Understanding Indigenous Rights

(the Case of Indigenous Peoples in Venezuela)

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Abstract

On December 15, 1999, the people of Venezuela approved a new Constitution, which is the first Venezuelan constitution to entrench the rights of indigenous peoples. The purpose of this thesis is to analyze the different theoretical issues raised by the problem of rights for indigenous peoples. It is argued that indigenous rights are collective rights based on the value of cultural membership. This implies both an investigation of the value of cultural membership and of the criticisms that the multicultural perspective has offered against that point of view.

Indigenous peoples have the moral right to preserve their cultures and traditions. It is submitted that indigenous peoples have a double moral standing to claim differential treatment based on cultural membership, because they constitute cultural minorities and they were conquered and did not lend their free acceptance to the new regime imposed upon them. Therefore, they constitute a national minority, with moral standing to claim self-government and cultural rights.

Resumé

Le 15 décembre 1999, le peuple de Venezuela approuva une nouvelle Constitution, la première Constitution Venezolaine à reconnaître les droits des peuples indigènes. Le propos de cette thèse est celui d'analyser les différents aspects théorétiques qui naissent du problème des droits des peuples indigènes. Ce travail argumente que les droits des indigènes se basent dans la valeur de l'identité culturelle. Ceci implique l'investigation de la valeur de l'identité culturelle et des critiques posés par la perspective multiculturelle contre ce point de vue.

Les peuples indigènes ont le droit moral de préserver leurs cultures et leurs traditions. Ce travail suggère que les peuples indigènes ont une double légitimation moral pour demander un traitement différentiel base dans l'identité culturelle. Ils constituent des minorités culturelles qui ont été conquises et qui pourtant n'ont pas approuvé de façon volontaire le nouveau régime auquel ils ont été soumis, et pourtant, ils constituent une minorité nationale, avec un légitimation morale pour demander leur propre gouvernement et leur droits culturels.

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Introduction

There are twenty eight indigenous ethnic groups living in Venezuela, with a population of approximately three hundred thousand. They represent 1.5% of the country's total population. The biggest ethnic group, the Wayuu, or Goajiro, is well integrated into the larger society. Most of its members speak fluent Spanish and live in or around urban areas in the oil-rich Zulia State. Smaller groups, like the Yanomami, live in the southern part of the country, well inside the Amazon jungle. The Yanomami live in pretty much the same manner as before the arrival of the Spaniards in the fifteenth century. Their culture and traditions are almost intact. However, although these indigenous groups are so different from one another, they have shared a common suffering during the last five centuries: the continual threat of integration into the larger society of Venezuela.

Since its independence from Spain, in 1811, the Venezuelan policy towards indigenous peoples was characterized by the idea of their acculturation and integration into the national life. This policy was believed to represent a just treatment for indigenous peoples: they deserved treatment equal to that of any other Venezuelan citizen. One of the ideals of the independence process was to achieve the realization of the Principle of Equal Protection of the Law. Differential treatment based on group membership would have been considered as unjust and discriminatory. Indigenous cultures were considered as backward and uncivilized, and hence indigenous peoples would benefit from their integration in the larger society.

It would be anachronistic to criticize those points of view from our current moral outlooks. However, would indigenous peoples be better off if integrated into the larger society of Venezuela? The purpose of this thesis is to demonstrate that even if the answer to this question were affirmative, it does not matter. What really matters is the right of indigenous peoples to preserve and maintain their cultural membership and avoid forced integration. As will be argued, people need a culture in which to live and make sense of their lives. Even though it is possible to change one's original culture and acquire another, people have the right to maintain their own original culture.

Indigenous peoples have the moral right to preserve their cultures and traditions, and therefore they are morally entitled, in certain circumstances, to differential treatment. This is the only way to treat them with justice. It is not true that people are treated with equality if the same laws are applied to everyone in the same fashion, without paying attention to cultural differences. Family laws are, for example, highly tainted by cultural and moral outlooks reflecting the larger society's views on these issues. Those laws not only affirm but also preserve and maintain the moral perspectives of the larger society. However, as the studies of many anthropologists and sociologists have proved, indigenous family traditions are different and in some instances contradictory to those held by the rest of the Venezuelan society. Hence, in some cases the law supports the moral outlook of one part of the society, while pushing aside and sometimes rejecting the moral outlook of the other part.

There are some cultural groups that must accept even those laws contradictory to their moral beliefs. Thus, cultural groups formed by immigrants must abide by the laws of the country where they have immigrated. The situation of indigenous peoples is completely different, because they were occupying the current Venezuelan territory before the arrival of the Spaniards, with a normative structure in place to regulate their societies. They were conquered and subdued under a new rule that they did not freely accept. Their rights stem from these particular facts: first, they are a cultural minority living within a larger society; and second, they were there, on their lands, before the formation of the national society. For these reasons, if the new normative or legal system fails to differentiate based on indigenous cultural membership, it is discriminatory and unjust. Indigenous peoples have thus a double moral standing to claim differential treatment based on cultural membership: they constitute cultural minorities, and they were conquered and did not lend their free acceptance to the new regime imposed upon them. Since they are the original occupants of the lands now comprising the Venezuelan territory, they constitute a national minority, with moral standing to claim self-government and cultural rights.

Those rights were denied to indigenous peoples until the approval by popular referendum of the new Venezuelan Constitution on December 15, 1999. In the new Constitution indigenous peoples' rights have been entrenched, and thus they have become "partners in confederation" with the Venezuelan society (to paraphrase James Tully's words). The Constitution establishes that indigenous peoples constitute autonomous peoples within the Venezuelan territory, with self-government and cultural rights. This new situation

has marked the beginning of a process of reconciliation and mutual respect between indigenous peoples and the Venezueian society. I will address this process and its consequences in the second part of this thesis.

However, the analysis of the newly entrenched indigenous rights in Venezuela will be preceded by a conceptual analysis of minority cultures' rights in the first part of the thesis. In this context, I will begin by defining collective rights. As will be argued, minority rights are based on the value of cultural membership, and thus they constitute collective rights. The definition of collective rights will be completed with an analysis of who holds such rights. It will be argued that collectivities as such do not hold collective rights; they are held by the individual members of a collectivity. As such, the term collective does not identify the holder but the shared interest served by the right in question.

It will be submitted that rights are grounds for imposing duties on others. Therefore rights must be morally justified. For this reason, after defining collective rights, I will address the importance of cultural membership, which provides the moral foundation upon which to base collective rights for minority cultures. Moreover, since the views that will be expounded in this thesis have been criticized by defenders of minority rights from the multicultural perspective, I will tackle those criticisms under the section entitled "The Challenges of Multiculturalism". Finally, based on this conceptual framework, I will address the indigenous peoples' rights recently entrenched in the Venezuelan Constitution.

I. A Conceptual Framework for the Analysis of Indigenous Peoples' Rights

The purpose of this chapter is to analyze the different theoretical issues raised by the problem of rights for indigenous peoples. The definition of collective rights will be explored, along with the question of who holds such rights. Then, given the broad scope of the idea of collective rights, I will turn to the specific question of collective rights for minority cultures, analyzing the moral justifications for their existence and the relationship between individual and collective rights within the borders of minority cultures. Finally, I will expound some of the theories that have been proposed to determine the rights of minority cultures from a multicultural perspective.

Indigenous rights are based on the value of cultural membership. These rights are necessary collective, since they serve the shared collective interests of the members of a community. For this reason, the analysis of indigenous peoples' rights presupposes a prior definition of collective rights. Now this definition would be incomplete, for my present purpose, without addressing the question of who holds those rights. In order to answer this question, two conflicting views will be compared. Then, provided with the definition of collective rights, the next step will be to explain why minority cultures are endowed with collective rights. This will imply both an investigation of the value of cultural membership and, since I will endorse a liberal perspective on these issues, of the criticisms that the multicultural perspective has offered against that point of view.

1. A Definition of Collective Rights

Before analyzing indigenous peoples' rights, we must have a definition of collective rights in general. This definition will provide the conceptual framework upon which the analysis carried out in this thesis will be based. For this purpose, I will explain the definition of collective rights proposed by Joseph Raz in *The Morality of Freedom*.[1]

Raz argues that right-based moralities cannot explain the existence and importance of public goods: they constitute a fundamental part of people's autonomy and yet it is impossible for individuals to have rights over them.[2] For Raz, personal autonomy entails that some public goods are intrinsically valuable. A right-based morality cannot make room for these public goods without undermining their intrinsic value, which cannot be accounted for in a right-based model. Raz considers the extent to which the existence of collective rights nullifies the previous conclusion, but he argues that there are collective goods (such as living in a tolerant society) to which no group has a collective right.

To develop his argument, Raz proposes a definition of collective rights. He maintains that a collective right only exists when an interest of one human being justifies holding another person to be under a duty. Yet this definition is qualified, for such an interest must be that of an individual, as a member of a group, in a public good. Raz adds that the

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[1] See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 207-209.

[2] "A good is a public good in a certain society if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his shares of the benefits." *Ibid.* at 198.

sole interest of one member of the group is not sufficient to ground the imposition of duties on others. In Raz's words:

> A collective right exists when the following three conditions are met. First, it exists because an aspect of the interest of human beings justifies holding some other person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.[3]

This definition of collective rights deserves further exploration. At the outset, Raz's general definition of rights must be analyzed, since from it stems the definition of collective rights. Raz says that "X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[4] This definition has three features: the capacity to have rights, the justification for their existence, and the fact that rights entail duties on others. I will return to the problem of the capacity to hold rights, but for now it is important to note that the capacity to have rights derives from the ultimate (non-instrumental) value of the holder's well-being. Something is of ultimate value when it is valuable independently of its consequences.

