties would be impossible because

reciprocity is impracticable. One could therefore be tempted to conclude that strong claims are difficult to justify since they are impracticable insofar as not all individuals can claim the right to live in their language. Perhaps an analogy can be made with the right to worship. A member of a marginal religious sect would have trouble claiming the right to live in a society moulded on his sect's beliefs, though he could claim the right to worship freely without undue interference. Or consider the case of the immigrant who claims the right to speak and be understood in his own (marginal) language. His claim could a priori be rejected on the grounds that it is practically impossible to fulfill the correlative duties. Thus, strong *universal* language rights --such as the right to live in one's language-- would be unfeasible since they do not allow a universal reciprocity of rights and duties, hence rendering the different claims mutually exclusive. Consequently, the argument goes, it appears that the only way that the state could uphold its duty to all linguistic groups equally is through individual language rights. Only in that limited sense could all languages in a given country be considered equal, whatever their number.[25] These rights have negative correlative duties, hence duties that can be fulfilled towards everyone.[26] In short, the duties implied in the right to be understood in one's

language would go beyond moral language rights; only the right against undue interference and discrimination on the basis of language would remain a most basic claim which falls under the rubric of moral rights.

This conclusion, however, is not satisfactory. It is true that the strong version of having the moral right to live in one's language, and even the right to sustain one's language, does not allow a reciprocal recognition. Still, I suggest that *some* communities, not all, can hold stronger language rights. In the abstract, all communities have the right to preserve the conditions of their identity. This is the universal dimension of any justificatory basis for communal rights that protect identity. However, as argued in Chapter IV, there is another level of justification which considers that communal claims are situated in an historical context and in particular circumstances. Now, not all communities have the promotion of language as the condition for preserving their identity. Therefore, only when communities can demonstrably show that language is a central communal good and only when certain conditions exist can stronger language rights be seriously considered. To put it differently, the fact being that strong language rights cannot be universally exercised, the main condition for

vesting such right in a given community is the presence of a strong language-identity link.

The classification could then look as follows. First, the individual right against discrimination and interference on the basis of language is vested in all individuals, for its worth is essentially unrelated to community status. Second, the communal right to sustain one's language is vested in members of a linguistic community which, notably for historical reasons[27], holds a particular place in a given polity. An example of this could be special language rights for indigenous communities. Finally, the communal right to live in one's language can be held by territorially based communities which have a certain critical mass[28] in addition to historical claims. It is reasonable to assume that "the more geographically dispersed the language group, the less practicable [language rights] become".[29] Indeed, the strongest sense given to language rights implies the right to be understood in one's language, which needless to say is not a transportable right.[30] Thus it is likely that strong language rights can only be territorially based. Many communities qualify here, but very few need to claim the right in the first place insofar as community life is already largely in the language of the community. Moreover, only a limited number of communities can make a

valid case for strong language rights on the grounds that they are central to the preservation of their identity. These various considerations suggest that a number of criteria would need to be examined, including territory, the historical status of the language, its institutional value, and its overall importance to the life of the community.[31]

As I have already indicated, universal rights are rights which apply to everyone equally and at any time and place. However, we saw how these do not encompass the whole of claims that can pass as rights. The notion of communal rights expresses claims whose worth may depend on the laws and conventions of the society in which they arise. It is within the category of communal rights that stronger language rights can be justified, for they are derived from an individual's membership in a given community, whereas individual language rights are derived from the individual in his isolated capacity. Thus the duties involved in respecting language use at a minimum can be justified on the interests of a single individual *qua* human being, that is, on his interests in privacy and fairness, two goods which are ultimately derived from the value of autonomy. But X's claim to stronger language rights could not be based on his interests as an isolated

human being, but rather on his interests in the preservation of the community with which he identifies.

III

There is quite clearly a difficulty in adjudicating which language claims are to be recognized in a given polity. A problem arises when more than one linguistic community has legitimate claims to strong language rights within the same territorial and public space. All things being equal, neither can trump the other. The reasonable solution would be to reduce the reach of each claim until both can coexist. Another area of tension is between strong language rights and weak language rights. Ideally, a law that gives strong language rights to a linguistic community will not be unjust if it is compatible with the respect for weak moral language rights. And, intuitively at least, the rule appears to be consistent with our sense of what rights are meant to secure, that is, not only identity but autonomy as well. If weak individual language rights are defined narrowly as non-interference, we can imagine how competing claims can be worked out. For example, a state policy which provides public health services in two official languages should not prevent other linguistic minorities from establishing their own private health clinics, albeit with private funds. The

balancing act is more difficult if individual language rights are to include the right against discrimination, as I have argued. Indeed, an affirmative action program that promotes the hiring of members of a given linguistic group to bring equality or to compensate for past discrimination could in itself entail discrimination against other language groups. Which is to prevail, the stronger right to equality and compensatory justice for a given community, or the individual right against discrimination? This question raises the delicate issue of so-called reverse discrimination, whereby "[f]or the sake of creating a more genuine sense of equal opportunity for certain minority groups, affirmative action denies equal or fair access to some individuals in order to guarantee it to others".[32] Here the issue can be formulated as a conflict over rights: between the moral rights of individuals and the moral rights community members. We saw that moral rights carry a universal authenticity, even if communal rights often require special justification and must appeal to external reasons because of their exclusive character. One is therefore led to conclude that a priori neither is outweighed in the balance. However, this does not imply that the adjudicating process cannot find reasons that carry sufficient weight for one claim to gain advantage over the other. What it does imply, nonetheless,

is that there must be sufficient cause to limit moral rights, since it is always wrong to limit them, which is to say that the onus normally rests on the claimant who argues for such a limit.

In sum, language is a good whose properties can be essential to a person's identity, and thus is worthy enough to give rise to rights. I have argued that individual moral language rights include the right against undue interference and discrimination. The duties these narrowly-defined rights involve are the only ones that can be imposed on the state with the expectation that they will be fulfilled towards everyone equally. However, such weak language rights appear insufficient to sustain one's language, though they may be central to the protection of autonomy. Stronger special language rights --including a whole range of positive action, from various government services to the right to live in one's language-- can therefore find justification in particular circumstances. These stronger language rights are more likely to be communal, for they are based on the interest that some individuals as members of particular communities have in the promotion of their language as a communal good, rather than on the interests of all individuals taken in isolation. Finally, balancing the respect for the various moral language rights appears to be the procedure that

best leads to a just outcome. I will illustrate this further in the next chapter.

NOTES TO CHAPTER VII

[1] C. Michael MacMillan, "Language Rights, Human Rights, and Bill 101", 347.

[2] Ibid., 347.

[3] MacMillan agrees that language is not of "paramount importance" to everyone. Ibid., 347.

[4] Michael McDonald argues for language rights in terms of their role in the realization of autonomy: "[B]ecoming an autonomous person requires a social context in which one acquires an identity not just as an individual but as a member of a community. Language and culture are central to the formation of an autonomous identity. If one's language and culture is penalized or even marginalized then the barriers to personal autonomy are likely to be high." Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 235.

[5] Z. Zachariev, "Planification linguistique à l'école dans les pays multilingues", Language in Public Life, eds. J.E. Alatis and G.R. Tucker (Washington: Georgetown University Press, 1979), 304. "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not 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." Section 27 of the International Covenant of Civil and Political Rights.

[6] McDonald writes that "language and culture are paradigmatically collective assets". "Should Communities Have Rights? Reflections on Liberal Individualism", 235.

[7] MacMillan, "Language Rights, Human Rights and Bill 101", 347.

[8] C. Michael MacMillan, "Henri Bourassa on the Defence of Language Rights", Dalhousie Review, vol.62, no.3 (Autumn 1982), 420.

[9] We could also add to this list the right to an interpreter in judicial proceedings, though this right is

not a language right per se since it is derived from the right to a fair trial.

10 Rudolf Viletta, in Minorités linguistiques et interventions: essai de typologie (Québec: Les Presses de l'Université Laval, 1978), 109.

11 Sélim Abou, "Eléments pour une théorie générale de l'aménagement linguistique", 13.

12 Laponce, Langue et territoire, 144.

13 Joshua Fishman, "Conference Comments: Reflections on the Current State of Language Planning", Actes du Colloque international sur l'aménagement linguistique, 412.

