Languages of Law

From Logics of Memory to Nomadic Masks

PETER GOODRICH
Senior Lecturer in Law at the University of Lancaster

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Modalities of Legal Annunciation: A Linguistics of Courtroom Speech

'[T]here is no cultural document that is not also a record of barbarism.'[1]

Let Us Compare Mythologies: Questions of the Legal Other

The Queen Charlotte Islands form a small archipelago off the coast of mainland British Columbia. Lyell Island is the largest of the group and has been inhabited since before the Dutch and subsequent British discovery and colonisation of western Canada by the Haida Indians. The island is covered by primordial forest and its traditional economy is based upon woodcraft and fishing. In early 1985, without consulting the inhabitants of the islands, the government of British Columbia granted a logging licence to an American company, Western Forest Products Ltd, to exploit the islands for lumber. By a variety of means which included inserting metal spikes into the trunks of trees and a non-violent blockade, the Haida Indians prevented Western Forest Products Ltd from commencing logging. On 6 November 1985 Western Forest Products Ltd issued a writ naming the president of the Council of Haida nations, Chief Richardson, as defendant in an action for an injunction seeking to prevent any further interference with logging on the island. The case of *Western Forest Products Ltd* v. *Richardson and Others*[2] came before the Supreme Court of

1 W. Benjamin, *One Way Street* (1979, London), p. 221.

2 The case was unreported in the Supreme Court of British Columbia law reports and the only available record is the trial transcript which is available for personal inspection but cannot be copied or removed from the Supreme Court building. A general account of the issues involved in the protest can be found in M. Johnstone and D. Jones, 'Queen Charlotte Islands, Homeland of the Haida' (1987) *National Geographic* 102.

British Columbia and was heard by Justice McKay in the following week.

At the preliminary hearing of the case the Haida Indians appeared before the court unrepresented by lawyers and endeavoured to argue their preliminary case without legal assistance. The first linguistic issue raised in the case was thus posed as that of whose language was to represent the litigants, the question of whose speech was to be heard within the institution. Such is always the first question of law, that of authority and qualification for legitimate speech, but here it was also the first question raised, the primary question in the case. It was the key question of representation in its fullest sense: how and by what means, by what insignia and in which words, or by reference to which texts, will I appear before the law. The issue, which could also be labelled that of voice,[1] was dealt with elliptically by the court. During argument Justice McKay on several occasions attempted to persuade Chief Richardson to employ counsel and eventually adjourned the case for three days during which time he urged the defendant to obtain representation. For the period of the recess, Chief Richardson persisted in refusing legal representation, partly on the ground of cost but primarily on the ground of not wishing to create an illusion of justice: 'the issue of our lands is too important to leave in the hands of lawyers who are unfamiliar with our people'. That resistance to indirect representation, to the translation of law, was made explicit in remarks of the defendant to the press, which included the statement that in the defendants' view and 'for whatever reason, [Justice McKay] does not want us to speak for ourselves'. It should be noted also in this context that Haida custom and institutions included mechanisms and customary languages for dealing with this type of dispute. Firstly, it may be observed that in Haida custom any dispute over land or the use of land was traditionally settled by consent, negotiation and participation rather than by adjudication; secondly,

1 As posed by Bakhtin, *The Dialogic Imagination* (1981, Texas), ch. 4, the question of voice is that of who speaks, a question that includes issues of the internal stratification of language and the 'inner dialogue' of the word. The question of voice is also the question of which or whose language it is that is being spoken, a question of who speaks, of who is qualified to speak and also of whom they speak for. For a case study see J. Brigham, 'Right, Rage and Remedy: Forms of Law in Political Discourse' in *Studies in American Political Development* (1987, New Haven), at p.306: 'Legal forms are evident in the language, purposes, and strategies of movement activity as practices. When activists speak to one another their *language* contains practices of, about or in opposition to the legal system.'

logging of the islands threatened not simply the community and lifestyle of the Haida but their existence as a nation insofar as its economic consequences would force large numbers of the community to leave the islands. If we now move to read the text, the 'unrepresented' arguments put to the court by the defendants, we may read the transcript most thoroughly by examining all those places in which the discourse of the Haida comes into conflict with and even subverts the language of an essentially colonial law.

