Uncertain Accommodation

Aboriginal Identity and Group Rights in the Supreme Court of Canada

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Introduction

The phrase "identity-related differences" refers to those characteristics that define individuals as certain kinds of persons (or as members of certain kinds of groups). These characteristics can be acquired both voluntarily and involuntarily. Over two decades ago, political theorist Avigail Eisenberg (1994, 9) observed that the issue of "which identity-related characteristics are most significant will partly depend on what sort of characteristics have political significance within a community." We have increasingly become aware of the dangers of ignoring and over-emphasizing these differences. History is replete with instances of injustice originating in society's failure to adequately address diversity and difference and, even worse, its active attempts to eliminate certain identity-related differences entirely. We should be particularly concerned about how the state manages these differences – as opposed to other societal actors – because, as political theorist Jacob Levy (2000, 23) argues, the state "has an unparalleled capacity to act cruelly, to inflict violence and pain, to inspire fear." The unfortunate fate of many religious, national, and cultural groups, as well as sexual and racial minorities in this past century alone, stands as a powerful testament to the accuracy of Levy's argument. This historical record has contributed to a growing consensus among scholars that justice requires states to do better – that is, for states to be considered just (or at least reasonably so), they need to protect and accommodate identity groups within their borders (Gutmann 1994, 4–5; Kymlicka 1995).

So, what is to be done? How can states act justly? There are many possible answers to these questions. I would hazard that a number of these

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responses – perhaps even a majority – include something about rights. When I use the term "rights," I take it to mean what philosophers such as George W. Rainbolt (1993, 93) have in mind: that rights are properly conceptualized as normative constraints. To say that a person has a right, then, is to say that they have a claim to X (where X is usually understood as an important human interest or value such as physical security or personal expression) and everyone else has a sufficient reason to respect that person's claim.[1] If someone holds a right, this is a sufficient (though not conclusive) reason for everyone else to behave in a way that is compatible with that person's holding that right (i.e., usually by constraining his or her behaviour).[2] For example, if we say that a person has a right to associate with people of her choosing, the rest of us have a sufficient reason to allow this to occur (i.e., by not locking the person in her home or physically stopping her from getting together with people whom we dislike). Many of the standard civil and political rights in most liberal democratic states fit with this notion of rights as normative constraints.

My intuition about rights and the question of what states can do should not be too controversial given the important space we have carved out for rights in our contemporary world. Philosopher A. John Simmons (2008, 68) aptly explains this point by bringing to our attention the fact that rights are often thought to be important because people associate them with justice: "That there is a strong connection between the satisfaction of people's rights and the (modern) idea of justice seems indisputable, as can be seen in the agreement on this point by moral thinkers as diverse (in period and in orientation) as John Locke, Immanuel Kant, and John Stuart Mill." People expect rights to play a role in the pursuit of justice, and many philosophical heavyweights support this expectation, though for different reasons. The connection between justice and rights renders intelligible legal philosopher Jeremy Waldron's (2005, 109) somewhat sobering observation that in a world marked by conflict and hard choices, rights "are supposed to be our best, most honest, and most respectful response."

When this argument about rights and justice is applied to the relationship between states and identity groups, the claim is somewhat transformed. It becomes something like the following: Justice (at least sometimes) requires states to extend group rights to certain identity groups and to create institutional measures for the protection of these rights. I refer to "group"