14 Camille Laurin, "Charte de la langue française", 124-125.

15 Steven B. Smith, Hegel's Critique of Liberalism (Chicago: University of Chicago Press, 1989), 75.

16 For example, Leslie Green says that in the case of Québec, the French-speaking people themselves, not others, have a duty of promoting their language, because the survival of French depends on their own behaviour and actions (i.e. birth rate, quality of teaching, etc.). See "Two Views of Collective Rights", 320.

17 Jean-Claude Corbeil, "Commentaire de la communication de Sélim Abou: 'Eléments pour une théorie générale de l'aménagement linguistique'", Actes du Colloque international sur l'aménagement linguistique, 20.

18 Jean Laponce, Langue et territoire, 147.

19 Ibid., 147.

20 Kenneth D. McRae, "Bilingual Language Districts in Finland and Canada: Adventures in the Transplanting of an Institution", Canadian Public Policy, vol.4, no.3 (Summer 1978, 331.

21 MacMillan, "Language Rights, Human Rights and Bill 101", 357. Similarly, see Zachariev, "Planification linguistique à l'école dans les pays multilingues", 307.

22 MacMillan, "Language Rights, Human Rights and Bill 101", 346.

23 See MacMillan's list of these instances. Ibid., 345-346.

24 Ibid., 351.

25 Zachariev states as a basic principle that "[l]'égalité des langues dans un pays est juridiquement possible, quel que soit leur nombre". "Planification linguistique à l'école dans les pays multilingues", 308.

26 See Regan's discussion of Feinberg's idea of negative rights, in The Case for Animal Rights, 282.

27 Nathan Brett, "Language Laws and Collective Rights", The Canadian Journal of Law and Jurisprudence, vol.4, no.2 (July 1991), 357.

28 Ibid., 356.

29 MacMillan, "Language Rights, Human Rights and Bill 101", 348.

30 Laponce, Langue et territoire, 142.

31 Corbeil, "Commentaire de la communication de Sélim Abou: 'Eléments pour une théorie générale de l'aménagement linguistique'", 21

32 Siew Kin Kow, Affirmative Action: Three Justificatory Arguments, unpublished M.A. thesis (London: The University of Western Ontario, 1987).

CHAPTER VIII - LANGUAGE RIGHTS IN CANADA AND QUEBEC

The view I have presented in the last chapter implies that a person's language rights are a function of how he ought to be treated as a liberal citizen, bearer of individual language rights, and sometimes as a member of a sub-community, bearer of communal language rights. The widely recognized requirement to respect individual language rights is confronted by the notion that the domain of communal identity also constitutes a value to be pursued. We can look upon this as moral progress, as I see it, or we can denounce what on the surface appears like a loss of autonomy, at least in the realm of language. In this chapter I wish to examine the different kinds of language rights in French Canada, following our earlier classification, and discuss some of the tensions that can arise between them. I will also consider the case of language rights violations which do not arise from an inter-rights conflict. If I am correct, our views on language conflicts in Canada must be reassessed in order to account for the proper moral weight of each claim and the nature of the tensions that inevitably arise from their coexistence.

I

In the last chapter I elaborated on the distinction between individual language rights associated with state tolerance, and communal language rights which entail active state support of certain linguistic communities. As we saw, the first kind includes the universal right to communicate in one's language within one's private sphere of existence which the state cannot penetrate, and the right against undue discrimination on the basis of language. Canada is a signatory of international conventions on this matter. Still, there is no explicit recognition of this right in the Canadian Charter of Rights and Freedoms. Presumably, using one's language in one's private sphere could indirectly be protected in the Charter via freedom of association. Being free to associate with whoever I want entails that I can join with others who speak my language, whether it be casually on the sidewalk or formally in a community centre. The state having no business in preventing us from associating, it has no more business in preventing us from speaking our language. More importantly, the recognition of this right is partly derived from section 2 guarantees to fundamental freedoms such as freedom of expression. In the *Brown's* and *Singer* cases, the Supreme Court of Canada construed the freedom of expression guarantees of section 2(b) of the

Charter to include the freedom to express oneself in the language of one's choice:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colors the content and meaning of expression.[1]

Putting forth this linkage between speaking one's language and expressing oneself, the Court was able to construe some protection for individual language rights of the first kind.

Individual language rights, as discussed earlier, also include the right against discrimination on the basis of language. Again there is no clear recognition of this right in the Canadian Charter. Section 15 includes protection against discrimination on the basis of race, national or ethnic origin, color, religion, sex, age or mental or physical disability, but not on the basis of language. Presumably it was assumed that national or ethnic origin would encompass language. Thus we can imagine a situation where a qualified job candidate of Italian mother tongue is a victim of discrimination because of this, but who claims Charter protection under the 'national and ethnic origin' items of section 15. In passing, the Québec Charter of Human Rights and Freedoms, unlike its Canadian counterpart, does include language in

its list of things that ought to be protected against discrimination.[2]

The second kind of language rights are communal and lead to positive state intervention at various levels and degrees. For instance it includes the educational rights and services for French- and English-speaking minorities as defined in the Official Languages Act and as guaranteed in the Charter. But it also includes a variety of services dispensed by provinces to their respective minorities, such as Ontario's Bill 8 which provides francophones with services in their language where numbers warrant, and Québec's legislation which guarantees access to medical and social services in English. It could be argued --as many do-- that these provincial services are not rights, but privileges based on political considerations. However for our purposes, they will be included in the list of things that count as rights, regardless of their lack of constitutional recognition as such. Indeed, these services are ultimately founded on a recognition that the two official language communities are owed a certain protection, which is to say that they are essentially rights even though they have little or no constitutional guarantee.

Finally, the category of communal language rights includes Québec's language policies that give expressive

powers to members of the French-speaking majority so that French can remain the language of everyday life. Because of what they are meant to achieve, they must reach further than the other communal rights. Yet it is important to remember that despite these differences in scope, a characteristic is common to all these interventions: they are the product of communal rights, that is, rights which individuals have by virtue of their membership in one of the official language communities or in the French-speaking community of Québec.

While there is consensus that individual language rights have moral foundations in a pluralistic society, communal language rights face far more ideological obstacles. For example, denouncing the preferential treatment of francophones and the resulting injustice for unilingual anglophones often finds sympathetic ears in Canada, especially when it is wrapped in the appropriate political discourse. After all, how could we not want "[a] single Canada, such as that which Canadians of many origins have been trying to build, in which the prime concern is for its individuals and all Canadians stand on the footing of equality with one another without any preference to the members of any component of the Canadian nation"?[3] Official bilingualism, in that regard, would be nothing more than preferential treatment for one group

resulting in unfair treatment of other linguistic minorities who do not have this 'privilege'. The spectacular growth of the Reform and COR parties gives a renewed political legitimacy to this view, despite their obvious demagogy in this matter.

What is more, language legislation such as Bill 101 would be the ultimate expression of preferential treatment since the state votes a law which deliberately favors the majority culture in the province. Recall Knopf's distinction between a "nationalist democracy", in which a majority rules by virtue of representing a particular group-culture, and a "liberal democracy", in which the state upholds the rights of each individual regardless of culture and group belonging.[4] The concept of citizenship in Québec would not be culturally neutral since language legislation benefits the majority language group. Opponents of Bill 101 could even point out sections 52 and 57 of Bill 101 (that catalogues, brochures, invoices, etc. must be drawn up in French) which on their face apply to anglophones and francophones alike, but which in effect "nevertheless impinge differentially on different classes of persons according to their language of use".[5] In appearance, this provision does not discriminate between nationalities; in practice, it puts the burden on non-francophones.