On the first day of the trial Chief Richardson appeared before the court in full ceremonial dress accompanied by eighteen elders of the Haida nations but without lawyers. The first argument, the first representation, the first address, was that of dress: to the judges' robes can be contrasted the button blankets of the defendant.[1] The significance of the ceremonial dress, a button blanket, is that the embroidery on the blanket symbolically both depicts the status of the wearer within the Haida nation and also denotes the wearer's relationship to and rights over traditional lands. No comment was made as to the ceremonial dress, nor was evidence allowed as to its significance. It was passed over in silence, it was not seen, it was not a language which the court was prepared to countenance: before the law there are only individuals, subjects that can be reconstructed as legal actors, abstract subjects, individuals without clothes, certainly without all that clothes imply, namely the social and ceremonial dimensions of collective and ethnic life, the material and social habitus of the individual. Despite subsequently expressed doubts, Justice McKay allowed Chief Richardson to speak to the court and to call witnesses. At the risk of vastly oversimplifying a court transcription that runs to over a thousand pages, the following sequence of arguments were heard – though arguably heard only in a notional sense – by the court. Draped in red and black button blankets, all the witnesses called addressed the issue of the Haida's arrival in and occupation of the Queen Charlotte archipelago. Noting that the writ

1 The classic study is T. Carlyle, *Sartor Resartus* (1893, London), p. 45: 'The beginning of all Wisdom is to look fixedly on Clothes, or even with armed eyesight, till they become *transparent*.' ('As Montesquieu wrote a *Spirit of Laws*, observes our Professor [i.e. Teufelsdrockh], so could I write a *Spirit of Clothes*; thus, with an *Esprit des lois*, properly an *Esprit de coutumes*, we should have an *Esprit de Costumes* . . . In all his Modes, and habilatory endeavours an Architectural Idea will be found lurking; his Body and the Cloth are the site and materials whereon and whereby his beautified edifice, of a Person, is to be built.' (p. 23).

served on the Haida made reference, as was until recently the standard form for common law writs, to the 'grace of God' (*Dei gratia*), Chief Lightbrown and others retold at length the mythological history of the Haida arrival in the islands. God, whom they referred to as the 'Great Spirit and Creator' had granted the islands to the Haida at the beginning of time for their use and occupation. They had a right 'to stand on the islands' and to act as caretakers from that moment at the dawn of time when the first Indians had emerged, according to Haida legend, from a clamshell carried by a raven and dropped on the sands of the islands.

A series of further anecdotal narratives, tellurian mythologies and traditional poems were presented to the court as evidence of the ancestral claim of the Haida to the islands. Several Haida artists explained at length the character and symbolism of their art forms, of their totem poles, masks and carvings, all of which spoke to the integral relationship of the Haida to the land, of their love of it and respect for it. They had been there since time began; this was their land by custom, by the prescription of use, by precedent even, yet ironically they were threatened by a common law writ and a property right that ran only to a hundred or so years. And it was a writ, let us say, that had neither history nor art nor poetry, nor even the logic of common law memory, to protect it. After the island had been reduced to stumps by the modernist anti-aesthetic of the loggers, the intruders would leave but the Haida would remain to inhabit what was left of their destiny and their island. They would have nowhere else to go. Of the other anecdotes and histories presented, the most striking occurs towards the end of the evidence when one of the women elders sang traditional songs to the court for a full afternoon. The songs repeated ancestral legends and evidenced again that, in Haida custom and art, inhabitant and nature were one; that as occupiers of the islands the Haida do not differentiate themselves from their environment but rather see their culture and community as being inextricably and intrinsically bound up in the land. She ended her songs weeping. Chief Richardson concluded his defence by appeal to natural justice, to a law of nature, an ethics, which he argued invested the Haida cause with a spirit of truth that pre-existed and would long survive any ruling as to mere law.