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rights as those that go beyond the standard package of civil rights (e.g., the right to free expression or movement) and political rights (e.g., the right to vote or stand for office) accorded to citizens generally in contemporary liberal democracies. The distinguishing feature of group rights is that they are held by people (either individually or collectively) because they are members of certain identity groups, and their purpose is to ensure the well-being or survival of these groups. Some scholars object to the very idea of group rights, arguing that they are incompatible with the basic moral equality of citizens (Barry 2001). Others, however, present compelling philosophical cases for these rights. Arguably, the most well-known account is by Canadian political philosopher Will Kymlicka. For Kymlicka (1995), a liberal multiculturalist, the extension of group rights is legitimate if it facilitates individual autonomy. As political theorist Mira Bachvarova (2014, 4) observes, "Kymlicka's commitment to the value of personal autonomy led him to consider, more expansively than most liberals did, the conditions for the effective exercise of autonomy." Specifically, Kymlicka argues that autonomy is always exercised in a socio-cultural context (what he calls a "societal culture"), which makes individual choice both meaningful and possible.[3] This connection between autonomy and culture creates two problems for people who are not members of the majority cultural group – whom Kymlicka identifies as people who belong to polyethnic groups (e.g., immigrants and their descendants) and subnational minority groups (i.e., groups that are nations without their own states such as the Québécois or the Basque). The first problem is that members of minority groups may have a harder time operating in the societal culture of the majority. As a result, the extension of group rights can be an important resource to assist these individuals to navigate a societal culture that is not fully their own (Levey 1997, 216). The second problem is that the societal cultures of minority groups are at a disadvantage vis-à-vis their majority counterparts because the latter usually have more control over (or even exclusive access to) state institutions and resources. Thus, extending group rights to minorities can facilitate the autonomy of members of minority groups by protecting these groups' societal cultures. In both instances, group rights can create a degree of equality and fairness between people belonging to minority and majority groups.[4] On the whole, Kymlicka (1995) presents a robust and impressive argument that these rights can be

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legitimate tools for states to employ in their efforts to protect and accommodate minority groups, and his work continues to greatly influence many contemporary scholars and political practitioners.

Unfortunately, the move from theory to practice is seldom easy. This book is one account of what happened when, in the 1980s, the Canadian state made such a move and constitutionalized Aboriginal rights. It is not my intention to create the impression that the political authorities in Canada, moved by some sense of justice, acted to give Aboriginal rights constitutional recognition. In actuality, the 1982 adoption of the Aboriginal rights provision in the Canadian Constitution was the product of decades of mobilization by Aboriginal peoples and their allies (Manuel and Posluns 1974), as well as intense political bargaining between the federal government and the provincial premiers (Waddell 2003). The changes that came about in the early 1980s are thanks to these parties' hard work.

In 1982, the Canadian Constitution was amended substantially. The package of constitutional changes adopted included, among other measures, section 35, a provision recognizing Aboriginal and treaty rights. At the time, the adoption of section 35 was a very contentious matter. Indeed, it was so contentious that the only way for supporters of this provision to secure its ultimate inclusion in the constitutional package was for them to agree to leave it purposely vague. Essentially, the federal and provincial governments agreed to settle on a definition for section 35 at a series of first ministers' conferences to be held after the passage of the *Constitution Act, 1982*. The conferences failed to result in an agreement and, consequently, the Supreme Court of Canada (SCC) was left holding the metaphorical bag: It found itself with the task of outlining the nature and scope of section 35 and its corresponding rights.

The court's first opportunity to outline what Aboriginal rights would entail came about in the 1990 *Sparrow* decision.[5] Since then, a firestorm of criticism has ensued. For some scholars, Aboriginal rights go too far (Flanagan 2000); for others, they do not go far enough (Green 2000). Still others contend that Aboriginal rights are an important step toward Aboriginal-non-Aboriginal reconciliation in Canada (Cairns 2000), while their opponents insist that these rights are merely a continuation of the state's policies of assimilation and colonization (Alfred 2005). Interestingly, some scholars of Aboriginal politics view Canada's legal system in its entirety

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– not just section 35 – as facilitating these state policies. Patricia Monture-Angus (1999), for example, argues that the legal system is an alien structure imposed on Aboriginal peoples that offers them very little in their struggle for self-determination. Moreover, all of these divergent scholarly opinions are reflected in the positions held by members of Aboriginal nations and communities, government officials, and the Canadian public at large. Legal scholar Jean Leclair (2006, 522) is correct in his assessment of the situation: "Since 1982, many people, from Supreme Court justices to legal scholars, be they aboriginal or non-aboriginal, have battled one another over the meaning that should be ascribed to the words 'aboriginal rights' found in section 35 of the *Constitution Act*, 1982." And yet, while very few are happy with the current state of Aboriginal rights in Canada, there is a lack of consensus about what is wrong with these rights and how to fix them.