While it is true that an important strand of democratic tradition is conceived along those lines, it tends to obfuscate the real issue. An anglophone in North America necessarily sees his language being promoted because market forces privilege the dominant linguistic group of which he is a member. Moreover, allophone immigrants will choose to learn English as the dominant language in order to maximize their chances of integration and upward mobility. This guarantees a continued 'supply' of new anglophones and brings further pressures to assimilate all linguistic minorities, including French. In these situations the state can afford a semblance of cultural neutrality. Yet the rationale for state intervention in linguistic matters is no different than the rationale for intervening in matters such as social welfare, education, the environment and security: market forces tend to benefit the powerful and, in this particular case, are incapable of sustaining linguistic minorities and of fostering proper relations between the various language groups of a given polity.[6]

Still, making the case for state language planning does not justify why only *some* linguistic minorities ought to be privileged over others. It was suggested in the last chapter that strong language rights can be justified if historical reasons warrant holding others duty-bound and,

in the case of very strong language rights, when the territorial concentration is sufficient to make them practicable. The historical rationale is plain to all: the French and the Aboriginal peoples did not immigrate into a predominantly English political community, and therefore unlike other linguistic groups, have a stronger claim to protect their community.[7] There is a tacit agreement between a political community and its immigrants that they will learn the majority language and will have no a priori communal claims to strong language rights. French Canadians, not being immigrants in the same sense, can make historical claims to refuse linguistic integration and receive protection from the state. In drawing these conditions, I do not deny that it is desirable to sustain a degree of plurality of languages and to be sensitive to the linguistic composition of regions. Official multiculturalism attempts to provide for this, and as was suggested in the Laurendeau-Dunton Commission, not only is it "perfectly reasonable that [other languages] should be taught as academic subjects in the schools and used for instruction in private institutions and in religious services", but in some cases they should also receive local legal recognition.[8] Rather, the point is to say that not all communities can claim the same communal rights equally, that there are moral grounds for allocating

public funds to the promotion of some communities more than others. Incidentally, in its list of recommendations to include the use of languages other than French or English in schools, universities, the media, and the arts, the Laurendeau-Dunton Commission does not seem to speak of a duty of justice towards these non-official minorities, but rather of a duty of benevolence.[9]

The idea of compensatory justice also comes into play. Being the victim of past --and ongoing-- injustice is not an independent justification for holding rights. But it points to one of the shapes that the duty can take. For Camille Laurin, who sees the Charter of the French Language as a statement of fundamental rights which "lies at the heart of human rights"[10], language legislation was a priority not only because of the presence of a strong language-identity link, but also

> because the quality of our language is threatened by the decay resulting from the colonization of the people of Québec, and because their rights must be restored to those who have suffered discrimination and injustice simply for speaking the language of their country.[11]

This applies even more to francophones outside Québec. On one view, Confederation was meant to re-associate both communities into a new polity, one which would officially end the policy of assimilation that was in place under the Union. The oppression of French Canadians that followed

soon after 1867 in all provinces contributed to their erosion as a community. Since the original pact, of which tacit language rights were an integral part, had been broken, denying claims to compensatory justice constituted a further affront to the terms of Confederation.

II

In Chapter VI we examined some of the socio-economic and demo-linguistic conditions that contribute to the erosion of the French language. They motivate various degrees of state language planning whose ultimate aims are cultural as well as political: to sustain the conditions for a communal identity based on the French language and to preserve Québec's position within the federation -- assuming the second can ultimately reinforce the first. More immediately however, state language planning serves two major functions: to improve the correctness of Québec French (corpus planning) and to make decisions concerning its position in Québec society (status planning). Breaking down these functions further, language planning sometimes serves to purify a given language. For example, the Académie Française and the Office de la langue française (Québec's French Language Bureau) are involved in replacing English loan words brought by new technology.[12] The Office de la langue française creates new French

terminology relating to new sectors of activity, such as computers and aeronautics. At the other extreme, corpus language planning can be a much more far-reaching enterprise and involve a complete reform of a given language: in 1922 onwards, for example, Turkey transformed the Ottoman language, which uses Arabic script, into Turkish, which uses the roman alphabet.[13]

More closely related to status planning are attempts at giving a language a majority status in a given region. This can be achieved by restoring an ancestral language to its former status, namely by reintroducing it into the educational system and the media.[14] This is what Israel did with the Hebrew language, which was no longer anyone's mother tongue, and yet became the main language for a majority of the population.[15] With somewhat less success, many other languages are being revived in the context of autonomist movements: Welsh, Irish, and Scottish in the U.K.; Breton, Corsican, and Flemish in France; Catalan and Basque in Spain; Frisian in Holland.[16] To some extent, official bilingualism in Canada also aims at reviving French which is withering away in many regions outside Québec.[17] This function sometimes implies that other languages will be relegated to a secondary status, and there have even been attempts to abolish other languages in the process. That was the case in France soon after the

Revolution and again in the 1880's when populations in Brittany, Occitanie, Alsace and Corsica saw their languages being restricted in favour of the Parisian version of French, or now in favour of standard French.[18] It was also the case in the U.K. with the 1870 Education Act which abolished Welsh and Gaelic schooling.[19] Today however, the increased recognition of multinational states is more conducive to making the proper arrangements for the coexistence of many languages.

The original aim of the Office de la langue française was to improve the corpus of the French language rather than its status. The idea was to disseminate correct terminology in order to alleviate the negative perception many Québécois had of Québec French relative to standard European French.[20] But successive pieces of legislation increasingly involved status planning. Bill 85 (1968), though it was not passed, aimed at taking "the measures necessary to ensure that persons settling in the Province of Québec may acquire, upon arrival, a working knowledge of the French language..." and "to ensure a working knowledge of the French language to every person who attends ... an English-language institution".[21] The right of parents to choose English or French schools for their children was maintained, but most schools would have to ensure pupils acquire a working knowledge of French. The

aims of Bill 85 were successfully restated one year later in Bill 63, which also gave the Office de la langue française a new mandate that opened the door to the status planning that was to come. In addition to its previous functions, the Office would now have the duty to advise the government on measures which might be passed to "see to it that French is the working language in public and private undertakings..." and to ensure the priority of the French language on public posting. It would also have the mandate to "hear any complaint by any employee or group of employees to the effect that his or their *right* to use the French language as the working language is not respected" [emphasis mine], and be given the corresponding powers of investigation.[22] Again, freedom of choice in regard to the language of education was respected, thus enabling immigrants to choose English schooling.

Bill 22 (1974) brought major changes to the underlying philosophy of language legislation. For one thing, French was declared the official language of Québec. But more significantly, it introduced measures to channel children of immigrants into the French school system. It stated that "[p]upils must have a sufficient knowledge of the language of instruction to receive their instruction in that language", or else they would have to receive their instruction in French.[23] Although exceptions

were provided to allow Indians and Inuits to receive instruction in their own language, and although Québec anglophones could still send their children to English schools, immigrant children who did not have a working knowledge of English would have to attend French schools. Bill 22 also took measures to make French the language of communication in the public administration, public utilities and professional bodies, as well as to guarantee private sector workers the right to communicate in French among themselves and with their superior officers. The law would now also require that public signs be drawn up in French, or in both French and another language.[24]

The Charter of the French Language grew out of Bill 22 and of the White Paper La politique québécoise de la langue française. More explicit and less diluted than Bill 22, it also introduced more coercive measures. With the same objective of channelling children in the French school system, the law would now require all children to receive their instruction in French, except those with at least one parent whose major part of his or her elementary instruction was received in English in Québec.[25] Thus the new law abandoned the testing measures for immigrants, which had permitted anglophone immigrants to attend English schools, and left them no choice but to attend French schools regardless of their mother tongue. It also

meant that anglophone parents moving to Québec from elsewhere in Canada would likely have to send their children to a French school. Moreover, Bill 101 provided for commercial signs and posters to be exclusively in French, a provision which many found needlessly irritating.[26] Finally, Bill 101 pursued francisation programs which had been put into gear in Bill 22.