The testimony presented to the court was extremely novel in legal terms. It took the form of symbolic dress, mythologies, masks and totem poles as well as the legends, stories, poems, songs and other

forms of interpretation that such art and mythology implied. The argument was both lyrical and visual, narrative and aesthetic, and it extended far beyond the contours of contemporary Western languages of law, although the defence – perhaps simply as a matter of respect and most frequently in response to judicial questioning – did also include more prosaic forms of argument as to Haida customary law of dispute settlement and land claim. Unreserved[1] judgment was given by the court the day after argument ended. Justice McKay observed that the court would not normally have allowed argument of the political kind heard but that, in view of the fact that the Haida had no other arena available to them, he had been prepared to listen and generously recommended that a record of the evidence presented should be kept for posterity. The judgment itself was extremely brief. The evidence presented as to the Haida title to and relationship with the islands was not legally relevant to the case being heard, which simply concerned interference with a valid logging licence. In law it was simply a matter of the wrong forum, perhaps of *forum non conveniens* too, and he had no alternative but to grant the injunction. He proceeded to do so while absolving himself of any moral responsibility by remarking in time-honoured form that 'while people sometimes think that judges have the power to do what they want, they must in fact act according to law; they administrate the law but cannot make policy'. Of course, this moral self-absolution of the court, this washing of hands, had as its underside the annihilation of the opposing language, the non-legal language in which the defence had been conducted. That language was annulled in the simple, direct and brutal sense that it was not even referred to save as a curiosity, a relic, a primitive remnant of a more savage past. The court would not compare mythologies, *it refused even to countenance the question of the 'other'*, because to do so would raise questions of its 'self', of the social and mythic construction of its own body, its social role and actions, its own clothes.[2] In short, although it was the only arena available to the

1 In legal terms the case simply concerned the formal validity of the logging licence and there was, in consequence, no need to take time to consider judgment.

2 That refusal of the 'other' is intrinsic to law: 'The law supposes a Grand Subject which must encompass or act upon something in the exercise of its grand project, and this something cannot any longer be taken to be simply itself, a reflection of itself, as it were. The "Other" is that upon which the "Law" acts, that which it completely absorbs, but which remains when the "Law" has spent itself. The "Other" may be called "Society"' (from A. Carty, 'Enlightenment,

Haida, the court was not prepared to countenance their argument which related not to law but rather to those more intangible courts of politics, history and moral reason. In those arenas the Haida might well be vindicated and justice be seen to lie down on their side; but in the meantime the trees and their livelihood would have been prised from their lands and their nation dispersed.[1]

The apparently emotive example of legal deafness presented in *Western Forest Products Ltd* v. *Richardson and Others* is at its most profound level an example of a deep structure of common law. It exemplifies an habitual logic of law, one which throughout its history has systematically obliterated difference in all its manifestations, in all its discourses. Like the inquisition, and the 'ordinaries' of the Counter-Reformation, like the Church which has historically either annexed or destroyed the other, the logic of the common law has been one of a comparable lack of alternatives, of a refusal to recognise that vast host of the other: the outsider, the stranger, the vagrant, the marginal; the Irish, the coloured, the foreign. What is their place in the law, what is their voice, whose language do they use? In its immediate linguistic technology, the case is in fact a vivid illustration of the procedural peculiarities and stringent evidential rules of relevance and admissibility that pertain to all forms of legal dialogue. Routine hearings for rent arrears, repossession of goods bought on credit, unfair dismissal, maintenance, breach of the peace, social security appeals or incompletely performed contracts exhibit identical disparities between expectations of audience and the reality of routine processing of claims before tribunals and the lower courts. As is reasonably accurately articulated in popular presentations of the legal community, the law, both as an institution and as a profession, represents itself as an arcane and élite pursuit; its image of a language is that of a peculiarly legal reason, that of the logic of rules, and its forms of utterance reflect the idiosyncracies, the obscure presuppositions and the generic inaccessibility of a language that is 'learned' in

Revolution and the Death of Man: A Postmodern Approach to Law' in A. Carty (ed.), *Postmodern Law*, 1990, Edinburgh, p. 6). For an implicit elaboration of a similar argument, see P. Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14 *Journal of Law and Society* 119.

