When the Quebec government announced in 2002 that it had signed the *Peace of the Braves*, a long-term agreement with the Cree nation that answered many indigenous claims over territory and resource sharing, the initial public response was muted. However, the opposition increased considerably when, a few months later, a second treaty was revealed, this time with the Innu nation, called the *Agreement-in-principle*. Unlike the Crees, who form the vast majority of the population on their territory, the Innus comprise a small minority on a territory mostly populated by non-indigenous. This may explain why one could hear, at the time of the *Agreement-in-principle*, so many individuals shocked by the fact that the resources of “their” region had to be shared with indigenous peoples. They denounced what they believed were expropriation measures, partitioning of the land, depletion of common resources, and so on. They blamed the authorities for succumbing to the charms of multiculturalism in granting undeserved privileges to a minority.

Yet these treaties do not grant undue privileges; on the one hand, they recognize indigenous nations as legitimate partners in the exploitation of natural resources, and on the other hand, they decentralize state powers on small pockets of land for the benefit of Aboriginal self-government, which are already partly self-administered as federal reserves. The treaties explicitly aim at sharing resources and, eventually, redistributing wealth to redress the socio-economic disparities between indigenous and non-indigenous. However, most critics displace this political framing of the problem and focus instead on a cultural understanding of legal aspects. They raise this concern to a principle: the law should always treat individuals as equal, regardless of his or her cultural belonging. They do not condemn multicultural policies justified by the ideal of the equal inclusion of individual citizens, such as affirmative action. They resist the idea that political communities should also be made equal. They think that collective rights will impinge on individual rights and argue that the best way to redress inequalities would be to maintain the firmly established rights of individuals only. By judging the political question of balancing minorities and majorities from the standpoint of the integration of individuals in a majority culture, they do not consider the possibility that the insistence on individual rights may be a strategy to downplay the offer on the negotiation table; or that such an insistence may be a part of the problem.

The story does not end there; in fact, it has merely begun. Last summer, a judicial battle between the Innus and a pulp and paper company made explicit the consequences attached to the treaties. Governments will have to negotiate and share the profits of exploitation rights with indigenous peoples, if they wish to avoid the tribunals. Critics used this return to the courts—a situation that the treaties were supposed to avoid—as proof that indigenous negotiators were not acting in good faith. But why are the political...
stakes so rapidly transposed onto cultural or other issues? The guiding hypothesis of this paper will be that the insistence on individual rights is either a deep misunderstanding of the actual and effective workings of the law, or a disguised means by which to contest the sharing of resources with other communities. In other words, the best way to address redistributive questions and resolve conflicts with Aboriginal communities is to consider the political effectiveness of treaties, to evaluate which measures are right for individuals and communities, and to modify our understanding of the law accordingly.

I will make my case by examining the arguments advanced by Jürgen Habermas concerning the reparation treaties. I take Habermas as a starting point because he accepts the pragmatic framework I am putting forth, in what I consider to be a very compelling view on the workings and ideals of a deliberative democracy. I will not, however, discuss Habermas’ position on deliberative democracy (see Blanchard, 2004), in order to follow more closely his recent comments on collective rights in general, and on indigenous treaties in particular. His argument is deployed on two levels: first, it is argued that, for empirical reasons, collective rights are not workable; following this empirical analysis, a second abstract level develops whereby an individualist legal structure forestalls any kind of collective rights. In response, I will develop a counter-argument showing that empirical reasons call for the introduction of legal protections for collectivities and, therefore, that collective rights are legitimate at an abstract level. I will illustrate this reply with the case of indigenous treaties. This line of argument respects how Habermas grounds his abstract understanding of law in empirical facts; it is thus quite possible for a Habermasian to recognize the existence of collective rights at an abstract level, since this recognition stands on the pragmatic fact that collective legal treatment, such as indigenous treaties in Canada, are just and moral measures that do not endanger individual rights. Consequently, we should not reject reparations measures such as indigenous treaties just because they include collective rights.

I constrain my defense of collective claims made by indigenous peoples within the framework of a constructivist account of justice. I define constructivism as follows: the validity of a legal claim is a function of accepting that claim through an appropriate procedure of construction. This procedure, in Habermas’ words, states that a norm is valid if and only if all speakers affected by the norm have agreed, in a rational discussion, to the consequences and side effects linked to the general observance of the norm. I will not delve into the particular wording of this procedure but will simply state the following: by restricting myself to a constructivist account, my intention is mostly to avoid either strong moral realism or relativism. I do not believe in self-evident and theory-independent moral facts, or in moral validity as simply expressing the moral beliefs of a particular society. Collective claims should be accepted because it is the right thing to do according to the best procedure we can work out in order to resolve some of our legal and moral conflicts. This constraint is also intended to result in a coherent account of collective claims within a Habermasian framework.