Bills 85 and 63 had met considerable resistance from nationalist circles, the teachers' union, and student associations[27], because they respected the freedom of immigrants to choose the language of instruction. With Bills 22 and 101, the scope of language legislation was to become much more far-reaching since it in fact conferred language rights on the francophone majority. Even though the term 'right' is hardly used in Bill 22, the notion of rights underlies the whole of Bill 22. Moreover, the preamble states that "the French language is a national heritage which the body politic is in duty bound to preserve", thus empowering the National Assembly "to employ every means in its power to ensure the preeminence of that language...". Rights-discourse explicitly appears in the Charter of the French Language. Under the chapter entitled "Fundamental Language Rights", it guarantees that every person has the right to communicate in French within both public and private sectors, to speak French in

deliberative assembly, to carry on activities in French in the workplace, to be informed in French as consumers of goods and services, and to receive instruction in French.[28] Thus the National Assembly "is resolved therefore to make French the language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business;".[29] Clearly we are in the presence of the expression of a strong language right as defined in Chapter VII, that is, the right to live in one's language. Conversely, some anglophones felt language legislation was a violation of a most fundamental right. When Bill 22 was enacted, John Simms of the Montreal protestant school boards spoke of a paternalist and authoritarian government restricting freedoms, and said that any enlightened state should reject such language legislation or else deny equality before the law for all.[30]

This being said, the Charter of the French Language obviously would not be justified were francophones a small and dispersed minority on the Québec territory. It is the presence of a critical mass on a given territory which makes such strong language rights practicable and justifiable.[31] The rationale behind territorial language rights[32] is to create a security zone in which a sub-

community can determine its linguistic environment within its own borders:

> Cette solution permet aux hommes, à l'argent, aux marchandises et à la main d'oeuvre de se déplacer librement mais ne permet pas à la langue de les suivre. La langue est, alors, fermement fixée au sol par des frontières englobantes rigides et rassurances, au sein desquelles les centres vitaux minoritaires se sentent en sécurité.[33]

This approach to language rights is implied in strong communal language rights such as Bill 101: rights which are rooted in the geographic space considered to be the home of the French language. Even though the French-speaking population is a minority in Canada and on the continent, it is understood that on the Québec territory it forms the majority and should have the status of a majority.

Still, it remains possible to integrate the territorial model of language rights with the personal model. Indeed, the English-speaking Québécois carries with him official language rights as well as the various provincial rights conferred on him as a member of the anglophone community. On the other hand, the French-speaking Québécois is guaranteed the right to communicate in French within various spheres of life. Simply put, the territorial principle allows the French-speaking majority to hold strong language rights and ensures that immigrants integrate into the linguistic majority; the personal

principle allows the vesting of special language rights in the members of the anglophone and Aboriginal communities. Again, note that these are all communal language rights even though they do not reach equally as far.

In conclusion to this section, we can ask ourselves if language legislation has been successful in providing French-speaking Québécois with the good of living in their language. Indeed, should it turn out that the various interventions in the education system, the private sector and public administration were useless, their legitimacy would certainly be questioned. If it were found that there is no rational connection between the objective of promoting the French language and the legislative means used to this end, then there might be grounds for challenging Bill 101 under the proportionality test as defined in the *Oakes* case.

In that regard, many surveys of public *perception* seem to show that French is gaining ground as a public language in commercial transactions and advertisement.[34] They also show that French as a language of work is making real gains insofar as it is increasingly a condition of employment in business firms, though English was still perceived in 1980 as being more useful for promotions: "Results from the CROP (1981) survey suggest that gains made by French as a language of communication are more

important than its gains as a language of occupational mobility".[35] As a language of instruction, French has made important gains as a direct result of Bill 101, but also because French is increasingly perceived to be a language of status. Indeed, more and more children who are eligible for English schooling are choosing French schooling.[36] Thus considering its low costs of implementation[37], it would seem that the Charter of the French Language has succeeded in securing the linguistic identity of the French-speaking Québécois. Yet can we conclude that there is a causal link between Bill 101 and the improvement of the status of French? Only tentatively, for other factors have probably contributed to improving the status of French concurrently with language legislation, namely higher levels of education and a greater role in the business world. It could even be argued that some aspects of Bill 101 primarily aim at improving a socio-economic situation rather than a linguistic one per se. As Michel Guillotte writes about francisation programs, "[t]oute solution, toute recommandation se rapportant directement ou indirectement à la francisation de l'entreprise privée au Québec vise globalement le redressement d'une situation qui est davantage socio-économique que proprement linguistique".[38] Moreover, some view the Quiet Revolution as the major factor which contributed in boosting the

self-esteem of the French-speaking Québécois. Bill 101 came later and served as a kind of shock therapy to increase the Québécois' awareness of their linguistic situation.[39] In any case, it is clear that people do see a causal link between the language legislation, the improvement of the status of the French language, and the socio-economic improvement of the French-speaking Québécois.[40] The Supreme Court's comment in this regard deserves attention:

> Thus in the period prior to the enactment of the legislation at issue, the 'visage liguistique' of Quebec often gave the impression that English had become as significant as French. This 'visage liguistique' reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the Charter of the French Language was, in the words of its preamble, 'to see the quality and influence of the French language assured'. The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the 'visage linguistique' of Quebec would reflect the predominance of the French language. The s. 1 and s. 91 materials establish that the aim of the language policy underlying the Charter of the French Language was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the

> French language and assuring that the reality of Quebec society is communicated through the 'visage linguistique'.[41]

Yet judicial legitimization does not eliminate tensions, to which I now turn.

III

The exercise of a collective language right in Québec, Laurin wrote, "does not mean that many other mother tongues cannot exist or be used in private life and in the activities of individual ethnic groups".[42] This corresponds to the universal moral right to use one's language in one's private sphere of activity, and finds guarantees in Bill 101 itself. For example, advertising in non-French media does not have to be in French, and public messages of a religious, political, ideological or humanitarian nature can be in any language.[43] Moreover, the detailed regulations which accompany Bill 101 provide more exceptions: advertising related to any cultural or educational product or activity may be both in French and in any other language(s); natural persons can post messages in any language on their private dwellings; advertising during a convention, fair, exhibition or conference can be in any language; etc.[44]

Still, it could be argued that some parts of Bill 101 impinge on individual language rights of the first kind. Because the Supreme Court construed language as being

intimately linked with expression, it was able to substantiate its decision that the French-only sign provisions of Bill 101 limit freedom of expression as defined in the Canadian Charter. Viewed this way, forbidding languages other than French on commercial signs is an unjustifiable intrusion in someone's private sphere of activity. As the Court argued,

> [t]he respondents seek to be free of the state imposed requirement that their commercial signs and advertising be in French only, and seek the freedom, *in the private or non-governmental realm of commercial activity*, to display signs and advertising in the language of their choice as well as that of French. Manifestly the respondents are not seeking to use the language of their choice in any form of direct relations with any branch of government and are not seeking to oblige government to provide them any services or other benefits in the language of their choice. In this sense the respondents are asserting a freedom, the freedom to express oneself in the language of one's choice in an area of non-governmental activity, *as opposed to a language right of the kind guaranteed in the Constitution.*[45] [emphasis mine]

To put it differently, the respondents were not claiming a communal language right as members of the anglophone community, but an individual language right of the first kind. On the surface, this interpretation would therefore lead to the conclusion that the French-only signs provisions are a violation of individual language rights of the first kind. To be sure, there is a risk that any argument would be double-edged: given the centrality of language, if francophones argue that the pervasive nature

of language justifies wide-ranging interventions in society in order to protect their language, other linguistic groups can argue that the pervasive nature of language on the contrary justifies protection *against* state intervention which aims at limiting their own language.

There is another reason why some parts of Bill 101 are said to impinge on individual language rights of the first kind. Since the Québec Charter of Human Rights and Freedoms includes language in its list of items that ought to be protected against discrimination, the Supreme Court, in the *Brown's* case, was able to rule that the French-only signs provisions of Bill 101 discriminate on the basis of language:

> [Section 58 of the Charter of the French Language] has the effect, however, of impinging differentially on different classes of persons according to their language of use. Francophones are permitted to use their language of use while anglophones and other non-francophones are prohibited from doing so. Does this differential effect constitute a distinction based on language within the meaning of s.10 of the Quebec *Charter*? In this Court's opinion it does.[46]

Insofar as banning the use of additional languages is concerned, the Court felt it was unduly discriminatory and thus on the surface it would seem that this represents a limit on individual language rights of the first kind.