The key feature of Raz's definition of rights is the justification for their existence. There has to be an aspect of the well-being of the right-holder that is sufficiently weighty in

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[3] *Ibid.* at 208.
[4] *Ibid.* at 166.

order to justify imposing duties on others. Rights are justified in protecting an interest of the right-holder only when that interest is itself morally justified. People have many interests not protected by rights, for those interests do not count as "sufficient reasons" to regard others as duty-bound. Therefore rights depend on the moral principles held by a particular society. The right to live is based on the universally-accepted moral principle that life is an interest sufficiently important to bind people with the negative obligation to refrain from killing their fellow citizens. But the interest of an immigrant in electing her representatives to a national parliament is considered, in most countries, as not sufficiently important as to justify the political right to participate in the polling.

For every right there is a correlative duty, but the duty does not have to mirror exactly the right to which it correlates. What justifies such duties, that is to say what justifies such limitations on the freedom of others, is precisely the weight of the protected interest of the right-holder. In his definition, Raz says that a right exists when, "other things being equal", there are reasons to impose duties. Hence, the circumstances of each case are crucial in determining the specific duties that a right will create. According to this view, rights are dynamic, in the sense that one right does not always produce the same resulting duty. For example, in a jurisdiction where capital punishment exists, the interest in the life of the convicted and her right to live does not preclude the officials in charge of the execution from carrying out the death penalty once the decision to execute that person has been made. Raz says that a right "is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the

duty."[5] These considerations are very important in assessing the content of the rights of minority peoples.

From the foregoing discussion, it is possible to understand why Raz's first condition for the existence of collective rights is that there has to be an interest of an individual human being that justifies holding others to be duty-bound. But what distinguishes collective rights from other types of rights are the second and third characteristics. Thus, Raz says that "the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group."[6] It should be observed that Raz makes reference to the interest of individuals as members of a group; he does not refer to the interests of a collectivity as a whole or as an entity distinct from its members. He uses as an example of a collective right the right to self-determination of one's nation. In this case the interest is the interest of each member of a nation in the independence and self-determination of her nation and not the interest of the nation itself.[7]

The key features in Raz's definition of collective rights are that the interests in question are interests in public goods, and that the sole interest of one member of the group is not sufficient justification for the right to exist. With respect to the first issue, Raz says that a good is public when its benefits are not controlled by any member of a determinate

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[5] *Ibid.* at 171.
[6] *Ibid.* at 208.
[7] Raz says: "Self-determination is not merely a public good but a collective one, and people's interest in it arises out of the fact that they are members of the group." *Ibid.* at 208.

society, but each of them only controls her share of the benefits. Further, Raz distinguishes between contingent and inherent public goods. The former are those for which it is possible to have control over their distribution. The latter (also called collective goods) do not allow such control. The existence of a tolerant and educated society is an example of a collective or inherent good. However, Raz says that even though one's interest in living in such a society may be regarded as a very important interest, it lacks sufficient weight to ground a right. Nevertheless, since for Raz it is possible to have duties without corresponding rights, he concedes the possibility of regarding a government as bound to achieve such an ideal society, this duty being based on the interest of the members of its society.

Raz believes that the right to live in a tolerant society imposes heavy duties on others if only serving the interest of one individual. Here he seems to be arguing that there are no individual rights to public goods. However, it may be argued that there are collective rights to public (inherent) goods: an interest shared by the members of a community in a public good can yield a collective right over such a good. For example, the interest of an indigenous community in the preservation of their cultural heritage may ground a right to its preservation. In this example, what would count is the shared collective interest of the community's members whose culture is to be preserved. The key issue would not be the balance of interests versus duties, but the moral justification of the collective interest in question. Is the preservation of an indigenous community's cultural heritage an interest morally justifiable to such a degree that it is capable of grounding duties on others? If the collective interest over the public good is sufficient moral reason to justify the imposition

of duties on others, then the community has a collective right to it. Therefore, the crucial feature of collective rights, as well as of rights in general, is the moral justification for their existence, rather than the peculiar characteristics of the public good at issue.

However, the remarks made by Raz on public goods require some exploration. In this sense, Denise Réaume has argued that the reason why there is no individual right to public goods, such as living in a tolerant society, is not the one explained by Raz (i.e., that the interest in question is not sufficiently "heavy" as to justify imposing so many duties on others), but the existence of what she calls "participatory goods".[8] She argues that it is possible to have individual rights to some kinds of public goods when they are valuable for an individual aspect of one's interest. Using her example, one can have an individual right to the public good of clean air, since this right, even though it complies with the non-excludability condition (no member of the society can be involuntarily excluded from its benefits), is nonetheless individually enjoyable. In contrast, the enjoyment of participatory goods is collective; they need the joint involvement of many people.[9] For Réaume, there is no individual right to a tolerant society because it depends on a participatory good:

> The non-excludability of a certain number is not simply a matter of technical infeasibility or prohibitive cost [as Raz argues]. Since participation is constitutive of the good itself, the degree of non-excludability exhibited is among its essential features. The important point

[8] D. Réaume, "Individual, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1 at 10.

[9] For Réaume participatory goods "involve activities that not only require many in order to produce the good but are valuable only because of the joint involvement of many. The publicity of production itself is part of what is valued –the good is the participation." *Ibid.* at 10.

> is that this degree of non-excludability makes these goods, and any other derivative from them, inappropriate objects of individual rights.[10]

It is clear then that for Réaume there are no individual rights to participatory public goods. However, she goes on to question whether there can be collective or group rights to those goods. She rejects the term "collective rights", saying that it is not appropriate to secure participatory goods, arguing that when the collective at issue is the whole society there is no need to make a claim for the supposed right. On the other hand, if someone within the society wants to be excluded from the benefits of the participatory good, the rest could claim the right to force the recalcitrant to join them; a case which Réaume deems difficult to justify. For this reason she uses the concept of "group rights", defined as those claimed by a group which constitutes only a part of the society, to allow the possibility of group rights over participatory goods, such as the right to education in a language different from the majority.[11]

As Réaume points out, Raz does not distinguish between collective and group rights. In my view, Raz's analysis can be applied to both types of rights: what seems to differentiate them in Réaume's analysis is the size of the collective participating in the rights, groups being smaller than collectivities. Yet if it is conceded that a collective is just a large group with another name, what really matters is the moral justification for the existence of the right. The important issue is not the size of the group but its qualification as a viable group, which is measured in accordance with how important the existence and

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[10] *Ibid.* at 12-13
[11] See *ibid.* at 24.

preservation of the group is to its members. Réaume says that she is arguing against Raz's position, stating that the numbers are not so important as the viability of the group, when considering the existence of a group (or collective) right. In effect, though, she takes the same position, because as we saw for Raz the crucial point is the moral justification for the existence of the right, not the numbers. Even though it appears that for Raz the size of the group *is* important,[12] the relevant point in his definition of collective rights rests on the moral justification of the interest, provided that such an interest is shared by a collective and focuses on a public good. In this vein, Raz points out that there are many intrinsically valuable collective goods, whose value does not come from their importance to the interest of people as community members. Therefore, it is clear that the crucial issue in deciding the existence of a collective right is the participatory public good's relevance to people's interest, in other words, the moral justification for subjecting other people to a duty. Of course, the bigger the group, the greater its chances to successfully claim a collective right; but what justifies such a right is not the group's size, but rather the moral justification for upholding the interest of its members. The viability of the group goes to the moral justification.

The foregoing discussion shows that collective rights, according to Raz's definition as amended by Réaume, are founded on the interests of individuals as members of a group in participatory goods. When the interest in question is in a public good that is individually enjoyable, other things being equal, what we have is an individual right to a public good. For example, the public good of clean air is individually enjoyable;

[12] For Raz, while "the existence of the interest does not depend on the size of the group, the existence of the right and its strength does." Raz, *supra* note 1 at 209.

therefore it is possible (when the other conditions are met) to have an individual right to clean air. Raz seems to be aware of this distinction, since he says that the interest in question is of individuals as members of a group in a public good that serves their interest *as* members of a group. Clean air is an interest of individuals as such, and serves their interest as individuals, not as group members. On the contrary, as we will see, minority cultures' rights serve the interest of individuals *as* members of the minority and can only be collectively enjoyed.

In conclusion, collective rights are defined by a shared interest of the members of a group in a participatory public good. But the right in question exists only when the interest in question is morally sufficient to justify imposing duties on others. The rights of minority cultures seem to be by definition collective rights over participatory goods, since they are based on the intrinsic value of the community for its members. However, the question of whether the community's value is sufficiently important as to ground the imposition of duties on others must be left open pending further analysis.

2. The Holder of Collective Rights

Who is the holder of collective rights? This question has been asked by different authors and answered in different manners. For example, both Raz and Michael Hartney maintain that the holders of collective rights are the members of a determined group, whereas others, like Michael MacDonald and L.W. Sumner have argued that the holder is

the collectivity itself. I will explain these theories in order to reach a conclusion on this issue, which is a natural and necessary complement to the definition of collective rights already presented. Yet, as will be seen, the answer depends on the particular form in which the question is asked. It is different to ask whether collectivities can be vested with moral or with legal collective rights, or to ask whether collectivities are the holders or the beneficiaries of collective rights.

Raz says that only those whose well-being is of ultimate value are capable of having rights. Then he adds that being of ultimate value means being valuable independently of one's instrumental value or, to put it in another way, to have value that does not derive from a contribution to something else; hence something is of ultimate value when it is valuable for its own sake. Yet Raz, concluding his section regarding the capacity for rights, says that "only those whose well-being is intrinsically valuable can have rights."[13] However, he has also said that not everything intrinsically valuable is also of ultimate value. This discussion seems puzzling. First he argues that the capacity for possessing rights derives from the ultimate value of the well-being of the holder. Then he states that being intrinsically valuable does not necessarily mean being of ultimate value. And finally he concludes that the capacity for holding rights stems from the intrinsic value of the holder's well-being.