---

1 For a discussion of this procedure, cf. chapter 3 of Habermas, 1996.
Habermas recently published an article that is probably the most complete argument he has yet to offer against the idea of collective rights (Habermas, 2005). My aim is not to illustrate the completeness of the argument, since I will limit myself to his rejection of contemporary indigenous treaties (explicitly at 2005: 23-24). A few comments are nonetheless required concerning his critique of collective rights, since it is clear that Habermas rejects indigenous treaties as allowing an “illiberal group” to institute a collective legal order that endangers the individual (23).

In his major opus Between Facts and Norms, Habermas asserts that “the concept of individual rights plays a central role in the modern understanding of law”, a position that he has consistently refined ever since (1996: 82). What he means by this special relationship is that the private rights of subjects of law (i.e., human rights) are complementary to the public rights to participate in a political order constituted by popular sovereignty. This complementing relationship should make sense in the conditions of a deliberative democracy, whereby debates are guided by consensual ideals of the common good in order to define norms of justice. Contrary to liberal theory, which gives strong predominance to questions of justice over individual and collective “conceptions of the good”, deliberative theories, such as Habermas’, wager that ideals about the common good can enter the political debate, in a filtered form, where they complement and support the norms of justice.

Let me provide a concrete example of this discursive conceptualization of human rights and popular sovereignty. Habermas considers cases where the cultural identity of individuals prevents their full participation in public institutions, their basic rights being therefore denied. Even if citizens are conceived as equals among all, some see their conceptions of the good promoted in the institutions of the state, whereas others see their own ideas of the good downplayed or even rejected. In such cases, we are facing “an incomplete or unequal inclusion of citizens, to whom full status as members of the political community is denied” (2005: 16).

To answer this problem, Habermas considers two options. The first develops the principle of civic equality. This is the case when the courts issue decisions that correct the asymmetrical effects of the observance of legitimate laws, as when Muslim women obtain permission to wear headscarves in schools (2005: 14). There are other cases where cultural groups are granted special representation rights (such as positive gerrymandering) or are favored during school admissions (2005:15). According to Habermas, these cases call for amending both the application of ordinary laws and public policies in favor of a consistent individual right to equal treatment. Whether the correction takes into account religious, racial or cultural identity, the idea is to provide equal access to “patterns of communication, social relation, traditions and relations of recognition that are required, or rather desired, for the development, reproduction and renewal of identity” (2005: 18). Even in the case where local authorities obtain greater administrative powers, “such transfers of authority are derived from civil rights and therefore cannot conflict with the rights of individual citizens” (2005:19).
In this sense, there would exist empirical facts supporting an “intersubjectivist expansion of the abstract concept of the legal person” that does not damage the idea of individual rights:

“Because the individuation of natural persons occur through socialization, their identity – and as a consequence the integrity of legal persons – can only be protected together with free access to those contexts of communication and mutual recognition in which persons can acquire and consolidate their identity, articulate their understanding of themselves, and develop their own life plan.” (2003: 10).

However, this expansion must take careful steps. The aim of free access to cultural resources brings one to contemplate the idea of collective rights. This is understandable, since such rights “empower cultural groups in maintaining and providing the resources from which their members draw in forming and stabilizing their personal identity” (2005: 18). Yet, such an expansion could imply negative consequences. Modern states and economic structures (to name only the obvious) create new opportunities, but they also can take the form of dominating “systems” of state and economic power. This is even truer if the identity of individuals -- their own self-understanding -- can only acquire meaning by the very same processes that individuals can be dominated upon. In this context, individual rights shielding a private sphere, as well as a formal pattern through which those rights are defined and contested, becomes vital.

Habermas criticizes the idea of collective rights on the grounds that they would endanger the protective shield of individual rights. To be sure, Habermas admits, “collective rights are not suspicious per se” (2005: 19). Collective rights may be justified as expanding equal inclusiveness; but in this respect, they are considered as a failure by Habermas since their existence would, he argues, introduce new forms of repression against individuals. Habermas brings to mind such cases as the infamous US Supreme Court decision granting permission to Amish communities to keep their children out of ninth and ten grades, but his other examples are less cogent. He cites the Quebec language laws (in particular what is called Bill 101), claiming they might conceal potential oppression towards individuals. I think Habermas is plainly wrong here. One may contest, on close scrutiny, particular dispositions of Bill 101 on the basis of their effects on individual rights, but I believe that very few knowledgeable individuals would claim that Bill 101 embodies, as a whole, a set of unfair collective rights ². The more interesting case is that of indigenous treaties which, according to Habermas, would be harmful to a political community grounded on equal rights, and to indigenous women in particular. I will consider the empirical basis of this claim in the last section; for the moment, my focus is on the theoretical aspect of this critic.