One picture which emerges so far is that of a law which favors the ethnic majority to the detriment of basic universal rights to speak one's language and not be discriminated against for doing so. What is defective in this picture is that it does not treat the issue as a tension between moral rights. I have suggested that the authenticity of some language claims is more obviously universal while other claims are validated by a close examination of circumstances, among them historical ones. The underlying rationale of the Charter of the French Language falls under the latter. Thus conceptualized, there are reasons for holding it as a morally valid state action and to evaluate its undesirable aspects as resulting from the clash with other equally valid claims. This situation is very different from when a government infringes on individual language rights for reasons which are not grounded in moral claims. That was the case in Canada in 1918 when a federal order-in-council prohibited German-language newspapers in Canada, affecting the life of German-speaking communities such as Kitchener.[47] The ban was not the result of the exercise of a communal right, but the result of anti-German sentiment during the First World War. This case illustrates a clear violation of the right to speak one's language within one's sphere

of private activities, namely here the right to publish a private newspaper in one's language.

The tension between moral rights is not only expressed in the conflict between individual language rights and communal language rights, but among communal language rights themselves. Now, Bill 101 as a strong language right is to coexist with other communal language rights, namely those of the aboriginal communities. For example, section 87 of Bill 101 states that "[n]othing in this Act prevents the use of an Amerindic language in providing instruction to the Amerinds, or of Inuktitut in providing instruction to the Inuit". Also, section 97 states that "[t]he Indian reserves are not subject to this act". The Charter of the French Language is also to coexist with the constitutional rights of anglophones, namely those of section 133 of the B.N.A. Act as well as the Canadian Charter of Rights provisions on official languages and on minority language education (except section 23(1)(*a*)).

Of course this coexistence has not always been smooth. In the *Blaikie* case, the Supreme Court ruled unconstitutional the provision of Bill 101 making the French version of Québec statutes and regulations the only official ones. To this end, the Court invoked section 133 of the B.N.A. Act which provides for the use of French and

English in debates, records, and Acts of the National Assembly.[48] It had been suggested that since the Manitoba legislature in 1890 had canceled section 23 of the federal Manitoba Act, which provided for the use of French or English in the legislature and courts of Manitoba, then the National Assembly could do the same.[49] Indeed, section 23 of the Manitoba Act and section 133 of the B.N.A. Act were similar and, it could be argued, had the same purpose and therefore the same status despite the entrenched status of the latter. In 1979, the Supreme Court ruled in the *Forest* case that these provisions of Manitoba's 1890 Official Language Act were unconstitutional, just as those of Bill 101 were found to be in the *Blaikie* case that same day.[50] Therefore, the constitutionally-protected communal rights of section 133 overrode that particular provision of Bill 101.

Moreover, in 1984 the Supreme Court struck down the "Québec clause" in Bill 101 on the grounds that it was incompatible with section 23 of the Canadian Charter.[51] The Québec submission agreed that the "Québec clause" was a limit on the freedom of instruction, but argued it was a reasonable limit consistent with section 1 of the Charter. In short, it argued that a collective right underlies the Québec clause: it "is reasonable because it is the expression of a collective right of the francophone

majority --vulnerable because it is a minority in Canada and only constitutes 2.5 per cent of the population of North America-- to assure its rightful cultural security".[52]

These two cases illustrate the tension between two communal rights: the strong language rights of French Canadians in Québec and the language rights anglophones have as members of one of the official language communities. Enforcing full compliance of both rights leads to a clash whose resolution seems to be determined by the entrenched character of the latter. But regardless of the outcome, the distinction I wish to emphasize is that we are in the presence of an inter-communal rights conflict rather than a conflict between communal language rights and individual language rights. This inter-communal rights conflict is also different from the violation of communal language rights French Canadians outside Québec have suffered, which I will examine in section V.

IV

I have left open the question of whether the courts' decisions were fair in the legal cases discussed above. But we can ask ourselves if there are counter-arguments that would question the validity of these decisions.

For instance, there is a case for saying that freedom of commercial expression overflows the realm of private activities, a case which the appellants did not attempt to make. On this view, commercial activities have a public dimension which warrants state regulation regardless of the fact that the mode of ownership is private. There is a difference between those private language activities which are intimately self-regarding, such as talking to a friend on the street or joining a club, and those language activities which interrelate with the public realm. Thus there is something to be said about the need to demarcate the domain of action where one is totally free to use one's language. Here the issue refers to the difficult task of drawing the line between the private and the public sphere. I would tend to argue that this kind of commercial activity overflows the private realm and touches upon the sensibilities of the French-speaking population which, before language legislation, had little control over such activities, thus little control over the public space. *Some* regulation therefore appears quite legitimate.

And, even if it were shown that decisions about the language of signs are a private matter protected from state intervention, there would be a case for showing that commercial expression does not constitute expression as

such, and thus that it has no Charter guarantees. Indeed, it is easy to see why the idea that putting up an English-only sign constitutes fundamental expression trivializes what freedom of expression ought to mean, namely, the freedom to express one's thoughts and opinions. After all, the rationale for French-only signs has nothing to do with freedom of expression for francophones, but instead aims at creating a French *visage linguistique*. Why, then, invoke freedom of expression against it?

My inclination is to say that putting up a commercial sign in one's language is unrelated to fundamental expression. Regardless of the legitimacy/illegitimacy of the restrictions, they do not seem to restrict freedom of expression as such, and thus this kind of commercial activity is far from being a particular instance of fundamental expression. To be sure, these restrictions have an emotional impact for they can be construed as a symbolic attack on the English-speaking community of Québec, sending the message that the strength of the French-speaking community is inversely proportionate to that of the English-speaking community. Moreover, it is not clear how the exclusive use of French is at all necessary, thus making the restrictions all the more frustrating to non-francophones. Nonetheless, it does not seem to be a case of freedom of expression violation.

There are also reasons for questioning the validity of the discrimination argument, that is, that the French-only signs impinge differently on people according to their language of use. The rationale for forbidding languages other than French on commercial signs is that a plurality of languages *does* have a differential impact insofar as the English language has a stronger power of attraction than French, especially in Montreal. It may be a case of reverse discrimination, yet one that is justifiable in Québec's case. Thus, as for those provisions of Bill 101 being discriminatory, it is hard to see how they are any less justified than other reversed discriminations based on a recognition that the free market operates to the advantage of the powerful.

I do not want to imply that the courts were insensitive to these arguments. The Supreme Court reflected some of these concerns when it legitimized the imposition of French on all commercial signs, and said it would support its marked predominance over additional languages. I am inclined to agree with its proposed compromise, though one could argue that the explanations given for calling some of the restrictions unreasonable are on shaky grounds.

My point is that there are two kinds of interpretations. The first one is to interpret commercial

expression as fundamental expression and/or as part of the private realm, and point to Bill 101's unreasonable limits and intrusions. This, it would seem, is how the Supreme Court saw it, and on our view should lead to an ad hoc balancing of valid moral language rights. It is, to put it differently, an inter-rights conflict, and adjudication must involve an interpretation of what freedom of expression means in this situation, and what the promotion of the French-speaking identity can reasonably include as a valid claim.

The second one is to interpret commercial expression as not being fundamental expression and/or as part of the public realm, and thus not construe the situation as an inter-rights conflict. In this case, one claim is not a valid one, and thus we would be led to a different kind of resolution. It would have involved, I suppose, saying that commercial expression, though important, is not fundamental, and that commercial signs, though important to the owners, are public in the same way that licence plates are.

V

So far our analysis is founded on the proposition that individual language rights against discrimination and undue interference are insufficient to promote the French

language in Canada, and thus that there are grounds for strong language rights on the Québec territory. They contribute to the definition of a French language zone in which English as the dominant language is turned into a minority status language. The situation for francophones outside Québec is of course quite different given its relatively low demographic weight in some regions, the inadequate institutional development and government support in many provinces, and the ensuing disintegration of many vulnerable French-speaking communities. Moreover, language rights are obviously not as extensive as those found in Québec where the right to live in French is defensible. Yet recourse to communal language rights is justifiable for historical reasons, as argued above, although they generally are not purely modeled on the territorial principle. Language rights for French-speaking Canadians outside Québec are generally based on a mix of the territorial and personal principles, that is, all individuals have transportable rights to certain services in French where the numbers warrant. For example, section 20(1) of the Canadian Charter of Rights guarantees French language services with federal institutions where there is significant demand. Moreover, section 23(3) states that the right to French language instruction applies wherever there is a sufficient number of eligible children. Thus

even though the right is vested in individual French Canadians wherever they are, "significant demand" and "sufficient number" implies a certain territorial concentration before the right may be exercised in effect.