The consequences of this discussion are of paramount importance, since it is possible to say that a community is not of ultimate value, but it is of intrinsic value. A collectivity is

[13] *Ibid.* at 180.

not of ultimate value because its value derives from its contribution to the well-being of its members. As will be argued below, collectivities are not valuable for their own sake, but for the sake of their members. However, Raz concedes that, for example, works of art are of intrinsic value, because even though their value derives from their contribution to the well-being of persons, their sole existence is part of that well-being independently of their consequences (i.e., they are not of instrumental value). They are, therefore, of intrinsic but derivative value. If the capacity to hold rights is derived from the intrinsic value of the holder, collectivities can have rights, because it is possible to say that they are intrinsically but derivatively valuable (as works of art). This last conclusion matches Raz's affirmation that groups may be right-holders. In such cases, the interests protected by such rights are those of the group's members, rather than those of the group itself. As Raz points out: "rights, even collective rights, can only be there if they serve the interest of individuals. In that sense collective interests are a mere *façon de parler*. They are a way of referring to individual interest which arise out of the individuals' membership in communities."[14] Therefore, the emphasis is put upon individual interests; they are the interests protected by and benefiting from collective rights, and so individuals are the real holders of collective rights, even though they may *exercise* those rights through group representatives.[15]

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[14] *Ibid.* at 208.

[15] John Finnis explains that: "the common good is fundamentally the good of individuals (an aspect of whose good is friendship in community). The common good, which is the object of all justice and which all reasonable life in community must respect and favour, is not to be confused with the common stock, or the common enterprises, that are among the means of realizing the common good." J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 168. See also R.P. George, "Individual Rights, Collective Interests, Public Law, and American Politics" (1989) 8 L. and Phil. 245 at 251.

The issue is important because if it is argued that only the group is entitled to claim its rights, then it can be argued that some members of the group may be excluded from the benefits obtained from the right at issue. For example, in *Attorney-General of Quebec* v. *Quebec Protestant School Boards* the Government of Quebec argued that Section 23 of the *Canadian Charter of Rights and Freedoms*[16] was only intended to ensure the survival of the minority group of each province.[17] Therefore, this Section must be understood as conferring on the whole minority group a collective right to have schools in their own language to ensure its preservation. For this reason, certain members of the minority group can be deprived of the benefit in question provided that there is no danger to the group. In other words, the Government of Quebec was alleging that if the group's survival is not threatened, there is no violation of a minority language educational right. This argument presupposes that collective rights are held by the community rather than by its members and that those rights can be legitimately denied to some members of the group if its survival is not endangered. The Quebec Superior Court, in a decision upheld by the Supreme Court of Canada, rejected Quebec's argument regarding collective rights, stating:

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[16] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11.

[17] See *Attorney-General of Quebec* v. *Quebec Protestant School Boards*, [1984] 140 D.L.R. 33 (3rd). In this case a group of English-speaking parents in Quebec sued the Minister of Education claiming that the Minister had wrongfully denied their children admission to English-language schools, which they said was their right under section 23 of the Canadian Charter of Rights. The response of the Minister was that the Charter of the French Language (Bill 101) restricted access to English-language schools to children of parents resident in Quebec prior to August 1977. These parents did not qualify in either way under Bill 101. Therefore, they asked for a declaratory judgment which would nullify Bill 101 in situations where it came into conflict with the Charter. This would affect those Canadian citizens immigrating to Quebec who had received English-language education outside Quebec but in Canada. Quebec's argument was that Bill 101 should be read as a reasonable limit on the minority-language educational right declared in section 23, according to Section 1 of the Charter, provided that section 23 was read as guaranteeing a collective rather than an individual right. From a collective right reading, a minority such as the English in Quebec would have the right to education in its own language, but that right would be held by the community rather than by each individual. The parents argued, on the contrary, that the right set in section 23 was an individual right.

> In fact, Quebec's argument is based on a totalitarian conception of society to which the Court does not subscribe. Human beings are, to us, of paramount importance and nothing should be allowed to diminish the respect due to them. Other societies place the collectivity above the individual. They use the Kolkhose steamroller and see merit only in the collective result even if some individuals are left by the wayside in the process.
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> This concept of society has never taken root here -even if certain political initiatives seem at time to come dangerously close to it- and this court will not honour it with its approval. Every individual in Canada should enjoy his rights to the full when in Quebec, whether alone or as a member of a group; and if the group numbers 100 persons, the one hundredth has as much right to benefit from all the privileges of citizens as the other ninety nine. The alleged restriction of a collective right which would deprive the one hundredth member of the group of the rights guaranteed by the Charter constitutes, for this one hundredth member, a real denial of his rights. He cannot simply be counted as an accidental loss in a collective operation: our concept of human beings does not accommodate such a theory.[18]

Even though in this judgment the Court seemed to oppose the idea of collective rights, it is possible to interpret the judgment as defending the individual rights of the group's members. For the Court, there is an individual right to education in the minority language that cannot be denied to any individual member of the minority group (except where numbers do not warrant). However, what seems important in this case is the allegation made by the Quebec Government that collective rights allow the possibility for some members of the collectivity to be refused the benefits of the right in question. It argued that, since the community is the holder of the right, when the collective goal is reached it is not important that some members of the community are denied the benefits of the right, provided that the community as a whole receives them. This idea bothered

[18] *Ibid.* at 64-65.

Justice Jules Deschenes in the mentioned decision. The idea that "the one hundredth member of the group" would be deprived of her right as a result of a collective right held by the community itself (who is in turn the beneficiary) appears to have aroused Justice Deschenes' moral indignation since he said that his "concept of human beings does not accommodate such a theory".

McDonald has categorized Judge Deschenes' decision as "outright hostility" to collective rights.[19] He says that this liberal hostility to collective rights is based on a historical consideration that equates collective rights with totalitarianism, where the individual is secondary to the collective goals of the community. However, the decision can be read as defending the individual rights of those members deprived of the benefits derived from the right in question. The argument of the Government of Quebec implies that the right to education in the minority language is a collective right, which in Quebec belongs to the Anglophone community. This would allow the majority to deny access to minority language schools to some Anglophone children in Quebec, provided that the survival of the community is guaranteed. On this point, Hartney has observed:

> But this argument -taken as a moral argument rather than an attempt interpreting a legal text to achieve a certain legal result- presupposes that there exists a collective interest which is something over and above the interest of the members of the group, and that the right in question is meant to serve that collective interest rather than the interest of the individuals. That is like arguing that there is some value in having clean air over and above the fact that human beings need clean air, and that this value is being preserved as long as there is some corner of the globe where

[19] M. McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can. J. L. & Jur. 217 at 226.

> clean air still exists, even if people are dying everywhere else from a lack of it. Here the term 'collective right' is being used, not to give greater weight to the interest it is meant to protect, but to give them less weight than would otherwise be the case.[20]

In his criticism of the decision, McDonald points out that collectivities as such may be claimants, obligants and beneficiaries of rights, and for that reason they can hold collective rights.[21] We have already seen that Raz is of the same opinion. However, the crucial question here is not who claims the right but whose interests are protected by it. McDonald has said that it is possible for an individual to claim a collective right, as when a Francophone in Alberta invokes rights under Section 23 of the Charter to ensure that her child can go to a French school. However he says that "there is a good reason to want the community interests in general to be protected by the community's rather than through an individual member's exercise of a right."[22] Hence, McDonald seems to be advancing the possibility of collective interests that go beyond the interests of its members. In contrast to Raz, he appears to be proposing that the justification for collective rights is not found in the collective interest of individuals in public goods, but in interests held by the community above that of its members. McDonald believes that it is the welfare of the community what is at stake in claiming collective rights, not the welfare of a particular member. He is clear in stating that the welfare of the community is justified for its own sake and not only for the well-being of individuals:

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[20] M. Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Can. J. L. & Jur. 293 at 314.
[21] See M. McDonald, "Collective Rights and Tyranny" (1986) 56 U. of Ottawa Quart. 115 at 120.
[22] McDonald, *supra* note 19 at 232.

> This, however, should not lead one to think that collective autonomy is valuable only as a means of enhancing individual autonomy. On my view, collective autonomy like individual autonomy is valuable in its own right; hence, one should not be valued simply as a means to the other.[23]

Although not a substantial part of his general theory of rights, Sumner considers the possibility of collective rights in his book *The Moral Foundations of Rights*, holding like MacDonald that collectivities as such may be vested with rights.[24] He says that for the purposes of his analysis, he assumed that the subject and object of every right are distinct individuals. However, he asks whether there is any reason to assign rights only to individuals, and immediately answers that there are no conceptual barriers to assign rights to collectivities. According to his theory of rights, the capacity of agency is a logical pre-condition of having rights. Since collectivities generally have certain procedures to reach collective decisions and to take collective actions, they qualify as the subjects of rights so long as they possess the capacity to act on behalf of their members. In other words, a collectivity holds rights when it has capacity of agency. After admitting that collectivities can be the subjects of rights, Sumner states that ascribing rights only to individuals in order to achieve global goals does not seem to be reasonable. A more reasonable thesis would acknowledge both individual and collective rights in order to achieve these global goals.