The structure of the critique put forth by Habermas against collective rights – and, a fortiori, against indigenous treaties – is deployed on two levels. First, at an empirical level, we would have good reasons to implement “individualistically-structured orders of equality” (2005: 18); they confer equal treatment to individuals and can even extend their

² Even Stéphane Dion, a political science professor and a federal Minister known for his hardline stance against Québécois nationalism, stated in a political speech that Bill 101 is a concrete example of fair collective rights (2002).
cultural rights. At a second abstract level, he puts aside local contingencies and introduces the individualist concept of the legal person, in the role of individual rights constituting our understanding of law. The abstract level is mirrored in the effectiveness of corresponding measures at the concrete level. This construction is quite similar to the “reflective equilibrium” elaborated by John Rawls (1971). If we had some reason to believe that the introduction of collective rights would be locally innocuous, then this empirical fact could be generalized in our abstract concepts, provided that we consider the theoretical impacts of conferring rights to collective entities.

In addition to the factual considerations that I will study shortly, Habermas provides a curious argument against the empirical feasibility of collective rights, owing to what he coins the “ontological constitution of symbolic objects” which “speaks against the idea of cultures qualifying as bearers of rights”:

“A culture is not suited to be a legal subject as such, because it cannot meet the conditions for its reproduction with its own power; instead, it depends upon the constructive appropriation by autonomous interpreters who say ‘yes’ or ‘no’. Therefore, for empirical reasons the survival of identity-groups and the continued existence of their cultural background cannot be guaranteed by collective rights at all.” (2005: 22)

In other words, human beings possess the ability to justify which interests serve them best, while cultural collectivities, on the contrary, are artificial objects that are not able to justify an inherent interest in their own survival; individuals must do so on their behalf. This, in the view of Habermas, stands as a sufficient empirical reason to forestall “collective rights” aimed at protecting the survival of cultures.

An implicit premise of this argument stipulates that the soundness of holding a right is determined by the ability of its holder to justify its own interests. This premise is plainly false. For instance, business corporations hold rights, but no one would argue that they are able to justify their own interests. A “legal person” is a legal fiction that enables certain rights for business entities. This fiction is justified regarding its aims: it confers legal status to a collective actor for reasons that are (arguably) justified in our society; that is, in our interest. Another example of rights-holders that do not possess the ability to justify their own interests are infants and seriously handicapped persons; yet I do not believe Habermas would argue that they do not possess rights.

Habermas qualifies his position with a discussion on the efficiency of cultures in problem-solving activities. Cultures that stand the passage of time provide resources in answering day-to-day problems. Therefore, Habermas holds, “the test for the viability of a cultural tradition ultimately lies in the fact that challenges can be transformed into solvable problems for those who grow up in the tradition”. These persons, according to Habermas, bring an “autonomous endorsement” to their tradition (2005: 22). This endorsement would explain why the survival of cultures would merely be a function of their ability to adapt to a changing environment: in the end, individuals endorse cultures that display greater efficiency in adaptation. To add a collective right in this picture would guarantee the survival of the non-fittest. To put the objection in other terms, collective rights would invariably reify cultures.
This argument is vulnerable to the considerations Habermas employs when he argues that individuals acquire their identity through channels of socialization. The problem here is that a social environment is not a morally neutral ground. The process of survival is biased when cultures “survive” by making sure that other competitors stay permanently out of play. This is not survival of the fittest, but survival of the baddest (assuming that getting rid of cultural opponents is, hopefully, a bad thing). Many individual members of dominant cultures have taken pride in cultural practices that dominate and destroy other cultures; they portray themselves as the fittest as a result of these practices. There are other cases where individuals have foregone their cultural identity, not because their culture is inefficient, but because it has been dominated, shattered to pieces, and forbidden to reproduce itself. In other words, most if not all cultures that have stood the passage of time have done so in an immoral way. We must prevent ourselves from seeing identity as a pure matter of choice if we wish to uncover the ideological strata that try to invade our very own identity.

On the reification problem, Habermas neglects the fact that the majority cultures are de facto reified, since they generally survive in spite of their inefficiency. Cultures are reified in all sorts of ways: by means of strategic individual motives, interplay of individual preferences, the ascription of cultural content to other cultures, etc. In this context, the aim of collective rights is to protect individuals from other cultures, in cases where the protection of equal ethical liberties by means of expanding civil inclusiveness does not prevent unfair domination of majority cultures over minority cultures.