The history of French-language rights violations in Canada is a complex one since it is intermingled with the issue of separate denominational schools. Some cases of what appeared to be an opposition to a publicly funded separate school system were probably a circumvented way of undermining the support system of the French Canadian community which was Roman Catholic. By the end of the nineteenth century, French Canadians saw the separate school system as a way of preserving not only the Catholic faith but also the French language. Interestingly, the evolution of the identity of French Canadians from being religion-based to becoming language-based seems to have had an impact on the nature of conflicts with the English majority. In the years after Confederation, being French Canadian was intimately linked with being Roman Catholic; correspondingly, attacks on the French Canadian community would take the shape of governmental oppositions to Catholic separate schools. The official reason for restricting and prohibiting these was the need to have a uniform and centralized educational system, not an opposition to the French language per se. But when

religion became less central to the identity of French Canadians, to be replaced by language, attacks on the French Canadian community shifted to a more explicit opposition to French instruction as such. Many anglophone Roman Catholics themselves opposed instruction in French, wishing to "wipe out every vestige of bilingual teaching in the public schools of this Diocese", as Bishop Fallon of London stated in 1910.[53] The point I am making is that it is often difficult to isolate cases of French language rights violations from cases of denominational rights violations. With time however, the conflicts became more clearly based on language. But various events would seem to suggest that the attacks were aimed to weaken the identity of the French Canadian community, whether it be religion- or language-centred.

The communal language rights of French Canadians outside Québec have been impinged upon many times and to different degrees. There is no point in drawing a complete inventory of these violations, hence a few examples will suffice. If we look at education, their right to an educational regime suited to their religious and linguistic needs was an integral part of the Confederal pact. Typically, violations of this right involved a deliberate policy of assimilation restricting or banning the study of or in French in schools, such as Ontario's

Regulation 17. Reactions varied, from simple non-compliance to the development of a tacit modus vivendi, but in crucial aspects French-language education was rendered impotent for many years, and the loss to the French Canadian community is incalculable. Today, limiting minority language educational rights often takes the form of a "failure of local or provincial authorities to approach the interpretation of Section 23 with openness and generosity".[54] As the Commissioner of Official Languages notes, "[t]he effect in some jurisdictions was to deprive a generation of minority official language children of the type and quality of education to which they were entitled."[55] Even after the Supreme Court's ruling in the 1990 *Mahé* case, the governments of Alberta, Newfoundland, Nova Scotia and Northwest Territories have been stalling the enforcement of the Charter right of francophones to manage and control their own school boards.[56] On the issue of legislative and judiciary bilingualism, most provinces do not recognize any rights for francophones, and some who did have attempted to abolish them. We have already mentioned the 1890 Manitoba Act which not only ended the official status of French in the legislature and courts, but banned its use. Moreover, in 1988 the Supreme Court of Canada ruled in the *Mercure* case that Alberta and Saskatchewan were bound by Section

110 of the 1891 North-West Territories Act which provides for legislative and judicial bilingualism.[57] But since these rights were not entrenched in the Constitution, both provinces immediately moved to pass a law modifying the Act in order to abolish the rights in question.

What is important to note here is that these are not cases of inter-rights conflict. The rationale for limiting language rights outside Québec is assimilation to the English majority on grounds of cost-efficiency and/or cultural imperialism, for which there could be no valid moral claim. Thus what I want to emphasize is that the situation is different outside Québec: different of course because the communal rights of francophones are crucial to their survival and their violation is all the more morally reprehensible, but different also because their violation is a case of plain repression against French-speaking minorities rather than the result of the exercise of some communal English-language right.

VI

Our discussion has focussed on explaining the grounds for different moral language claims in French Canada and on illustrating how these claims can sometimes conflict with each other. I have emphasized a process of weighing the different valid claims rather than a set rule which

would compel us to reject one claim or the other. Typically, one rule states that in Canada communal language rights such as Bill 101 have little legitimacy, while the other rule states that in Québec collective rights trump individual rights. Such reductionism is not illuminating, to say the least, for a political theory of language rights, and is bound to fail if translated into policy. Thus an ad hoc balancing of competing valid claims seems more compatible with the need to interpret universal claims in particular circumstances, whether these be based on the value of autonomy or on that of identity. Properly done, it allows us to construe our citizenship in a way which is congenial to our membership in one of the two linguistic communities. We then get a fuller view of what the Canadian polity must provide as a matter of justice, and hopefully a process of argumentation to adjudicate between these valid moral claims.

NOTES TO CHAPTER VIII

1 Supreme Court of Canada, The Attorney General of Québec v. La Chaussure Brown's Inc., 37.

2 National Assembly, Charter of Human Rights and Freedoms (C-12), section 10.

3 J.T. Thorson, quoted by Kenneth McRoberts, "Making Canada Bilingual: Illusions and Delusions of Federal Language Policy", Federalism and Political Community: Essays in Honour of Donald Smiley, eds. David P. Shugarman and Reg Whitaker (Peterborough: Broadview Press, 1989), 150.

4 Alison d'Anglejan, "Language Planning in Quebec: An Historical Overview and Future Trends", 47.

5 Supreme Court of Canada, Allan Singer v. The Attorney General of Québec (1988), 26.

6 Richard Bourhis, "Introduction: Language Policies in Multilingual Settings", Conflict and Language Planning in Québec, ed. R.Y. Bourhis (Clevedon: Multilingual Matters, 1984), 2.

7 Nathan Brett, "Language Laws and Collective Rights", 357.

8 Royal Commission on Bilingualism and Biculturalism, Report of the Royal Commission on Bilingualism and Biculturalism, Book IV: The Cultural Contribution of the Other Ethnic Groups (Ottawa: Queen's Printer, 1969), 13.

9 Ibid., 228-230.

10 Camille Laurin, "Charte de la langue française", 125.

11 Ibid., 121.

12 Bourhis, "Introduction: Language Policies in Multilingual Settings", 4-5.

13 Ibid., 6-7.

14 Ibid., 7-8.

15 Ibid., 7-8.

16 Ibid., 8.

17 Ibid., 9-10.

18 Ibid., 11-12. Consider the centralizing policies under the Third Republic: "Regional languages were to be stamped out as barbaric and backward, for French was the language of progress. At the end of the Second Empire, some 70-90 per cent of the population of Languedoc, according to locality, were monolingual in Occitan... . In twenty-four of the eighty-nine départements, more than half the communes were non-French speaking... . After 1870, state education and the need for a common language for communication in a more mobile society rapidly reduced these figures." M. Keating, State and Regionalism: Territorial Politics and the European State, 50-51.

19 Bourhis, "Introduction: Language Policies in Multilingual Settings", 11-12.

20 Daoust-Blais, "Corpus and Status Language Planning in Québec: A Look at Linguistic Education", 214-216.

21 National Assembly, "An Act to amend the Education Department Act, the Superior Council of Education Act and the Education Act" (Bill 85, 1968), sections 1 and 8. On the various pieces of language legislation, also see Daoust-Blais, "Corpus and Status Language Planning in Québec: A Look at Linguistic Education", 217-229, and d'Anglejan, "Language Planning in Quebec: An Historical Overview and Future Trends", 36-45.

22 National Assembly, "An Act to Promote the French Language in Québec" (Bill 63, 1969), section 4.

23 National Assembly, "Official Language Act" (Bill 22, 1974), section 41.

24 Ibid., section 35.

25 National Assembly, "The Charter of the French Language", sections 72, 73. In passing, René Lévesque had a preference for the Canada clause, but felt pressured by party hard liners to opt for the Québec clause. Gérard Bergeron, Pratique de l'Etat au Québec, 131.

26 National Assembly, "The Charter of the French Language", section 58.

27 Bergeron, Pratique de l'Etat au Québec, 124.

28 National Assembly, "The Charter of the French Language", sections 2-6.

29 Ibid., preamble.

30 Cited by Dominique Clift and Sheila McLeod Arnopoulos, Le fait anglais au Québec, 57.

31 It is worth noting that some research shows that territory, unlike language, does not appear to be a central factor of identity in Québec. Indeed, territory is only indirectly linked with communal identity. A study of English- and French-speaking Québécois revealed that "language and cultural background are two important dimensions of ethnic identity, but that geographic region is not as important as might be expected". To anglophones, territory and language do not coincide in any meaningful way; to francophones, territory is perceived as being only incidentally related with language. The point is that it is language which is the central dimension of identity, not territory. See Donald Taylor et al., "Dimensions of Ethnic Identity: An Example From Quebec", The Journal of Social Psychology, vol.89 (1973), 185, 189, 191.