As a non-Aboriginal Canadian and a scholar, I believe that this conflict is of great significance. It is of personal importance because I have a deep desire to be a citizen of a country that deals with all people who reside within its borders in a just fashion. This conflict is of scholarly importance because I am convinced that rights have an important role to play in treating people justly. However, given the degree of disagreement surrounding section 35, I think that it is proper to suspect that something has gone seriously wrong in this case. My goal in this book is to examine where the proverbial train went off the rails and, in so doing, participate in the conversation about how to get it back on track. This book focuses on the following questions: After so many years, why have Canadians been unable to reach any kind of consensus regarding where the SCC went wrong in its Aboriginal rights jurisprudence? More importantly for the future relationship between Aboriginal peoples and non-Aboriginal Canadians, why have Canadians been unable to agree on what Aboriginal rights should entail? And lastly, what does this Canadian case teach us about group rights, in terms of how they are theorized and how they can be put into practice?

Approach

Can the conflict over Aboriginal rights be resolved by altering, in some way, the scope of the rights covered by section 35? In other words, does the solution lie in extending the reach of these rights to cover additional Aboriginal interests (i.e., the position argued by Green 2000)? Or is the solution found

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by shrinking the reach of these rights to exclude certain matters (i.e., the position put forth by Flanagan 2000)? Characterizing the controversy surrounding section 35 as an issue of scope is one way – indeed a common way – of viewing the debate about these rights. This view underpins the claims of those who argue that Aboriginal rights go too far or do not go far enough.

Alternatively, one could ask whether the rights covered by section 35 suffer from some additional shortcoming that goes beyond issues of scope. That is, do other factors unrelated to scope play a significant role in the conflict? This book pursues this line of investigation. It does so as a result of the scholarly work put forward by those interested in the issue of identity, as well as those interested in how identity impacts rights. For decades, scholars have raised serious concerns about the use of the concept of identity in political analyses and prescriptions (Dhamoon 2009; Dick 2006). Rogers Brubaker and Frederick Cooper (2000, 2) go as far as arguing that the lack of academic consensus and precision over how to conceptualize identity renders this concept of little analytical value. They conclude that the analytical burden currently shouldered by identity can more effectively be borne by a bundle of other concepts. They argue that, in order to cover all of the issues and debates currently encompassed by the term "identity," we need three distinct concepts, not one: identification and categorization; self-understanding and social location; and commonality, connectedness, and groupness (Brubaker and Cooper 2000, 14–21).

The challenges associated with the use of the concept of identity give us reason, then, to doubt whether identity-based rights are the best mechanisms for protecting and accommodating identity groups such as Aboriginal nations. In this book, I explore this possibility. I do so, however, not by challenging the normative arguments advanced by scholars such as Kymlicka (1995) about the moral permissibility or optimality of these rights. Rather, I follow the lead of scholars such as Caroline Dick (2011) who focus on evaluating the performance of specific examples of these rights in action. I am interested in evaluating the degree to which section 35 rights protect and accommodate Aboriginal peoples in Canada (i.e., Dick's project), as opposed to the (philosophical) soundness of the normative case for group rights (i.e., Kymlicka's project).

This book begins by advancing that, while the scope of section 35 may, indeed, be a problem, problems may also result from the attempt to anchor

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section 35 rights to a particular group identity – in this case, aboriginality. Specifically, the conflict surrounding section 35 rights may be constituted by a debate about the scope of these rights, as well as a debate about the meaning of aboriginality. This book analyzes these two (possible) facets of the conflict by bringing together scholarship on Aboriginal politics, political philosophy, and the law. It evaluates judicial decisions, legal submissions (factums), and scholarly commentary pertaining to Aboriginal rights cases in Canada, with a focus on unpacking the roles competing conceptions of Aboriginal identity play in the construction and ultimate reception of section 35 rights.