Therefore, I do not find Habermas’ objection convincing, either in rejecting “cultures” as rights-holders, or in trying to show that cultures would be reproduced through the free choices of individuals, or as a stance against the reification of cultures. Therefore, I will only concentrate, in what follows, on the strongest objection against collective rights: the idea that protecting minority ways of life with collective rights would represent a grave danger to a reasonable set of individual liberties.

2

In what precedes, I have argued that one cannot forestall collective rights merely by trying to show that cultural communities are not appropriate subjects of rights. I agree that some collective rights have reified cultures, but this is not a characteristic of collective rights per se, it is a consequence that can be attributed to the effects of many kinds of behaviors. If we wish to reject collective rights because they would promote inefficient or immoral cultures, then we might as well reject most, if not all, cultures. In fact, I think we must reject this line of argument for a deeper reason: it implies a very misguided notion of the survival of the fittest. Some have used it against indigenous cultures to condemn their pseudo-inability to adapt to the modern world. This type of argument shows a flagrant ignorance of basic facts; moreover, Habermas grounds it in a conceptualization of rights-holders’ identity that is both naïve and dubious, where rights would be the sole property of talking subjects.
Instead of focusing on the *subjects* of rights, I propose to analyze the pragmatic *aims* of our language of rights. By limiting the domain of rights-holders to autonomous entities that have the ability to justify their interests, Habermas retreats into a metaphysical style of philosophy that has little to do with questioning the *aims* of conferring rights. In a discussion on the attribution of rights to animals, Dieter Birnbacher made a distinction between *moral* and *legal* rights that is of great use here:

“Moral rights and legal rights clearly belong to different ‘language games’. Ascribing legal rights to natural entities is a move in a language game that is essentially and consciously pragmatic. As a pragmatic device, legal rights have to be judged essentially by their instrumentality, i.e. by the extent to which they serve the ends they are designed for. [...] Legal rights in the sense of claim-rights are commonly ascribed to collectivities and corporate legal subjects such as nations, state agencies and business corporations quite irrespective of whether these entities are candidates for the ascription of sentience or consciousness.” (1998: 33-34).

The fact that cultural collectivities – or nations – intrinsically possess some *moral rights* or not (“in fact”, adds Birnbacher, “they can be credited with moral rights in the sense of moral liberties to the extent that they can be thought of as subjects of action,”) is independent of the more interesting question of their *legal rights*, as would be assessed by their impact on human interests. This bracketing of the moral status of groups does not imply abandoning our moral intuitions concerning groups, since we still could translate any moral intuition into legal rights. But I put this question aside for now.

A fundamental aim of claim-rights protecting collectivities is to secure some kind of protection for a group. Therefore, the question, now freed from metaphysical gravity, is posed in two ways: Why should we do such a thing? Would we be endangering the individual in any way?

The best reason I can think of to introduce group rights is to redress an ongoing unfair imbalance between majority and minority groups. This is more fundamental than blindly protecting any culture, just for the sake of its moral status as a culture. The *aim* of collective rights is to provide individuals in minority groups with legal instruments to flourish in groups of their own choosing. When we concentrate on the moral aims of group rights, we understand that these legal instruments are shaped in order to redress a balance invariably favoring cultures that, because of their majority position, are instrumentalized by individuals in light of their own self-interest. The intended goal is that these rights create an equality of opportunity for individuals to bring together their common interests in deliberative political communities.

One may be worried that such a redress would create more artificial groups than will ever be needed. A complete answer to this worry would necessitate a very thorough analysis of the distinctions to be made between “groups” of any sort and “political groups” that have a politico-legal import, such as immigrant nations, indigenous nations, minority nations, majority nations, nation-states, supranational states, and so on. Schematically, a political group is one that embodies a *sociopolitical institutional structure*, which is the set of institutions individuals need as a group in order to secure their political autonomy. In other words, autonomous political groups are defined by
referring to a *structure* of institutions they embody, and not by reference to the *character* of culture that they display. These groups can also be called *societal cultures* \(^3\). Groups worthy of recognition embody a societal culture supported by a critical mass of individuals, whether such a structure already exists or, as will be argued later, is the result of restorative justice measures.