Holding the opposite view, Hartney defines as "value-collectivism" the idea that collective welfare is valuable for its own sake independently of that of its members (as

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[23] *Ibid.* at 236.
[24] See L.W. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987) at 209.

both Sumner and MacDonald maintain).[25] He says that this position is "counter-intuitive" because, in his opinion, communities are important due to their contribution to the well-being of individuals, that is, the value of communities stems from their contribution to the lives of individuals. Hence, since communities are important for the well-being of individuals, and the members of these communities may have a moral interest in the preservation of their community, it is possible to endow them with rights. But, what kind of rights? Is it possible for communities to hold moral rights? Hartney denies this possibility, stating that the idea that moral rights may belong to collectivities as such (as sustained by McDonald) is mistaken and leads to confusion. To affirm that collective rights are held by the collectivity can distract us from the fact that the reason for the need to protect collectivities is their contribution to the welfare of individuals.

Hartney distinguishes between two types of rights: firstly legal rights, which only depend on the legal authority that confers the right; and secondly, moral rights, which exist only when there are important moral reasons for protecting certain goods. Following Raz, Hartney says that "not all goods or interests generate rights; it is only when there is a particularly important moral reason for protecting the good or interest in question that we speak of there being a right to it."[26] In other words, not all goods generate moral rights; only those that are central to the well-being of individuals can do so. This is the difference between a legal and a moral right: the first can protect an unimportant interest, while the second entails a good sufficiently important as to warrant protection by duties on others.

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[25] Hartney, *supra* note 20 at 297.
[26] *Ibid.* at 303.

With regard to the likelihood of a collective right for the preservation of a certain community, Hartney concedes that if the existence of the community is a good for its members, and therefore they have an interest in its preservation, then both the government and the rest of the society can be regarded as duty-bound to protect such a community, provided that the interest in question (the preservation of the community) is sufficiently important. The community itself could be said to have rights against the rest of the society or the government only if it has an interest or interests different from those of its members. For Hartney there are no such interests. Although the government and individual members of society may have certain duties with respect to the preservation of the community in question, these duties are owed to the individual members of the community, who in turn hold the corresponding right. Even considering that communities are important for the well-being of their members and that they can be vested with legal rights, there are no moral rights that inhere in them, for only individuals can hold moral rights. However, Hartney says that a right may be called collective, not because it inheres in a group, but simply because the object it serves is collective. This label does not identify the holder, but rather the aim a right serves. Thus, Hartney concludes by saying that "a right will be called 'collective', not if it inheres in a group, but simply because its object or the interest served or its exercise is collective."[27] This conclusion matches Raz's ideas on collective rights expounded above.

[27] *Ibid.* at 311.

From the comparison of the previously explained opposite theories, it is possible to draw certain conclusions. I agree with Raz and Hartney that there are no interests of a community itself that are not beneficial for its individual members. This view is consistent with the idea of respect for individual freedom and autonomy. The ultimate goal of a liberal society is the welfare of its individual members. If sometimes the interests of the community surpass those of certain individuals, is just because those interests of the community are justified on the benefit of its individual members. The community as such does not have interests, but only those of its members. Therefore, the interests protected through collective rights are those of its members, in their shared collective goods. Collectivities are valuable not for their own sake but for the sake of their members. However, it is possible for the community to claim such collective rights on behalf of its members with the aim of protecting their interests. The community itself, through its representatives, is sometimes better equipped to claim and defend collective rights, without ruling out its members' standing to claim such rights when the circumstances require it. Here and later the term "collective right" is used in its narrow sense to describe the object or enforcement mechanism of a right, rather than the agent holding it.

3. The Justification of Collective Rights for Minority Cultures

Thus far I have been discussing collective rights in general. Now I would like to turn to the question of collective rights for minorities. Thus, as we have seen, we need a sufficiently important moral reason to impose duties on others in the name of collective

rights for minority cultures. A minority culture is located within a larger society, and collective rights to protect such minority would normally imply imposing duties both on the government and on the larger society. Hartney has said that people generally believe that communities are important for their contribution to the life and well-being of individuals, and therefore, that the existence of a community may be a good for its members. The question then would be: is the survival of one's own community morally acceptable as a ground for imposing duties on others?

A. The Importance of Cultural Membership

It is generally accepted that people need a culture within which to live in order to give sense to their lives. To live in a culture is to live humanly. We need to live within a certain culture where the choices we make about how to live a good life can have meaning. It is in our culture that our language, our customs and our ends (whatever they may be) have meaning for us. However, why is it necessary to live in one's own original culture? Immigrants sometimes give up their own culture and adopt that of the country in which they have chosen to live. Jeremy Waldron has argued, for instance, that people do not need their own culture, since it is a fact that many people live a cosmopolitan life, enjoying different cultures at the same time, and having a fulfilling life without the need to keep their inherited culture. It is not correct to say that people really need to live in the particular culture of their ancestors, since what they need is only to live in *a* culture.

Hence, Waldron argues that minority cultures are not entitled to special assistance but only to a right of non-interference that respects their freedom of association.[28]

In the context of rights for minority cultures, what is asked for by such groups is not only respect and non-interference of their freedom to associate, but also assistance, protection and certain forbearances. The argument behind such demands is the existence of special ties with a person's own culture, without which a person is left stranded. Although we may not all need our inherited culture, many claim a right to choose to keep it if they want to. Waldron's argument would entail that integration into a larger society and dominant culture is not only possible, but sometimes inevitable: when minority cultures are not protected, their existence threatens to disappear. Thus, members of a disappearing culture are left without the means to protect it, and are faced with the necessity of integrating into another (normally dominant) culture. It is argued by some that certain groups would be better off under this last option, since they would be integrated into a "superior" culture. The forced integration that aboriginal peoples have undergone since the discovery of America was seen by many people as a way of elevating them to a superior culture, to rescue them from an inferior and backward culture. From this point of view, the conquerors assumed a self-imposed duty to teach their own culture to the Indians and erase the culture they had inherited. This view constitutes an ethnocentric vision of the world, where the standard to measure the value of cultures was given by their comparison with that of Western European countries.

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[28] See J. Waldron, "Minority Cultures and the Cosmopolitan Alternative" (1992) 5 Univ. of Michigan J. of L. Reform 751 at 762.

Nowadays that ethnocentric vision of the world is giving way to a new vision that accords respect to every culture, and does not measure cultural value according to foreign standards. It is generally considered that people have special bonds with their own culture and that those ties are worthy of respect. Under this new vision, people simply have the right to protect the survival of their own culture, and attempts to force integration into a so-called superior culture are viewed as morally wrong. That is, it would be an injustice to force people to change their culture for another. Consequently, it is possible to say that, depending on the particular moral circumstances surrounding each culture there is a right to the preservation of one's own culture. In this vein, James Tully has argued that a form of constitutional association that does not recognize the diverse cultural ways of citizens and forces assimilation is to that extent unjust.[29] Nevertheless, the duties that arise from this right, and its proper scope, will greatly depend on those circumstances that determine the right's moral boundaries.

Given Tully's remarks about cultural value, and the generally accepted view of cultural importance articulated above, how do we define the scope of cultural rights in a liberal society? Will Kymlicka has argued that "cultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to a range of meaningful options."[30] For him, a "societal culture" is a very wide term that covers as diverse a range spheres as education, social and economic activities, religion

[29] See J. Tully, *Strange Multiplicity, Constitutionalism in an Age of Diversity* (Cambridge: University Press, 1995) at 6.
[30] W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 83 [hereinafter *Multicultural Citizenship*].

and recreation among others, but which at the same time is limited by a particular language or a particular territory. Such culture provides meaning to the way of life of its members. It is possible to talk in terms of, for example, both a Flemish culture in Belgium (which is characterized by a shared language), and a Belgian culture in Belgium (characterized by a shared territory, political institutions, economic and social activities and so on, but with two languages).

Kymlicka's articulation of the value of minority rights has a special purpose, namely to show how a liberal society can defend the rights of minority cultures without renouncing its own ideals. He argues that liberalism is defined by its ascription to fundamental freedoms, in particular, the freedom of every person to choose how to lead her own life. Thus, liberalism allows people not only to adopt a plan of life, but also to change it whenever they want. But the options available to take such decisions are embedded within a culture that provides different options and gives meaning to them:

> The freedom which liberals demand for individuals is not primarily the freedom to go beyond one's language and history, but rather the freedom to move around within one's societal culture, to distance oneself from particular cultural roles, to choose which features of the culture are most worth developing, and which are without value.[31]

As Kymlicka likes to say, this position really satisfies our "intuitions" about the value of cultures to human life and the relationship between culture and individuals. I agree with him that it is possible and important to choose amongst different ways of life, or different

[31] *Ibid.* at 90-91.

conceptions of a good life. But these choices are made within the particular background supplied by one's own culture. I believe that we can step back, and review and change our commitments, and that we are not bound by our inherited sense of what a good life is in making such revisions. However, it is our own culture what provides the necessary horizons against which to examine the value of our commitments and without which we could not revise our concept of the good life. As Kymlicka says, "it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value." [32]

Moreover, in assessing the value of cultural membership and the collective rights that it entails, some authors have pointed out that there are certain fundamental values that frame the identity of human beings, which cannot be reduced to individual values. Instead they are by their own nature shared values that can only be enjoyed collectively. In this respect, Lesley Jacobs has noted that everyone has commitments to projects, principles, institutions and relationships, from which many of their actions flow. Such commitments reflect a person's identity and may be called "identity-conferring."[33] The integrity (or dignity) of every human being is preserved when her actions are consistent with those identity-conferring commitments. Therefore rights are designed to protect the right-holder's integrity. Rights are held to protect people from being forced to act contrary to their identity-conferring commitments, contrary to their integrity. From this right to preserve the integrity of every individual, Jacobs argues that it is possible to

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[32] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 165 [hereinafter *Liberalism*].