This analysis demonstrates that, even though there are multiple conceptions of aboriginality – in other words, the Aboriginal litigants, the provinces, the federal government, and the Supreme Court justices advance different understandings of the collective identity – Aboriginal rights are constructed to protect a single, particular vision of aboriginality: the vision held by the justices of the SCC. This vision of aboriginality is quite different from the understanding of the collective identity put forward by the Aboriginal litigants themselves and challenges the litigants' version of aboriginality in important ways. This book advances the argument that, as a result of the SCC's actions, Aboriginal rights fail to protect Aboriginal peoples and even result in harm.

This central finding allows us to reframe and better comprehend the controversy surrounding Aboriginal rights in Canada. This book advances that, contrary to the traditional way of understanding the controversy, the contestation surrounding section 35 actually involves two related, yet separate disputes. One dispute – the dispute that is the standard focus of debate – is about the scope of the rights that Aboriginal peoples have or ought to have. The other dispute – the dispute that is often ignored – is about the very meaning of this collective identity. In order to accurately grasp the controversy surrounding section 35, both disputes need to be addressed.

The scoping dispute and the identity dispute are front and centre in this book's treatment of section 35 and are reflected in its prescriptions. Specifically, the book puts forward two recommendations as a result of the SCC's decision to tether section 35 rights to aboriginality. The first recommendation is that the proper way to settle the controversy over section 35 is to settle the debate over the meaning of aboriginality and, only then, to

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move on to establishing (or in this case, reconstructing) the scope of Aboriginal rights. That is, we need to decide what aboriginality means before we can come up with the right set of rights for its protection.

The second recommendation put forward in this book is that, as long as the SCC continues to insist on a connection between section 35 and aboriginality, the best way to settle the identity dispute is for Aboriginal rights to be based on Aboriginal peoples' understanding of aboriginality. The crux of the argument is that if group rights are anchored to a specific identity, then it is unfair to require members of the identity group to conform to an outsider's version of their identity as a condition of exercising these rights – especially if the group members did not agree to the link between rights and identity in the first place and this requirement has not been adequately justified to them. This is no way to treat people justly.

The book concludes with one additional observation. The analysis presented throughout problematizes the court's decision to tie Aboriginal rights to aboriginality. One is left wondering whether other interests not based on identity might be a sounder basis for Aboriginal rights in Canada. This is an important question moving forward. While this book does not provide an adequate, stand-alone case for separating group rights and identity given the problems that result from the connection in this Canadian case, it could be of use to those currently engaged in advancing such an argument.

Terminology

In her work on colonialism and resistance, Emma LaRocque (2010, 6) rightly cautions that "terminology about identities is a minefield." Thus, I offer the following explanation regarding my decision to use the term "Aboriginal." I recognize that a number of scholars have argued that this term is problematic. Some scholars argue that this term obscures the great diversity of communities and nations encompassed by this label – that it has a homogenizing effect (Vermette 2008, 7). Others contend that this label is the creation of those who do not bear this collective identity – that it is the white man's term (Dodson 1994). As one member of the Dene Nation put it: "Geez, first I was [an] Indian, then a Loucheux, then I had to call myself a Gwich'in, now I'm a First Nation – what the hell they gonna make me call myself next!?" (Irlbacher-Fox 2009, 35). And, of

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course, the term "Aboriginal" is not generally used by the individuals who are called "Aboriginal" (Wood 2003, 371–72). As Native American studies scholar Dale Turner (2006, 32) explains, "the primary source of identification for many Aboriginal peoples is their community, or nation. If you ask an indigenous person in North America where they are from, most will tell you their indigenous nation first: Mohawk, Lakota Sioux, Haida, Metis, to name a few." In short, these individuals have their own ways of referring to their nations that come from their own cultures and languages. In this book, the use of the term "Aboriginal" is not meant as an evaluative statement about the validity or significance of these issues or the corresponding academic scholarship. I am very sympathetic to these positions and believe that many of the arguments underpinning them are quite convincing. I have selected to use the term "Aboriginal" instead of other possible terms because it is the term employed in the *Constitution Act, 1982*. It is also the term employed in many of the legal documents that are the focus of the book's analysis (e.g., the judicial decisions and factums). And this term seems to be the term most often used in the scholarly literature on section 35. The term "Aboriginal" is selected in order to ensure a certain degree of coherence and clarity for the reader, especially the reader who is unfamiliar with the scholarship on Aboriginal politics and Canadian law.