I have already shown elsewhere how this characterization of groups can be made fully compatible with the philosophy of Habermas (Blanchard, 2003a; 2004b). Still, even if such a definition could neatly distinguish between groups worthy of legal rights, it does not answer the worry that group rights would multiply the number of groups interacting at a political level and thereby engender chaos. This worry seems to be at the very base of the global opposition to the recognition of indigenous groups in international organizations such as the UN. The very first legal right that groups claim is, in effect, the right to self-determination. Richard Falk states the problem bluntly:

“The total number of sovereign states generally considered geopolitically manageable is two hundred, roughly the current level. An increase to 250 is widely regarded as the upper limit of manageability. To maintain this goal, state-shattering exercises must be kept at a minimum. And yet the promise of self-determination to all peoples makes it very difficult to find a principled basis in law for denying claimants who seem to represent a distinct people and have the will and capability to be a sovereign state.” (Falk, 2000: 15).

Let us accept this difficulty as it stands: what we ultimately wish is to accommodate group claims in a peaceful and stable setting. At any rate, the “head in the sand” scenario generally worsens the situation. The Center for International Development and Conflict Management has published numerous reports showing that a peaceful and long-lasting containment of self-determination conflicts is almost always directly related to autonomy agreements that “provide some combination of political recognition, greater rights and regional autonomy to the populations represented by [separatist] movements” (Marshall and Gurr, 2003: 26). These reports also show that preventing the devolution of state powers is a sure path to an escalation of conflicts.

But wouldn’t these facts merely show the necessity of signing some agreement of some kind, not of creating conditions for a multiplication of autonomous groups? This further objection against collective rights is sensitive to the fact that producing full-scale autonomy agreements could bolster even more groups to engage in conflicts and produce a spillover effect. The Center for International Development and Conflict Management reports show, on the contrary, that responding rapidly to low-level conflicts by way of *internal recognition* generally brings peace to a region. In the common scenario, “most people accept and work within the framework for autonomy while a few spoilers continue to fight in hopes of greater concessions” (Marshall and Gurr, 2003: 29). It is only in the few cases where spoilers *successfully* drag out the conflict that a spillover effect can be feared. This state of affairs has nothing to do with arrangements promoting collective rights or not. It is necessary to point out that Marshall and Gurr include, in their

---

\(^3\) The distinction between *structure* and *character* of culture has been made famous by Will Kymlicka (1989, 1995).
prudential measures, indigenous treaties that effectively create new collective institutions, but which channel group action into collective empowerment, instead of engaging in conflict.

Therefore, the prudential solution against the proliferation of self-determination conflicts is to quickly negotiate fair autonomy agreements when signs of conflicts start to appear. Devolution of central state powers is the best answer to the spectre of state dissolution. Cases where some collective rights seem to have promoted conflicts are not representative of the general effects of collective rights; we must refrain from hasty generalizations. If the devolution is reasonable, it will be limited to workable schemes, and these include indigenous treaties. We have no reason to exclude collective arrangements from these measures. We do have reasons however to take into account not only the question of collective rights, but all necessary considerations, whether social, economic or political, and especially the balance of power. Even so, this prudential solution to global and regional disorder neatly complements the moral intuition of creating equal opportunities for the survival of societal cultures.

I come back to Habermas in order to answer the question that I raised above about the fear of the consequences of collective rights on individual liberties. According to Habermas, this objection rests on the fact that collective rights proponents have never offered a clear criteria distinguishing between acceptable intrusions of collective rights on individual liberties from unacceptable ones. To support this conclusion, he cites two prominent thinkers who have promoted collective rights: Charles Taylor and Will Kymlicka. Concerning Taylor, Habermas considers that his case-by-case approach fails in trying to define clearly a set of acceptable collective rights. Taylor has argued that possible clashes between individual and collective rights are resolved by supporting the inherent values in cultures that respect the idea of fundamental rights (Taylor, 1994). However, there are numerous cases where cultural values clash with what some members of these cultures would define as fundamental rights. How should we demarcate real from false clashes? In his text on Multicultural Citizenship, Will Kymlicka has distinguished between collective rights that purport to protect a group against external threat and collective rights restraining internal members in their fundamental liberties (1995: 16). Only the first category would implement valid rights. But as Habermas argues, there are cases where collective rights serve both functions (2005: 20).

Habermas’ sweeping critique is unsatisfying, and there is more to be said on the subject. Clear criteria delimiting legitimate rights of groups can be found by circumscribing group claims in the politico-legal realm. This is not easy to do if we attach to groups an intrinsic moral quality that would compete with the moral capacities of individuals. We can work around this difficulty by concentrating on the fact that in the law medium, what often counts is the aim of creating rights, and not that of mirroring the moral realm. If we wish to legally protect groups while avoiding the question of their moral selves, the balance of group and individual rights is strictly one of institutional design. Legal institutions should be designed so as not to clash against each other, in order that they promote the full range of individual and collective human rights. Since it is nonetheless true that clashes can happen, it becomes important to define the full range of universal individual capacities that are intrinsically (or morally) valuable. This is, at a
minimum, the set of capacities that humans need in order to autonomously judge the rightness of a politico-legal order. Such a procedure of selection would necessarily include some non-negotiable moral capacities that are needed to justify the content of this set. Habermas’ ideal speech situation and Rawls’ original position give clear and overlapping content to such a set of moral capacities. They are expressed in charters of freedoms, bills of rights, constitutions and so on. They are not entirely uncontroversial, but a good part of the content of these fundamental rights overlaps.