[33] L. Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity" (1991) 4 Can. J. L. & Jur. 375.

derive certain collective rights. Thus the identity of an individual may be bound up with the larger identity of the community to which that person belongs.

For example, the identity of a member of the Yanomami people in Venezuela is closely linked with the existence and preservation of the customs and integrity of her group.[34] Her identity-conferring commitments stem from her belonging to her community. If her community is unable to sustain its traditions and customs because there is a threat of assimilation into the larger community of Venezuela, her own integrity (the possibility of acting according to her identity-conferring commitments) is also threatened. In this situation, collective rights play a key role in protecting individuals from threats to their integrity, through the protection of the community to which those individuals belong. As long as the integrity of an individual requires the existence of her community (because only within that community is it possible for her to perform her identity-conferring commitments), the collective rights that protect such a community acquire validity. Jacobs has observed that the integrity of a community is threatened when it cannot keep the traditions and cohesion that allow it to maintain its distinctive existence. Thus collective rights are most commonly appealed to in situations where cultural minorities are threatened by a dominant culture. He uses the examples of indigenous peoples and French-Canadians to show that collective rights of cultural minorities protect their members' right to integrity, through the protection of the community itself.[35]

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[34] See N. Chagnon, *Yanomamo, The Fierce People* (New York: Holt, Rinehart and Winston, 1983) at 190-214.

[35] See Jacobs, *supra* note 33 at 378.

In analyzing the value of cultural membership, Kymlicka says that there is a conflict of intuitions between what counts as respect for people as citizens and respect for them as members of a culture. There is a value in being free to analyze and reject the place and goals that our own culture has set for us, to separate ourselves from the established patterns that we inherited, and to change them if we consider it to be advantageous. On the other hand, people need to be free to live in accordance with such values, to belong to their own community and culture. The dilemma is how to reconcile respect for both kinds of freedoms without giving prevalence to one over the other. James Tully has defined this problem as the "conciliation of freedom and belonging", a conflict that arises out of "the clashes between the aspiration to be free from the ways of one's culture and place (...), and the equally human aspiration to belong to a culture and place, to be at home in the world."[36]

This dilemma is solved, within the borders of liberalism, by giving people the possibility of standing back and reflecting on the traditional ways of life their culture has assigned to them, and letting them question such social roles. However, this process is conducted against the background set by one's own culture, which provides the arena for such assessments to be made.[37] In that sense, people are respected as citizens with the freedom to assess and reject the space where their culture has placed them; yet, if they choose to stay and live in accordance with such standards, they may do so without interference and, under certain circumstances, even with help provided by others.

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[36] Tully, *supra* note 29 at 32.
[37] See *Multicultural Citizenship*, *supra* note 30 at 92.

Nonetheless, although the previous view pretends to accommodate cultural diversity, it does so within the scope of liberalism. Some people who defend minority cultures view this sole fact with suspicion, since what they demand is to be free from being judged by patterns extraneous to their own cultures. For them, such proposals to make room in an authoritative tradition (such as liberalism) for cultural diversity are doomed to fail, because what they want is precisely to challenge, from an external perspective, the authority claimed by such traditions. For them stretching the scope of the authoritative traditions cannot accommodate their demands for cultural recognition because such demands are based on a challenge to the authority claimed by those traditions.[38] According to Tully, there are three external traditions: liberalism, communitarianism and nationalism. They are called the "authoritative traditions of interpretation" of modern constitutionalism, and they are considered to have originated from European men under an imperial and white male point of view. For this reason, said traditions are flawed from the outset, and so there is no way to do justice to cultural recognition using the vocabulary of these three traditions. The Supreme Court of Canada in essence endorsed this opinion when it stated:

> Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are <u>aboriginal</u>.[39]

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[38] See Tully, *supra* note 29 at 44.
[39] *R.* v. *Van Der Peet*, [1996] 2 S.C.R. 507 at 534 (Emphasis original).

In the same way, Tully explains that, for example, aboriginal peoples seek recognition not only of their cultural identity, but also of their own forms of interpretation. They seek recognition of their language and other means of communication. For example, they have sought to have their ritual form of articulating property rights for its members recognized as authoritative.[40] They see with skeptical eyes the attempts to extend traditional forms of interpretation of constitutionalism (such as liberalism) to justify and accommodate cultural diversity, because they are challenging such forms of interpretation.[41] They attempt to act politically out of the context of prevailing institutions (forged within the scope of the traditional forms of interpretation), in order to gain recognition for their own institutions and forms of interpretation. In brief, as Tully puts it, "the post-imperial injunction to listen to the voices of others must involve listening not only to what they say, but also to the way or language in which it is said, if the imperial habit of imposing our traditions and institutions on others in both theory and practice is to be abjured."[42]

Is Kymlicka's argument on the justification of rights for minority cultures vulnerable to this critique? Kymlicka is rather clear that he is speaking within a particular tradition: liberalism. He is arguing within the boundaries of such a stream of thought, and with the purpose of justifying rights for minority cultures in liberal theory, where the issue has

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[40] See *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. at 1010.

[41] The Supreme Court of Canada has also been receptive to this point, stating that "Canada's aboriginal peoples are justified in worrying about government objectives that my be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests." *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1110.

[42] Tully, *supra* note 29 at 57.

been subjected to systematic denial. I do not believe Kymlicka is trying to impose strange points of view on minorities; rather hi is providing arguments that may lead majorities in countries like the United States or Canada (basically influenced by liberalism) to accept and recognize cultural differences.

One could say that when Kymlicka explains that people need their own culture in order to have options available for the ordering of their own lives, he is making a generalization from his point of view, influenced by the liberal claim to universality of ideas. However, he is not denying the possibility of listening to others in their own languages and traditions; on the contrary, that might be one of the consequences of his ideas. Indeed, Kymlicka says explicitly that "fairness in a decision-making procedure implies, amongst other things, that the interests and perspectives of the minority be listened to and taken into account."[43] The ultimate basis of his ideas is his belief in the value of cultural membership for the welfare of individuals. This is also what is at stake in the struggle waged by aboriginal peoples for the achievement of recognition. They may disagree with Kymlicka's explanations on the foundations of such values, but they must agree on what lies behind them, because this is precisely what gives meaning to their position; otherwise they would be begging the question.

In that sense, if we focus the discussion, as Avigail Eisenberg proposes, on the difference perspective rather than on a system of rights, the reason why the value of cultural membership is the correct ground upon which to found the recognition of minority

[43] *Multicultural Citizenship*, *supra* note 30 at 131.

cultures becomes increasingly evident.[44] Eisenberg explains that the notion of difference to which she is referring denotes differences between people that play a constitutive role in shaping their identities.[45] Instead of thinking within a system of rights, she advocates considering constitutional cultural protections as a means of protecting group identity-related differences (in a way that resembles Jacobs' opinions). The idea of cultural membership precisely provides a ground for what Eisenberg defines as the politics of difference (which rejects the idea that people ought to be treated equally despite the characteristics by which they differ). For this reason, it is my view that Kymlicka's ideas do not privilege one (Western liberal) viewpoint, because if we translate his ideas into the framework provided by the politics of difference, they explain and ground the protection of identity-related differences through the notion of cultural membership. When the stress is put on this notion, as conceived by Kymlicka, the fear of bias disappears. It must be noted that liberalism is not a neutral framework to mediate between all "differences" and "perspectives" since, as will be explained afterwards, liberalism also represents a perspective on its own. The point here is to stress the value of the idea of cultural membership in order to justify differential treatment based on identity-related differences.

In any case, it is possible to argue that cultural membership and the survival of one's own culture are morally adequate reasons to impose duties on others. The defense of one's own culture, in some circumstances, is a sufficiently important basis on which to found rights. Even though one may believe that the reasons explained above are not valid, we

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[44] See A. Eisenberg, "The Politics of Individual and Group Difference in Canadian Jurisprudence" (1994) 27 Can. J. of Pol. Sci. 3.
[45] See *ibid.* at 9.

still can argue that cultural membership is worthy of protection, and justifies the imposition of certain duties on others. Indeed, it is difficult to argue against the importance of cultural membership for human beings; it is enough to remember the sheer loss of horizons and meanings that someone from an Amazon tribe would suffer if forced to move to a big city (such as Caracas or Sao Paulo), even one is in the same country as that in which the tribe is located. Not only would it be hard to get used to a new environment, but also she would suffer an absolute loss of any pattern with which to weigh the "new options" supposedly open to her.[46]

It is my view that Kymlicka's ideas about the value of cultural membership are fundamentally correct. The reason for protecting and promoting cultures is that they contribute to the welfare of individuals. Culture provides both the horizons for our moral life and the structure against which we can reflect on our place in society and our individual and collective goals. Without culture we would be isolated, whereas with culture we are "at home in the world", in Tully's words. People have the right to protect their cultural communities, and the good of cultural membership has sufficient moral weight to justify imposing duties on others. Therefore, we can derive some collective rights from the good of cultural membership. The purpose of the second part of this thesis is to analyze the kinds of collective rights to which the indigenous peoples of Venezuela are entitled. However, first it is necessary to justify the kinds of special rights commonly vested on minority cultures.

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[46] In a beautifully written novel, Sylvia Iparraguirre describes the misfortunes suffered by a Yamana Indian from Cabo de Hornos who was sent to London in the nineteenth century. His experiences clearly show the cultural shock I'm trying to describe here. See S. Iparraguirre, *La Tierra del Fuego* (Buenos Aires: Alfaguara, 1998).

B. The Rights of Cultural Minorities

Once we have recognized that cultural membership is a value sufficiently important to ground the imposition of duties on others, there is a further question on the scope of rights for minority cultures. In effect, what these rights commonly entail are more than respect and non-interference. They include assistance, protection and forbearances that may go beyond the normal scope of individual rights (such as freedom of association or of religion). Why do individual rights such as freedom of association fail to sufficiently protect minority cultures? Why do minority cultures need more than just to be free from external interference? Is there any justification for the discrimination that arises against the members of the larger society by giving additional or differential rights to minorities?