Structure of the Book

The structure of the book allows readers a variety of ways of approaching the text. Chapter 1 provides historical context for the analysis that follows. Those whose primary interest is the law may want to focus their attention on Chapters 2, 6, and 7, which contain the bulk of the legal analysis in this book. Those whose primary interest is the politics of identity can jump to Chapters 3, 4, and 5, which focus on the nature of the contestation surrounding the meaning of aboriginality and possible approaches to defining this collective identity. Chapter 8 brings together the legal analyses and discussions about identity politics in order to advance the major conclusions of the book. Of course, like many who labour to produce a book, I hope that there is enough of interest here to encourage all readers, regardless of their expertise, to engage with the text as a whole. The contents of each chapter are outlined in more detail below.

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Chapter 1 focuses on section 35, its history, and its current form. The first part of the chapter outlines the historical origins of the Aboriginal rights provision. The main objective of this historical presentation is to highlight that from the very beginning, there was fierce debate about what a constitutional provision recognizing Aboriginal rights should entail. The latter part of the chapter advances that the SCC was ultimately called upon to settle the debate regarding the nature and scope of section 35, and it decided that Aboriginal rights would be principally about protecting aboriginality.

Chapters 2, 3, and 4 focus on aboriginality. They illustrate that there are many ways to understand the term "Aboriginal" and to approach the conceptualization of aboriginality. Chapter 2 advances that the different possible meanings of aboriginality are, to an important degree, products of the different approaches that can be employed to conceptualize the collective identity. The chapter examines two of these approaches: the traits-based approach and the relational approach. Chapter 3 presents a critical comparison of the two approaches and makes the case for the use of the relational approach. The crux of the argument is that traits-based approaches manifest costs that are "weightier" than the costs associated with the relational approach, because they include real-world costs that affect people's lives. Chapter 4 employs a relational approach to construct three definitions of aboriginality by drawing on the literature on Aboriginal politics. I label these different versions of aboriginality the nation-to-nation, colonial, and citizen-state understandings of aboriginality. These three versions of aboriginality act as "ideal types" for my analysis of the court material in the two chapters that follow.

Chapter 5 turns back to the jurisprudence on section 35. The analysis focuses on the legal arguments submitted to the SCC by the Aboriginal, federal, and provincial participants in Aboriginal rights cases. The analysis demonstrates that the Aboriginal participants consistently advance one understanding of aboriginality (the nation-to-nation version), while the federal and provincial participants put forward two alternatives (the colonial and citizen-state versions). Chapter 6 also focuses on the court material, but specifically on the judicial decisions. What is of interest in this chapter is the version of aboriginality put forward by the justices of the SCC. During section 35 litigation, the justices invented and then consistently put forward the citizen-state understanding of aboriginality.

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Chapters 7 and 8 illustrate the serious consequences of anchoring section 35 rights to the citizen-state understanding of aboriginality. Chapter 7 makes the case that section 35 rights cannot, in principle, protect all three versions of aboriginality. Specifically, the colonial and nation-to-nation conceptions do not receive protection. I conclude that, while an absence of protection for the colonial version of the collective identity is something worth celebrating (or so I argue), absence of protection for the nation-to-nation conception of aboriginality is worrisome. Chapter 8 presents the case for this last point in detail. Specifically, I argue that the court's decision to protect the citizen-state conception of aboriginality is not justified and harms Aboriginal peoples in two basic ways – it misrecognizes them and treats them unfairly. I put forward the proposal that section 35 rights should be reconstructed to protect the version of aboriginality held by the bearers of this collective identity. This is the only fair course of action, if the court insists on maintaining the linkage between Aboriginal rights and aboriginality.

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