32 The territorial approach has gained popularity in the last decades, as witnessed by the numerous references to the Swiss model. There, for instance, educational language rights are territorial: the language of instruction is exclusively that of the Cantons, even when they include important linguistic minorities. Even in the four Cantons which make exception to this rule by allowing additional languages of instruction, these are limited to special unilingual linguistic zones within each Canton. Interestingly, the borders of the Cantons do not always coincide with the frontiers of ethnic and linguistic communities, which tend to be entangled. The territorial principle also applies in Belgium, except in Brussels. See Rudolf Viletta, Minorités linguistiques et interventions: essai de typologie, 112; and André Donneur, "La solution territoriale au problème du multilinguisme", Les Etats multilingues: problèmes et solutions (Québec: Les Presses de l'Université Laval, 1975), 211-212.

33 Laponce, Langue et territoire, 141.

34 Laporte, "Status Language Planning in Québec: An Evaluation", 62.

35 Ibid., 63.

36 Ibid., 66.

37 It has been shown that "the economic costs of Bill 101 ... have been overestimated". Indeed, "as f'r as business firms are concerned, the costs of the Charter are well within the limits of their ability to adjust to the new linguistic environment without undue stress on their performance". Ibid., 72, 75.

38 Marc Guillotte, "L'aménagement linguistique dans l'entreprise privée au Québec", Actes du Colloque international sur l'aménagement liguistique (Québec: Les Presses de l'Université Laval, 1987), 345.

39 Julien Bigras, "La langue comme pierre angulaire de l'identité québécoise", L'oiseau-chat: roman-enquête sur l'identité québécoise, ed. Hervé Fischer (Montréal: La Presse, 1983), 182.

40 Laporte, "Status Language Planning in Québec: An Evaluation", 75.

41 Supreme Court of Canada, The Attorney General of Québec v. La Chaussure Brown's Inc., 72-73.

42 Camille Laurin, "Charte de la langue française", 122.

43 National Assembly, Charter of the French Language, section 59.

44 Office de la langue française, Regulation respecting the language of commerce and business, sections 8, 12, 14.

45 Supreme Court of Canada, The Attorney General of Québec v. La Chaussure Brown's Inc., 41.

46 Ibid., 83.

47 This event is reported in: John English and Kenneth McLaughlin, Kitchener: An Illustrated History (Waterloo: Wilfrid University Press, 1983), 128; G ttlieb Leilbrandt, Little Paradise: The Saga of the German Canadians of Waterloo County, Ontario, 1800-1975 (Kichener: Allprint Company Limited, 1980), 158, 253; Herbert Karl Kalbfleisch, The History of the Pioneer German Language Press of Ontario, 1835-1918 (Toronto: University of Toronto Press, 1968), 106.

[48] Supreme Court of Canada, Attorney General of Quebec v. Blaikie (1979).

[49] Claude-Armand Sheppard, The Law of Languages in Canada (Volume 10 of Studies of the Royal Commission on Bilingualism and Biculturalism) (Ottawa: 1971), 103-105.

[50] Peter H. Russell, Leading Constitutional Decisions (Ottawa: Carleton University Press, 1982), 460-461.

[51] Supreme Court of Canada, Attorney General of Quebec v. Quebec Association of Protestant School Boards (1984).

[52] Quoted by Roger Gibbins, Conflict and Unity (Agincourt: Methuen, 1985), 63.

[53] Royal Commission on Bilingualism and Biculturalism, Report of the Royal Commission on Bilingualism and Biculturalism, Book II: Education (Ottawa: Queen's Printer, 1968), 49.

[54] Commissioner of Official Languages, Annual Report 1990. Retrospective: From One Crisis to Another (Ottawa: Minister of Supply and Services, 1991), xvi.

[55] Ibid., xvi.

[56] Ibid., xix.

[57] Ibid., xvi.

CONCLUSION

We saw that the case for a Rawlsian-type system of justice can be made on the basis that it creates a safeguard against perfectionist doctrines that would fail to respect the plurality of ends, and hence fail to respect our capacity to make autonomous choices. A theory of justice can be construed as a framework of rights which is prior to the various conceptions of the good persons may have. The idea is that if the principles of justice are not founded on any particular end or vision of the good life, then individuals remain free to pursue and revise their own ends within the framework of rights without being sacrificed in the name of the maximization of a particular good. In Rawls' theory of justice, this is achieved by placing individuals behind a veil of ignorance where the principles of justice can be deliberated upon without considering particular ends and interests. What comes out of this process is a consensus over the distribution of the means (such as freedom of choice) that are essential to the pursuit of individual life plans.

Understood in this context, it is no surprise that the Canadian Charter of Rights and Freedoms is considered a great accomplishment in guaranteeing every citizen basic

rights, many of which are related to the protection of personal autonomy. It contributes to creating a kind of Charter culture, largely based on pan-Canadian individual rights and on a common belonging in a liberal community of citizens.

I have tried to show why this form of liberal justice is problematic for community. For one thing, the system of rights which protects the goods associated with autonomy as a primary value can conflict with the promotion of goods associated with communal identity. This is difficult to avoid. Rather, the problem stems from the discourse on individual rights, and its concrete Charter configuration, which may not foster the protection of communal goods if the framework for interpreting these rights is individualistic, or at the least suspicious of communal claims.

Even recent reinterpretations of what liberalism is all about seem unsatisfactory. On these views, goods related to our identity can be accounted for, but only indirectly, that is, as being derived from the primacy of autonomy. They account for communal goods in such a way that they are construed as being essential to our autonomy, which implies that they cannot conflict with autonomy without defeating their purpose. Consequently, the validity of those communal claims which involve the

promotion of certain identity-related goods is subject to the expansion of the range of personal choices and to the respect of other traditional individual rights. The revised liberal view, in a sense, attempts to *reconcile* autonomy and community and thus remains constrained by its prime directive which even extends in the world of education and parental duties: as a rule, the supplying of communal goods must be in accordance with the respect for autonomous choices.

The revised liberal view is a moral standpoint which, despite its obvious appeal, leaves something to be desired. Indeed, its political implications do little for communities which, so to speak, cannot always afford to be 'liberal' in all respects. I have suggested the need for a modified theory that articulates the requirements for autonomy with those for identity, both taken as substantive values. This involves taking a conceptual approach to allow us to express valid claims to communal goods and to *manage* the inevitable tension between autonomy and community rather than trying to reconcile them, especially when there is no possible congruence. It would involve ascribing more weight to identity as a substantive (rather than derivative) value, along with the respect for autonomy. One of my objectives has been to

work out the main elements of one part of the fuller theory this would require.

It recognizes that choice is one of the normative bases of liberal theory. Choice relates closely to the concept of autonomy, for choice is the necessary action associated with being autonomous, with being the authors of our own lives.[1] Liberty then appears as the general condition that makes choices possible for persons with a capacity for autonomy. Choice, autonomy, and freedom fall under the general requirements of promoting human well-being and respecting people's inherent value. This is why we ought to be respected (i.e. be free) in our choices as autonomous beings.

The view I have elaborated presents identity as a value which also falls under the same requirements. Identity says something about who we are and who we think we are. It involves being distinct persons and having our own identity whether or not we are different, but it also involves being in conversation with our community and identifying with others. This sense of identity is derived from sharing a certain good or from seeking its realization. It explains why some communal goods, as they were defined in this context, can be central to identity, and hence central to our well-being.

Yet, there can be no perfect congruence between the conditions for identity and those for autonomy. On the liberal view I have criticized, the promotion of a communal identity is worthy of respect only if it does not run counter to other persons' autonomy. The modified view I have suggested implies that there is no clear order of precedence, no set rule, and that we must interpret the validity of the conflicting claims according to our conceptions of what human beings need in a given situation. Such an interpretation is all the more necessary when the claims stem from a general and abstract right rather than from a specific and concrete one.