Chandran Kukathas has argued that the best way to protect cultural minorities is to respect their members' freedom of association.[47] He says that freedom of association allows such restrictions within a group, like those existing in Muslim societies, where people have no right of free speech; restrictions that in turn give the communities considerable power over their members in order to protect the group, provided that there is a concomitant right to disassociate. In the same way, Jan Narveson has argued that in a fully voluntary group, where members can join and leave the group freely, even those

[47] Kukathas argues: "From a liberal point of view the Indians' wish to live according to the practices of their own cultural communities has to be respected not because the culture has the right to be preserved but because individuals should be free to associate: to form communities and to live by the terms of those associations. A corollary of this is that the individual should be free to dissociate from such communities." C. Kukathas, "Are there any Cultural Rights?" (1992) 20 Political Theory 105 at 116.

restrictions which many cultures deem to be morally offensive (such as gender discrimination) are legitimate and should not be repressed by others outside the group.[48] For instance, if a church only admits male preachers, women cannot claim that the government must oblige the group to admit them as preachers, because they have joined the group knowing its rules, and they can always leave it. It would be an unreasonable restriction on the liberty of the group to change its traditions by an action of the government. It is a different case if a black woman is obliged to defend her so-called sisters because they are members of the same race. In this case, the limitation on her liberty would be unreasonable because she has not decided to join the group, nor can she leave it.

Although I think that both Narveson and Kukathas make good points in explaining that free membership ought to be respected on the one hand, and that there are no obligations derived from one's membership in an involuntary group on the other, in the case of cultural minorities there are some additional questions that need to be addressed. To begin the analysis, I would like to use an example conceived by Nathan Brett in his article entitled "Language Laws and Collective Rights", where Brett asks us to think of a law that stipulates uniform seasons for hunting.[49] This law would be applied both to

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[48] See J. Narveson "Collective Rights?" (1991) 4 Can. J. L. & Jur. 329. In this article Jan Narveson proposes a pattern to distinguish between groups, depending on the freedom of joining or leaving the group. In this sense, he distinguishes three types of group: 1) *Fully voluntary groups*, where the members deliberately and freely join the group, become members and may leave the group at any time. An example of this sort of group might be a social club or a church, admitting that sometimes there are minor restrictions in order to leave the group that were agreed upon before joining it. 2) *Partially voluntary groups*, where the members cannot join freely but may leave more or less freely, or, that one can join freely but not leave freely. An example of the former might be one's nationality, and of the latter the marriage. 3) *Fully involuntary groups*, where members are born into them and cannot leave them, like one's race.

[49] See N. Brett, "Language Laws and Collective Rights" (1991) 4 Can. J. L. & Jur 347 at 348.

native and non-native people. He convincingly argues that the effect of such a law in each group would be different, since if the native people depended on hunting to survive (without endangering the species protected by the law), then the law could threaten their very existence. On the other hand, for non-native people the law would simply affect their right to a recreational activity. Although the law seems non-discriminatory on the surface, since it does not patently discriminate between classes of citizens, in reality it is discriminatory, for it has different *impacts* on the two groups to whom it is applied. The result could be that the lack of differentiation in the law would actually yield discrimination in its effect. This example shows that sometimes it is necessary to differentiate between groups of individuals in order to avoid discriminations resulting from the effect of a law or measure. For Brett, "if the legislation fails to differentiate on the basis of race in its categorization of individuals in this type of case it may be highly discriminatory in its impact; and this is racial discrimination."[50]

The above mentioned example shows how a supposedly color-blind legislation that purports to achieve equality may actually result in profound discrimination. This is the case when the differences between individuals derived from their membership in a group are not taken into account when establishing public policies. It is a myth already exposed that legislation can be purely color-blind regarding minorities, because in reality many political decisions taken by the majority are tainted by the moral outlook of such majorities. When legislation pretends to grant equality between different classes of individuals through the application of the same measures to different groups, the result is

[50] *Ibid.*

always discrimination against the minority affected. Bearing in mind the differences that arise from cultural membership when legislating, and in consequence making distinctions in accordance with such differences, is not discrimination but justice.

As the opinions of Kukathas and Narveson show, there is a liberal stream of thought that believes that freedom of association is enough to accommodate cultural differences. Under this view as long as each individual is free to found or join an association to pursue or protect cultural practices or uses, cultural membership is protected. However, as Kymlicka convincingly argues, this point of view is mistaken. It is possible for the majority to outvote minorities in questions regarding official language, education and so on, and hence disadvantage them. For example, when the legislature decides on the official language, it is taking a cultural decision with profound consequences on minorities; members of the majority will not face any problem in defending their rights before the courts in their own language, whereas linguistic minorities will. Thus, it is clear that minorities are vulnerable to the decisions taken by the majority on issues crucial to their social lives, and therefore individual rights like freedom of association are plainly not enough to protect their cultural membership.[51]

[51] See *Multicultural Citizenship*, *supra* note 30 at 108. It is important to mention that Kymlicka rejects, both in *Multicultural Citizenship* and in *Liberalism, Community and Culture*, the terminology of collective rights. He says that the term collective right is unhelpful to label certain forms of group-differentiated rights. He explains that the right of francophones in Canada to use French in Federal Courts, the minority-language educational right and the special hunting right of indigenous peoples are all group-differentiated rights. However, he points out that the term collective right only includes the second and the third of these rights, since, for example, individuals exercise the first, whereas the band as a group usually exercises the third. However, taking into account the definition of collective rights proposed in this thesis and the remarks made on the problem of the holder of such rights, the contradiction disappears. Thus, if we accept that what defines collective rights is not their holder or the claimant but the interest protected, it cannot be denied that the term can be applied to the three types of rights mentioned by Kymlicka, since they all arise

Another clear example is the language of public education. It is true that minorities can create and sustain private schools in their own language in order to preserve their cultural heritage. But it is unjust that the majority culture is kept and maintained by the government through the provision of publicly funded education while the minorities have to pay for themselves. In this case, the inequality is obvious and calls for certain collective rights to be balanced. The idea that the government is culturally impartial is completely wrong, because in taking decisions regarding the language of public education or the official language, it is deciding on cultural matters normally for the benefit of the majority (for obvious representational issues). In this sense Kymlicka, speaking about aboriginal peoples in Canada, has pointed out:

> However, we can defend aboriginal rights as a response, not to shared choices, but to unequal circumstances. Unlike the dominant French or English cultures, the very existence of aboriginal cultural communities is vulnerable to the decisions of the non-aboriginal majority around them. They could be outbid or outvoted on resources crucial to the survival of their communities, a possibility that members of the majority cultures simply do not face. As a result, they have to spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginal people get for free. And this is true regardless of the cost of the particular choices aboriginal or non-aboriginal individuals make.[52]

Therefore, special assistance rights for minority cultures are intended to compensate for unequal circumstances that these minorities face. What these special rights are supposed

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from a collective interest that can be claimed both individually or collectively. See *Multicultural Citizenship, supra* note 30 at 45; *Liberalism, supra* note 32 at 138-140.

[52] *Liberalism, supra* note 32 at 187.

to accomplish is equality between all members of the society, so that their cultural membership does not place certain members of society at a disadvantage. Similar to the example of the hunting law, the differentiation amongst members of the society according to their cultural membership is necessary in order to avoid actual discrimination that would otherwise occur should the law be ethnic or color-blind.[53]

Kymlicka is quite convincing on this point, and his view is consistent with the ideals of justice based on equality. It is not discriminatory but actually fair to allocate social resources in accordance with people's particular circumstances. Cultural membership is one of those circumstances which justifies the imposition of rights. Of course, the type of collective rights for minority cultures will greatly depend on the particular circumstances of each group. These rights will be based on the value of cultural membership, and therefore will be included within the scope of collective rights, since what is at stake is a collective interest in the survival of the minority culture. It is important to note that the rights for minority cultures are held by each member of the community, and their right derives from their membership and their collective interest in its survival. That is the reason why such rights are called collective. They can be claimed either by the community itself through its representatives, or by each member individually, and, maybe even more important, they cannot be denied to an individual member of the group under

[53] In this sense, Jurgen Habermas has argued: "Once we take this internal connection between democracy and the constitutional state seriously, it becomes clear that the system of rights is blind neither to unequal social conditions nor to cultural differences. The color-blindness of the selective reading vanishes once we assume that we ascribe to the bearers of individual rights an identity that is conceived intersubjectively. Persons, and legal persons as well, become individualized only through a process of socialization. A correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed." J. Habermas, "Struggles for Recognition in the Democratic Constitutional State", in A. Gutmann, ed., *Multiculturalism* (Princeton: Princeton University Press, 1994) 107 at 113.

the allegation that the group's survival is guaranteed. It is impossible to consider such rights as individual rights, because this would then be discriminatory against people outside the community. However, once it is understood that their moral value stems from a collective interest shared by the members of a collectivity, and that the reason for vesting them with rights is the disadvantages they suffer due to their cultural membership, the fear of discrimination disappears.

4. The Relationship Between Individual and Collective Rights

A common ground for criticizing collective rights, amongst liberals, is to blame them for certain unjustified limitations to individual rights. They fear that in claiming collective rights, a given community can restrict its members' ability to refuse or revise their common practices. In order to have a clearer view on collective rights for minority cultures, we need to address this argument.