This way of tackling the problem does not reduce fundamental rights to norms that are valued in a particular culture. It uses the characteristics of a constructivist account of justice in order to secure a fundamental set of rights that any culture will need to include in a deliberative democracy setting. In the Canadian Charter of Rights and Freedoms, the fundamental freedoms are: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association. Some may find this list incomplete or controversial. The important point is that it displays the reasonable intention to protect moral capacities that should never be trumped by a collective right.

In this sense, we do dispose of legal instruments to prevent states and markets from unjustified infringements on individual liberties. These legal instruments are an essential ingredient for balancing individual and collective rights. There are certainly other ingredients needed, be they political, social, economic or cultural; but my point here is to assess the legal soundness of collective rights. Contrary to what Habermas has said on this subject, there are moral and prudential reasons justifying the introduction of collective rights: we wish to provide legal instruments to individuals that are grouped together so that they can secure their group’s existence, i.e. to expand their choices on a range of matters. And on a more prudential note, doing so in an evenhanded manner would make our world a more secure one. Contrary to Habermas’ fears, introducing these legal rights do not trump the moral capacities of the individual if the latter are sufficiently secured with legal provisos. There is no special role that individual rights play in law that, at least from a deliberative democracy viewpoint, would forestall the introduction of legal collective rights.

Collective rights are therefore justified from an empirical perspective. This result is not surprising, since I firmly believe that a deliberative democracy implicitly relies on the idea that politically organized communities have a moral collective claim to organize their sociopolitical institutions as they wish, in accordance with the claims of other individuals and communities. Having expressed my arguments from a theoretical viewpoint, I will now turn my attention to a practical level analysis of recent treaties in Canada and Quebec that grant collective rights to indigenous groups.

3

To sum up the preceding section, many resist the idea of collective rights because of hasty generalizations. While I do agree that some assertions of collective rights are
clearly problematic (as when Germany invaded Czechoslovakia in 1938, on the pretext of protecting the minority rights of Germans), these examples are not representative. As we have seen, there are many good reasons to confer rights to collectivities, both moral and prudential ones. Moreover, collective rights are a common subject for the courts, the public institutions and the public debates that are in the daily business of assessing the rationality of identity claims (Eisenberg, 2005). One of the consequences of this assessment is that we have to provide in our concept of law for the idea of collective rights (Blanchard, 2004a). But for now, I will concentrate my analysis in this last section on a concrete example of collective rights.

Once we acknowledge the rationale behind collective rights, the task is to determine which communities are worthy of recognition. The difficulty concerning indigenous peoples is that their societal culture has been deliberately weakened and needs to be rebuilt. This is why some multiculturalists have tried to work around this problem by granting special rights to indigenous peoples. Even if I agree with Habermas that matters of cultural difference are not sufficient conditions to claim autonomous political power, I do think that a qualified right to indigenous difference complements the missing structures of indigenous societies. From the standpoint of legal rights, land claims treaties have been negotiated in Canada between colonial governments and indigenous peoples ever since their first contact with Europeans. However, indigenous nations were never treated as equals in these negotiations. What is expressed with the idea of “difference” is that even if indigenous peoples have been forced to abandon their substantive self-determination, they have not forfeited a formal right to it. The prior sovereignty of indigenous nations on the territory of Canada possesses constitutional significance by justifying the constitutional protections of indigenous interests (Macklem, 2002: 131). This goes against the idea, formulated by Habermas and others, that reparation measures are merely moral considerations that have no legal import (2005: 24). On the contrary, they have legal import, if we accept the aims of our system of rights.

What then is the meaning of “difference”? It is to bring equality into actual interactions between indigenous and non-indigenous peoples. The “right to difference” promotes the “equality of treatment of all peoples” reflected in collective measures such as reparation treaties. Their aim is to devolve state powers to indigenous communities in order to self-govern their territory in accordance with existing rights. What is recognized as “difference” is a former denial, which is overcome by recognizing equal sovereign capacities. In other words, it is not so much a celebration of diversity, than a retour à la normale for societal cultures retrieving a reasonable part of their lost pre-colonial autonomy.