The concept of communal right lends itself well to this kind of interpretation. While it is true that we must resist the tendency to express every interest in terms of rights, they remain essential because of their duty-creating properties. Communal rights allow us to express those moral considerations which are sometimes misconstrued as the interests of society over the individual when they are in fact the interests that individuals have in their capacity as members of a community of identity. They allow us to formulate worthy claims which escape the category of traditional individual rights. These rights are conceptually different from individual rights insofar as they represent claims to

communal goods made by community members, goods which are incidentally central to a communal identity. But significantly, communal rights have a universal justification in spite of their exclusive character. They are founded on the general right we all have of protecting the conditions of our identity.

Thus, among the fundamental human goods, some may give rise to individual rights, others --such as communal goods-- may give rise to communal rights, while of course others have no legitimate place in rights-talk altogether.

What are we to say about this? For one thing, it would seem that the sense we give to autonomy is subject to universal conditions. The capacity for autonomy more immediately justifies human beings having moral rights that protect their freedom to make choices as autonomous beings. These conditions are seen as universal ones. the kind that would be chosen behind a veil of ignorance, and whose moral relevance is difficult to doubt.

Identity, on the other hand, is necessarily born out of diversity in human existence. The promotion of a person's communal identity may justify the institution of special rights, but the kind that only make sense if we recognize a context of diversity. Rights to identity-related communal goods of the kind I discussed allow just

that: the formulation of those claims that are made by individuals in their capacity as community members.

If some moral rights are derived from the respect of autonomy, they nevertheless take shape in the realm of historical and cultural circumstances and are thus situated in their application. The proposition is that most of these moral rights must be capable of adapting to the contingencies of diversity. Indeed, if these rights are essential to guide legislators in their actions, they may turn out to be inadequate against assimilative pressures that destroy identity, and may themselves even contribute to the erosion of identity. They must therefore be sensitive to the diversity of circumstances in which they are exercised, and provide exceptions to accommodate this diversity.

The inevitable difficulty, then, is to seek a balance between different kinds of rights. And if it is true that rights are to enable us to solve competing claims, then we can expect some order of precedence among rights themselves, even though any attempt at this is at best imperfect. There are, though, limits on moral rights which are always unjustifiable. For example, I can think of one moral right which ought to outweigh all other claims: the right to security of the person against injury, molestation, and death. This right is "of such obvious and

immediate concern to the individual"[2] that there does not seem to exist a rational justification for violating it -- except perhaps in the case where one forfeits his own right to security by deliberately acting in a way that infringes upon someone else's right to security. Recognizing this threshold provides a guarantee that no moral consideration can override the right to security.

But these are not hard cases. There is no need to interpret what the right against being tortured means, or whether or not it is a valid claim. Our conceptions of what human well-being requires is not as clear in other cases. This is why we must interpret the validity of species of more general and abstract rights according to the diversity of needs, and engage in a balancing procedure to manage the tension that is likely to arise between different claims. A debate then arises because of different interpretations of what some general moral rights mean and require in practice.

To be sure, in our judgments concerning the extent to which communal rights could be claimed and exercised alongside individual rights, we tend to look at the latter as being "side-constraints" placed upon the pursuit of special collective interests.[3] Despite its initial appeal, the absolute respect of side-constraints is counter-intuitive if it fails to account for those goods which

escape, or do not always fit comfortably, traditional individual rights-talk. In fact, communal rights themselves can place side-constraints upon the unrestrained exercise of individual rights which in a market-oriented environment often benefit the powerful.

Moreover, the belief that communal rights have no validity is often correlated with a strong belief in pure majority rule. This allows a protection of individuals as citizens rather than as members of communities. Why? Because the emphasis is on the democratic rule of the majority of individuals regardless of group belonging, and on the vesting of rights in such individuals. On the other hand, the belief that communal rights do have some validity is often correlated with a desire to protect minority communities from majority rule. Rights are held by some individuals in virtue of their belonging in some community, and thus receive protection against the majority which may be tempted to stress individual rights only in its hegemonic pursuit.[4] Communal rights, to that extent, can complement federalism in this function.

It is in this light that Bill 101 should be understood. The conceptual framework proposed here, I believe, can improve our understanding of the moral weight that ought to be given to communal claims to the protection of the French language. Language can be

construed as a constitutive factor of our primordial identity: it is one of the creating forces of, or at least it gives access to, a common identity. Though the language-identity link is circumstantial, language has become central to French Canadian identity and in Québec extends into the realm of a territorial national consciousness. For historical reasons, claims to the protection of the French language are a matter of right.

Still, conceptions of language rights are obfuscated by unclear moral foundations, making it all the more difficult to make judgments about the validity of the claims and to adjudicate conflicts between them. A clearer categorization distinguishes between individual language rights, derived from the abstract right to privacy and against discrimination (two goods related to the respect of autonomy), and communal language rights, derived from the generic right to the preservation of our identity. Moreover, it recognizes that individual language rights and some communal language rights (those that involve sustaining a language) are insufficient given market forces, hence the justification for stronger language rights in some circumstances. But significantly, this view also implies that although there can be no strong universal language rights, strong language rights can have a universal justification.

In Canada there are different language claims corresponding to each of these moral categories. Some can give rise to moral communal rights such as those contained in Bill 101. These rights, however, may collide with other valid claims, whether they are individual language rights or other communal language rights. I brought out the necessity to construe these claims as having a universal justification derived from the general right we all have to preserve the conditions of our identity, and as having sufficient moral weight to warrant reasonable constraints to the exercise of other rights. Among other things, this means that section 1 of the Charter can be used wisely to express the validity of the strong communal language claims of the French-speaking Québécois, as the Supreme Court partly did.

The Charter cases I have briefly examined illustrate the difficulties involved in such a task. They show that one of the things which underlies the Québec-Canada duality is the presence of a tension between the conditions for political citizenship, to which are related a number of autonomy-related goods and mechanisms for their protection, and the conditions for community, to which are tied a set of identity-related goods. Not only does this tension manifests itself in actual Charter cases, but also in a less tangible rights-discourse,

namely when collective rights are invoked by communities as a way of counterbalancing the sometimes untamed exercise of individual rights.

In this context, and by way of conclusion, we cannot overstate the importance for Québec of a mechanism such as the Distinct Society Clause to work in conjunction with section 1 of the Charter of Rights, which reminds us that rights are not absolute and can sometimes be reasonably limited through judicial interpretation. In fact such a clause would be an ingenious way of affirming indirectly the centrality of communal goods (such as the French language) by giving more latitude to those who interpret the Charter.[5] The Distinct Society Clause would allow courts to read into the exercise of these rights a communal content, thus accounting for language as a communal good and recognizing the moral weight of the corresponding claim.

Still, a legislation which guarantees the right to live in one's language will normally require --as most rights do-- a set of restrictions and obligations, some of which are sure to clash with certain Charter rights and hence upset so-called Charter Canadians. It is a variety of what I have identified as a strained coexistence between the liberal community and communities of identity,

or, put differently, between the political community and the natural community.

The challenge is to construe liberal justice in a way that is congenial to both, and provide individuals with the goods they need as citizens and as community members. This has nothing to do with promoting a conception of virtue in citizens. Rather, it calls for a better understanding of our different needs for identity, and the sensibilities it involves. It contributes to our understanding of what the Canadian polity ought to recognize as a matter of justice. The alternative, as appealing as it may seem, leads to moral mistakes in our judgments about language conflicts in Canada and in Québec.

NOTES TO CONCLUSION

[1] On the subject of autonomy, see Rodger Beehler, "Autonomy and the Democratic Principle", Canadian Journal of Philosophy, vol.19, no.4 (December 1989), 575-582.

[2] Wringe, Children's Rights: A Philosophical Study, 56.

[3] See Robert Nozick's discussion of side-constraints that are placed upon goals, in Anarchy, State, and Utopia (New York: Basic Books, 1974), 28-33.

[4] This was expressed in submissions to the Royal Commission on Bilingualism and Biculturalism. See A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen's Printer, 1965), 99-100.

[5] See Brent Pavey and P.Coulombe, "Of Opportunities Lost and Roads not Taken: Meech Lake, Distinct Society, and Counterbalancing the Charter", The Western Journal of Graduate Research, vol.2, no.1 (1990).

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