Kymlicka has proposed the distinction between what he calls "internal restrictions" and "external protections", to tackle the liberal criticisms on minority rights. Thus, internal restrictions are "intended to protect the group from the destabilizing impact of *internal dissent*", whereas external protections are intended to protect the group from the impact of external decisions (constituted by those decisions taken by people outside the relevant group).[54] Kymlicka argues that, from a liberal point of view, internal restrictions aimed

[54] *Multicultural Citizenship*, *supra* note 30 at 35.

at restricting basic civil or political liberties of group members are not justified, as is true of any right by which a group is enabled to oppress other groups in the name of its survival.[55]

This distinction has been criticized by Jacob Levy, who says that it is not sufficiently clear to distinguish between different types of internal restrictions, since some of them might be justified whereas others might not.[56] Levy says that in Kymlicka's theory there is a "stacking of cultural rights, this vesting of different kinds of powers in the same body, which complicates the matter."[57] According to Levy, one may argue in favor of internal rules, self-government and recognition separately and still condemn what he considers the creation of a hierarchy amongst rights. A simple differentiation between internal restrictions and external protections does not allow for that. I think Levy fails to persuade because the intent of Kymlicka's structuring of rights is to differentiate between those types of group restrictions or protections acceptable from a liberal point of view. The distinction between external protections and internal restriction achieves precisely that end.

Following what we saw in the previous section, the reason for vesting minorities with collective rights is their vulnerability to the larger society's decisions. Collective rights for minority cultures are based on their right to defend their culture from being harmed

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[55] See *ibid.* at 152.
[56] See J. Levy "Classifying Cultural Rights" in I. Shapiro, ed. *Ethnicity and Group Rights* (New York: NYU Press) 22 at 51
[57] *Ibid.*

by decisions and actions taken by others. The reason for endowing cultural minorities with certain collective rights to protect their culture is the likelihood of them being outvoted by the majority on issues regarding the cultural survival of the minority. What is at stake is their vulnerability *vis-à-vis* the larger society. Therefore, the moral ground of minority rights serves to justify external protections but not internal restrictions. Even though there are certain limitations to people's freedom that are morally justified (like paying taxes), limiting people's dissent towards their inherited culture or customs is not morally justified. It is commonly believed that people have the right to discuss and reject the morality, values and patterns of good life sustained by their society; this is what personal dignity is all about. However, as Kymlicka points out, sometimes the line between internal restrictions and external protections is difficult to draw, and in certain cases the latter entails some of the former. For example, if a minority culture is endowed with self-government and self-determination (both being collective rights), it could pass legislation limiting a member's right to dissent. Respect for the right to self-government implies respect for the rules enacted on such grounds, and to intervene and oblige the minority to withdraw the limiting rules would in turn violate said right. One could rejoin that, since the right to self-government was granted to the minority for the protection of its cultural membership, all measures based on that right must be in accordance with that ground. Hence, so long as the right to dissent does not threaten the survival of the minority culture, its limitation cannot be justified and is void.

Another question remains, however. What happens if the minority asserts that the right to dissent does not have moral worth in its culture? Is it not interventionism to oblige the

minority, once it has self-government rights, to respect the right to dissent of its members even though that right does not have moral value in the minority culture? For example, it has been claimed that the type of liberal foundation for minority rights proposed by Kymlicka leads to interference.[58] In effect, Kukathas has argued that by pointing out that cultural membership plays a key role in the existence of individual choice, providing the necessary background to assess and revise one's own personal values, Kymlicka is obliging cultural minorities to adopt liberal values. According to Kukathas, some cultural groups (as in the Pueblo Indians' case discussed at length by both Kymlicka and Kukathas) do not place any value on individual choice or autonomy. Therefore, to base cultural rights on the value of individual autonomy, rather than defending such cultural rights, undermines some forms of cultural community, like those where the principle of individual autonomy or freedom of choice are valueless. The answer to this problem is provided by what Kymlicka calls the "problem of illiberal minorities". The argument is that to oblige cultural minorities to sustain liberal values, such as autonomy, is sectarian and intolerant:

> But what if the group has no interest in ruling over others or depriving them of their resources, and instead simply wants to be left alone to run its own community in accordance with its traditional non-liberal norms? In this case, it may seem wrong to impose liberal values. So long as these minorities do not want to impose their values on others, should they not be allowed to organize their society as they like, even if this involves limiting the liberty of their own members? Indeed, is it not fundamentally *intolerant* to force a peaceful national minority or religious sect-which poses no threat to anyone outside the group-to reorganize its community according to 'our' liberal principles of individual liberty?[59]

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[58] "Having embraced choice as critically important, Kymlicka is drawn down the path of interference". Kukathas, *supra* note 47 at 121

[59] *Multicultural Citizenship*, *supra* note 30 at 154.

These questions go to the core of the issue concerning collective rights of minority cultures. Kymlicka answers saying that the best policy before illiberal minorities is to respect their right to self-determination and the principle of non-interference. When the two groups (the larger society and the minority) do not share the same principles, what is needed is a mutual understanding to accommodate their differences, a "*modus vivendi*". The situation would be similar to that regarding illiberal countries; when, in such countries, some basic civil or political rights are violated, the citizens of liberal countries must "learn to live with this", because they do not have any moral claim to intervene (saving the situation of gross and constant violations of human rights). This position does not contradict Kymlicka's opinions on illegitimate internal restrictions, because from a liberal point of view those restrictions within illiberal minorities are not justified. However, liberals do not have the right to interfere and oblige illiberal minorities to change their values.

However, there are different types of liberalism to cope with the situation of those dissenters within a community. Along with the model known as "procedural liberalism" (as the one sustained by Ronald Dworkin,[60] for example), which holds that a liberal society is one that does not adopt any substantial view about the ends of life, but treats people equally, Charles Taylor, using the example of the Quebec society, proposes another type of liberalism that affords importance to some collective goals.[61] In his view

[60] See R. Dworkin, "Liberalism", in Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978).
[61] See C. Taylor, "The Politics of Recognition", in Gutmann, *supra* note 53 at 59.

this society holds a collective goal (or a public definition of good life) represented by the fight for the French culture's survival in North America. Those who do not share this collective goal are treated with equal respect, through the provision of adequate safeguards for their fundamental rights.

It is interesting to note that Taylor's liberalism may be viewed as minimizing the need to expressly protect collective rights for minority cultures. In effect, in his comment to Taylor's article, Michael Walzer points out that in the type of liberalism where the state is committed to the survival of a particular culture while protecting the basic individual rights of those citizens who do not share the common commitment, there is no need for equal protection for minorities if such (individual) basic rights are respected.[62] This idea is derived from Walzer's opinion that differential citizenship in the same country is impossible, and where it exists, secession is the correct path to follow.[63] However, Taylor's ideas do not lead to that conclusion, since as the Quebec example shows, it is possible to have both a government committed to a particular goal and some collective rights for the minority cultures living within its boundaries as well. Moreover, such minorities have the same moral claim to be protected whether they are located in a goal-committed state or not.

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[62] Walzer sustains that "Liberalism 2 is entirely appropriate here, as it is appropriate in the actual Quebec. There doesn't seem to be any requirement of equal provision or equal protection for minority cultures, so long as basic rights are respected." M. Walzer, "Comment" to C. Taylor, "The Politics of Recognition", in Gutmann ed., *supra* note 53 at 101.

[63] See M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (Basic Books, 1983). Walzer textually says: "If the community is so radically divided that a single citizenship is impossible, then its territory must be divided, too, before the rights of admission and exclusion can be exercised. For these rights are to be exercised only by the community as a whole (even if in practice, some national majority dominates the decision making) and only with regard to foreigners, not by some members with regard to others." Walzer at 62.

The type of liberalism Taylor is proposing implies a list of fundamental liberties that cannot be infringed and must be unassailably entrenched in order to be fair with those who do not share the collective goal. For this reason, we are back to the problem set forth above: what happens with societies that do not consider such "fundamental rights" to be morally relevant? On this point, Taylor says that a tension exists between what he calls the politics of dignity and the politics of difference. The former implies respect for people in a difference-blind fashion, without paying attention to their cultural differences, which would be considered as discrimination and lack of respect for human equality or dignity. The latter deems that respect for people entails respect and recognition for their particularity. Taylor explains that "[w]here the politics of universal dignity fought for forms of nondiscrimination that were quite 'blind' to the ways in which citizens differ, the politics of difference often redefines nondiscrimination as requiring that we make these distinctions the basis of differential treatment."[64] The politics of dignity is normally sustained by liberals, who are charged with claiming supposedly neutral difference-blind principles, which in reality are just a reflection of their particular culture. When liberals claim universality, the answer is that they are just being sectarian and ethnocentric, trying to impose their cultural values on others. This is a serious attack on liberalism, because it makes it look like a vicious circle: liberal thought and theory are based on a universal principle of human autonomy, which in reality is a particular feature of the liberal culture. For that reason, when members of a minority culture are obliged to respect basic civil and

[64] Taylor, *supra* note 61 at 39.

political rights due to their supposed universality, in reality that can be viewed as imposing alien cultural values upon them.

How do we resolve this dilemma? As established above, individuals have both collective rights derived from their collective interests, and individual rights derived from their individual interests. The conflict between these two types of rights, whether within the same community or before members of the larger society, has to be resolved on a case-by-case basis, weighing the particular circumstances of each situation. There is no set pattern to indicate which one must prevail. In these conflicts, it is superficial to say that individual rights must prevail, since there are cases where those same individuals place more importance on their collective interests than on their individual ones. Therefore, there is no test to decide, for each particular case, which right should prevail. Only achieving a balance between arguments based on reasonableness in favor of one or the other can yield a reasonable decision. As Leslie Green has said "how are these conflicts to be resolved? I can say nothing about it here, and it is silly to look for a general theory. Everything depends on the character and weight of the particular rights involved and on the social context."[65]

[65] L. Green, "Internal Minorities and their Rights" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Clarendon Press, 1995) 257 at 269.