The relationship between the indigenous and non-indigenous peoples in Canada has made significant progress in the last fifteen years. A strong impulse for this change is certainly sections 25 and 35 of the Constitution Act of Canada, which recognize the existence of “Aboriginal and treaty rights” with the enactment of the Act in 1982. Numerous courts cases have been filed since then. Consequently, provincial and federal governments have had strong incentive to negotiate agreements that relieve the courts and end judicial uncertainty.
One agreement ratified in 1993 led to the creation in 1999 of the Nunavut Territory and Government, giving northern Inuits an impressive array of land and self-governing institutions. A similar attempt is under way in Quebec, where negotiations are drawing the boundaries of a Nunavik government north of the 55° parallel. As I have asserted above, administrative borders are not contested when they concern territories where the vast majority of its inhabitants are of indigenous descent (an average of 85% in Inuit territories). Moreover, the governments created are judicially non-ethnic and fully subject to federal and provincial laws. But section 35 of the Charter of Rights recognizes the treaty rights of all indigenous peoples, including Indian and Métis peoples. These latter peoples inhabit either “reserves,” -- most of them in the neighborhood of urban areas -- or they populate big cities where their precarious conditions swell poverty statistics in an unequal way. In brief, the granting of indigenous rights cannot be made independent of their impact on non-indigenous individuals, and this is particularly interesting in the context of my analysis.

The most interesting case is that of the Agreement-in-principle with the Innus. This treaty concerns a large territory called Nitassinan, which roughly covers a 250 km by 1500 km area of mainland, north of the St-Lawrence River, from the Saguenay region to the eastern frontier with Labrador. The parties to the agreement agree that a major portion of this territory stays under the jurisdiction of the Quebec government, while providing Innus with access to joint management of its resources. The most important sections of the agreement establish rules for what is called Innu Assi: these are small pockets of territories over which Innu tribes would have full jurisdiction, save criminal law, telecommunication regulations and other important federal jurisdictions. This is no small feat: the treaty explicitly grants to a future Innu government prominent powers over education, health services, public security, language and culture, internal environmental regulations, family law, welfare, labour training and formation, and more. These powers certainly do not forfeit any universal fundamental rights, explicitly referred to in the agreement. It also contains very important considerations concerning women.

In the event of a smooth and well-planned transfer of powers, there is a good chance that such an arrangement will serve the means and ends of distributive justice. Under bureaucratic dependency on federal reserves, indigenous poverty levels have climbed and individuals have systematically joined poverty statistics in a disproportionate way. Those who have migrated to urban centers have also excessively swelled urban poverty statistics. According to a recent UN report on Human Rights and Indigenous Issues, "Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among Aboriginal people than in any other sector of Canadian society" (Stavenhagen, 2005: 2). Guaranteed access to land and self-development resources for the indigenous communities would make a difference. The treaties are explicit on this issue: the goal is to empower communities and to sever the dependent relationship with the central government that has done so much damage up until now. This is one more proof that the goal is not to reify cultures, but to create conditions in which individuals can dynamically act within them.
However, the insistence on the redistribution of wealth could explain, I believe, the difficulties surrounding the implementation of treaties. The unjustified procrastination to implement these treaties has certainly contributed to the general climate of suspicion that characterizes present negotiations. Historically, there has never been clearer proof of the existence of land rights for indigenous peoples. To state the problem differently, sections 25 and 35 of the Constitution Act are strong indicators of the inescapable terms of the negotiation process. Indigenous peoples are strongly convinced of the validity of their cause. To delay the implementation of already negotiated treaties is a sure way for encouraging the radicalization of claimants, which could degenerate into social conflicts that would benefit no one. The duty of civil society is to pressure governmental authorities to speed up the implementation of existing agreements and make way for future ones.

But why is civil society so silent? At a first glance, a rigid and dogmatic affirmation of equal civil liberties is certainly at fault. Collective empowerment is seen as a menace to the equality of individuals before the law. But in this rigidity, the concept of “culture” is treated as the sole responsibility of group members, and underprivileged communities are asked to assume their plight. Using this dubious concept of culture, non-indigenous peoples resist any new deal of wealth redistribution. This is why the issue of reparations is so important. The Agreement-in-principle is in effect a treaty aiming for the co-existence of communities as equals. It confers autonomous powers to peoples who, prior to the colonization of their territory, enjoyed self-determination. Contrary to the numerous fears expressed (even in Habermas), the Agreement-in-principle is not a return to a status quo ante. The devolution of powers is framed by a multistage conception of sovereignty, where indigenous, provincial and federal levels of government obtain their fair share of autonomy. In other words, while the pre-colonial autonomy of indigenous societies is recognized, the de facto sovereignty of occupying powers is also recognized, to the extent that a complete reshuffling of the global order is an impossible task. The main justification behind this compromise is within reparations theory: i.e. using restorative justice to redress actual imbalances and reestablish mutual trust. Iris Marion Young, among others, has framed the issue in a persuasive manner:

“The issue is not simply one of distributive inequality, that some people in some parts of the world are seriously deprived while others in other parts of the world live very well. Rather, the global institutional context sets different regions in relations of dependence and exploitation with others, and this institutional system reproduces and arguably widens the distributive inequalities. Redress of unjust deprivation and regulation of the global economy for the sake of promoting greater justice thus calls for institutional change, and not merely a one-time or periodic transfer of wealth from richer to poorer people.” (Young, 200: 250)

Treaties, such as the one embodied in the Agreement-in-principle, explicitly rely on this kind of “institutional change”. The Agreement-in-principle aims to seek a just distribution not only of natural resources for individual benefit, but of collective autonomy over these resources, in order to put an end to the dependency of one region towards another. The treaty is quite explicit about development aims. These figure in the general preamble (p. 6), the general dispositions chapter (pp. 9 and 10), and in the chapter on socio-economic development (pp. 66-70). Without concrete gestures, however, the
treaty is little more than empty words. The stakes are high: even the financial aspect is linked to a degree of self-determination, since it is explicitly stated that the Innu government must become self-sufficient in the long term (chapter 11.4). Similar dispositions are found in the Peace of the Braves agreement, although the aim of financial self-sufficiency is only implicitly made in passing references to greater autonomy and empowerment.

These are the essential ideas behind the treaties that have no echo in the critiques made by Habermas. The procrastination in implementing these treaties, which defies some of the strongest moral considerations concerning equality of treatment, can be traced back to a mentality change that is still lacking in the majority population and in the works of many thinkers. Concerning Habermas, this change is not based on a conceptual impasse, but, I believe, in a fear of collective rights that is extrapolated from isolated facts about a few “bad apples”.

* Critics that denounce the enabling of a set of “special rights” for individuals qua their cultural belonging have misread the recent indigenous treaties signed by the Quebec government. It may be a misreading grounded in sound preoccupations concerning the security of individuals facing powerful markets and states, but it is nonetheless a misreading. The critics of the “difference” paradigm have also misread the situation. As we have seen, the “right to difference” that the treaties express is oriented towards a restorative justice that empowers individuals against the devastating effects of systematic colonization. These treaties do not succumb to some kind of postmodern relativism of values that rejects a modern grounding of law in reason. All these critiques, which Habermas and many liberal thinkers have made on numerous occasions, fail in the face of the facts. We have prudential and moral reasons to adopt these treaties. The fears of infringing on individual freedom merely warrants the diligent design of institutions provided for in the treaties: the rights of individual and collectivities are carefully balanced using the primacy of fundamental liberties; the balance of power is expressed in the interplay of multiple levels of government; future conflicts about the balance of power are to be resolved in third party arbitration that the treaties already acknowledge; and finally, the treaties explicitly aim, more than once, to distinguish between political and legal issues. These passages in the treaties are all needed proofs that, while keeping in line with the state of law tradition, they strive for a fair equilibrium between neighboring individuals and groups who have no other long-term choice but to respect their equal freedoms.

I wish to conclude in an open-ended way. The moral and legal rights distinction that I use is not merely motivated on pragmatic grounds; it is also a product of the particular relationship that both indigenous and non-indigenous are experiencing right now. I strongly agree with Wayne Norman’s observation about the contemporary scene concerning recognition claims. In his forthcoming book, Negotiating Nationalism, Norman points out that the stage-setting debates on the question of nationalism that followed the fall of the Berlin Wall are now behind us; we are already in a second stage, that of negotiating identity claims (Norman, 2005: 12). Most political philosophers have recognized culture, in numerous ways, as an integral part of our institution-building
processes. Courts have issued numerous judgments favoring the recognition of minority claims, including indigenous claims. The task for political philosophers today is to look at concrete policy-making propositions and to promote those policies that contain strong reasons supporting their acceptance\textsuperscript{4}.

\textit{September 2005}

\textsuperscript{4} I would like to thank all my colleagues at CREUM, especially Colin McLeod, Avigail Eisenberg and Peter Dietsch for their comments during an earlier presentation of this paper.


Bibliography


Martin Blanchard (2004a), Inclusion et différence. Vers une critique constructive de la reconnaissance chez Jürgen Habermas, Ph.D. dissertation, Université de Montréal et de Paris IV-Sorbonne.