1 The Haida continued to protest and to blockade the island, and in a subsequent action for contempt of court several protesters received custodial sentences. On 11 July 1987 South Moresby finally became a national park but not

both senses of the term. In the most obvious of senses, legal dialogue is exclusory in the same manner that medieval usage of Latin was exclusory, namely that the language of legal communication is not a vernacular usage but rather a closely guarded and professionally governed specialist register whose lexicon and syntax reflect the historical influence of two alien and one obsolete, specifically legal dialects.[1] Against the background of that history it should be borne in mind that before any lawyer is equipped to 'estreat recognisances', 'escheat' property, pass 'fee simples', attend to 'res judicata', counsel in 'voir dire' or plead 'ex turpi causa non oritur actio' they have applied in excess of six years to the acquisition of the language and techniques of the legal register. As the case of the Haida Indian land claim well illustrates, however powerful the arguments or cause, however justified the case in terms of natural justice or moral competence, it is unlikely to be to the advantage of the laity to speak for themselves in legal settings; they are unlikely to be heard. More specifically, they cannot be heard in the sense that any recognition of the vernacular, and of all that the vernacular implies in terms of values and references, would place the court in a position of relativity; the language of law would itself become just one more dialect, one more register or code, a further vernacular to be weighed in the scales of legitimacy. In purely pragmatic terms, the vernacular must therefore efface itself and the non-legal speaker learn through that erasure of voice to benefit from complicity in the community of legal language, a complicity that takes place through representation and lodges both civility and fate in the hands of the profession.

It is to that profession and language, to the complex particularity of a legal audience, that the present Chapter will turn in endeavouring to outline certain of the more salient features of listening in legal settings. Throughout our theme will be that, irrespective of the aura of rationality and of specialism that surrounds legal hearings, they are best depicted not in terms of the law's own image, that of impartiality

before considerable parts of Lyell island had been extensively and irreparably logged.

1 For general accounts, see: D. Mellinkoff, *The Language of the Law* (1963, Boston); P. Goodrich, 'Literacy and the Languages of the Early Common Law' (1987) 14 *Journal of Law and Society* 422; G. E. Woodbine, 'The Language of English Law' (1943) 18 *Speculum* 396; B. Danet, 'Language in the Legal Process' (1980) 14 *Law and Society Review* 445; J-L. Sourioux and P. Lerat, *Le Langage du droit* (1976, Paris).

and the inexorable necessity of the application of pre-existent rules of statute and precedent, but rather in terms of the uneven exchange that characterises the flawed dialogue or 'distorted communication' of the most contemporary bureaucratic discourses. What underpins and prolongs the unilateral monologue of most legal auditoria is not the exquisite precision of scientific expression but simple political expedience and the linguistic manifestation of the vested interest of economically and sexually dominant social groups.[1]

Legal Auditoria

The books of the law run to many volumes. If one includes the full panoply of historical and contemporary law in force, together with the synopses, commentaries, doctrinal and procedural writings, updates and treatises on method, it runs to many libraries.[2] It is a literal impossibility to know the law, and even if one expended an entire existence in legal repositories one could only ever know part of the law. While much law is available in literary form to those trained in the art of finding and reading it, it should also be observed that many decisions are not reported and that many that are transcribed are not published but are available only in court libraries to which the judiciary alone has access. Even were one to accept for the sake of argument that the physical availability of law rendered the majority of legal rules accessible, in a broader sense the unequal distribution of legal knowledge gives the profession or community of lawyers an inevitable advantage or superiority in the forms and utility of legal discourse. In both linguistic and rhetorical senses, dialogue before the

1 On which point, see, for example, R. Fowler, *Language and Control* (1979, London); D. Cameron, *Feminism and Linguistic Theory* (1985, London). In specifically legal terms, see R. Benson, 'The End of Legalese' (1984–5) 13 *Review of Law and Social Change* 519; P. Goodrich, 'The Role of Linguistics in Legal Analysis' (1984) 46 *Modern Law Review* 523.

2 On the metaphor of the Alexandrian age of the printing press, see W. T. Murphy and S. Roberts, 'Introduction' (1987) 50 *Modern Law Review* 677; the other classic discussion is in M. Foucault, *Language, Counter-Memory, Practice* (1977), pp. 92–3: according to Flaubert's *The Temptation* the dubious honour of being 'the first literary work to comprehend the greenish institutions where books are accumulated and the slow and incontrovertible vegetation of learning quietly proliferates . . . [he] erects [his] art within the archive . . . all literary works are [now] confined to the indefinite murmur of writing.'