5. The Challenges of Multiculturalism

Hitherto I have been endorsing a liberal perspective over minority cultures' rights, and the main challenge to that perspective has been the treatment that illiberal minorities deserve. This problem is intimately associated with the problem of the value of cultures and ethnocentrism. This is not the place to discuss or analyze such a complicated problem, which goes well beyond my present purposes. It certainly represents one of the most puzzling dilemmas in what is called post-modernism. However, it is worthwhile to briefly explain Taylor's ideas on the subject. He says that some multicultural demands are made based on the premise that each culture deserves equal respect. The presumption behind this premise is the claim that all human cultures have some value of their own, a presumption that must be used in a procedural form: to lead the study of any culture. Taylor concedes that the presumption has to be demonstrated; that is to say, it is possible for us to make judgements about the value of cultures other than our own. Of course, the process of assessing the cultural value of a different culture implies a deep understanding of the culture being studied, and only then can a conclusion be made. However, under whose value-structures is such judgement to be assessed? If these patterns are already taken as given, then there is a risk of homogenization. Taylor concludes by stating:

> There must be something midway between the inauthentic and homogenizing demand for recognition of equal worth, on the one hand, and the self-immurement within ethnocentric standards, on the other. There are other cultures, and we have to live together more and more, both on a world scale and commingled in each individual society.

> What there is is the presumption of equal worth I described above: a stance we take in embarking on the study of the other. Perhaps we don't need to ask whether it's something that others can demand from us as a right. We might simply ask whether this is the way we ought to approach others.[66]

This is a highly complicated matter and I need not pronounce finally on it. But it must be noted that it is tied to the problems with which we are dealing here, and most of the discussion on the issues related to such problems that surround that matter are similar. It will be sufficient for my purposes to focus the attention on aboriginal peoples in order to illuminate some of the issues implied in the challenge of judging a culture's inherent value. Thus, in his analysis of the chthonic legal traditions (an umbrella term covering aboriginal or indigenous peoples), H. Patrick Glenn explains that a common characteristic in these many traditions is their orality, which leads to a process of consensus reached through information and participation; consensus that does not avoid dissent and rejection of the tradition, as history shows.[67] Additionally, Glenn explains that in general the chthonic legal tradition exemplifies some of the most democratic and open principles of social ordering. However, in chthonic traditions there are no individual rights, because the individual is embedded in the community.[68] Those traditions do not have an idea of rights, since the law protects the community rather than individual members. What must be noted in these traditions is that the protection of the community serves as a shield to protect the individual, whose interests are so interwoven with those of the community that the goal of respecting the individual is thus achieved.

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[66] Taylor, *supra* note 61 at 72.

[67] See H.P. Glenn, *Legal Traditions of the World* (Oxford University Press, 2000) at 58.

[68] Professor Glenn explains that "since the present individual is submerged in the past and the wider community, there is no individual power –or potestas- to obtain the object of individual will. There are no rights. Even if rights are looked at as simple interests protected by law (a modern variant), then the law does not protect purely individual interest." *Ibid.* at 67.

However, the chthonic legal tradition imposes some more limited social roles based in the tradition (as the situation of women testifies), which appear to violate individual rights. Therefore, in order to assess the real value of these traditions it is important first to understand that they have very different ways of leading their lives, but at the same time, that they might give additional respect through their ways to some so-called liberal virtues, like openness and democracy.

Likewise, Kymlicka has pointed out that, contrary to what is commonly believed, some indigenous cultures are too respectful of the liberty of their members, displaying "a profound antipathy to the idea that one person can be another's master."[69] This same point is highlighted by Tully, who says that aboriginal peoples, in their own ways, have democratic forms of participation and free expression that would be diminished by imposing European models. Yet I think it is relevant at this point to remember Tully's warning, when he says that "the presumption that non-Aboriginal people may sit in judgement, from the unquestioned superiority of their constitutions and traditions of interpretation, and guard the transition of the Aboriginal peoples form colonialism to self government smacks of the imperial attitude that contemporary constitutionalism aims to dislodge."[70] Here Tully is taking the same stand on the imperative suggested by Taylor to understand other cultures. However, what lies behind Tully's opinions is that the common view about what is known as "illiberal cultures" could be wrong with respect to many aboriginal peoples, because such cultures in fact respect some of the most

[69] *Multicultural Citizenship*, *supra* note 30 at 172.
[70] Tully, *supra* note 29 at 191.

important "liberal" values even better than some liberal societies, doing so in their own ways, through their own processes and traditions.

In order to assess the problem of cultural diversity that underlies the previous discussion, Tully proposes what he calls "the three conventions of common constitutionalism: mutual recognition, continuity and consent."[71] Through these conventions, most of the problems usually referred to as the conflict between individual and collective rights in cultural minorities are tackled from a different perspective. Thus, for Tully mutual recognition implies, in the case of aboriginal peoples, their recognition as equal and self-governing nations, which stand at the same level as both the European nations which conquered them, and, for the same reason, the new nations currently existing within whose borders the aboriginal peoples are situated. This entails recognizing such peoples as independent nations, respecting, in consequence, their customs and cultures, their laws and forms of government. Also, this entails their position as partners in a confederation or a political union based on mutual consent rather than as merely conquered peoples. Hence, the problem of individual or collective rights within aboriginal nations changes radically. Following the three conventions of common constitutionalism it will not be the government, say of Canada or Venezuela, who will vest aboriginal peoples with rights. Instead, aboriginal peoples will decide what kind of rights they have within their territories and, in agreement with the country where they are located, aboriginal peoples will decide what set of rights against such country they must have. For this reason, the

[71] *Ibid.* at 116.

second convention is continuity, that is, the customs and laws of the aboriginal peoples continue to exist and must be respected.

The ideas of mutual recognition and consent lead to what Tully calls the "constitutional dialogue". In the constitutional dialogue, both parties (aboriginal peoples and the countries within whose borders they are located) are equally situated, recognizing their standing as independent nations and respecting each other's opinions without using coercion. Tully says that this kind of dialogue is only a manifestation of the old legal principle of *audi alteram partem*, since each party has the right to speak in its own language and the other is obliged to understand. The idea that lies behind the constitutional dialogue was very well expressed by Mohawk Chief Michael Mitchell when he said: "we shall each travel the same river together, side by side, but in our own boats. Neither of us will try to steer the other's vessel."[72]

The consequence of such dialogue is that aboriginal peoples are to be seen as self-governing nations, with sufficient independence as to regulate the rights and freedoms of their people. This is what Tully calls "diverse federalism". The underlying principle is that the conqueror has no rights over the prevailing form of government unless the conquered people consent to its alteration.[73] According to this view, the minority group will have some measure of sovereignty, and therefore the right to have the government they deem convenient for their people; they will be free to judge their own cases

[72] Quoted by Tully, *ibid.* at 128.
[73] *Ibid.* at 150.

according to their own laws. So the problem of individual rights within the aboriginal nations changes completely, since the judgment will not be made from a liberal perspective, using the laws and moral positions of the larger society, but from the aboriginal perspective. It is in their own ways, their own languages and understandings that the discussion about the individual situation of their members will take place.

Notwithstanding the foregoing, the previous ideas are connected with the view of collective rights expressed before. In addition to the idea that indigenous peoples are entitled to the survival of their distinctive culture in order to have a meaningful background against which to make their decisions on the best way to live their lives, there is the idea that respect for them as equal nations implies the continuity of their cultures and laws. The consequence is the recognition of the indigenous peoples' right to self-government, their recognition as independent nations. From such right or recognition stems the right to decide by themselves the situation of their own people, the recognition that the legal status of their people is decided by their own legal traditions. With respect to the problem of internal restrictions, it is indigenous peoples who will decide what sorts of restrictions are justified, according to their own concepts of justice; in turn, it is this concept that has to be taken into account by members of the larger society when judging such restrictions. The members of the larger society do not have any right to intervene, but only a duty to respect and accept the decisions taken by the minority. However, as Kukathas has pointed out, the larger society is under the duty to be open to any member

of those minorities who is willing to renounce to her or his cultural heritage and to integrate into the larger society. The right to disassociate must be guaranteed.[74]

The previous conclusions seem initially persuasive in understanding the relationship with indigenous peoples, especially since some indigenous values show a profound respect for the individual and her freedom. Once it is recognized that they have different forms to show respect for the individual (her autonomy and freedom), those ways being legitimate and successful, the mutual recognition and the prohibition of intervention seem to be the best solution. But what happens when the situation is different from that of an indigenous people? Is it not possible to argue that the three conventions also reflect particular cultures, so they might not be valid in every case? Once it is accepted that we have to analyze each culture based on its own outlook, is it not valid to deny whatever common ground of understanding, since everybody will sustain a biased approach? In a way, even though Tully says that he will avoid the imperialistic position, when he argues about the "liberal problem of undemocratic enclaves", his answer somehow tends to be that, in their own ways, aboriginal peoples are as democratic and liberal as liberal states; he affirms that "[t]he democratic goods of participation, free expression and reform are realized better for Aboriginal peoples in their culturally distinct forms of constitution."[75] One cannot help feeling released from any moral fear about violations of human rights in aboriginal nations.

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[74] See Kukathas, *supra* note 47 at 116.
[75] Tully, *supra* note 29 at 193.

Yet, Tully adds that this conclusion is insufficient because it does not address problems such as the persistence of male elites in power after the recognition of self-government rights to aboriginal peoples. He answers saying that the concept of sovereignty in contemporary constitutionalism entails that government be based on the consent of the people, that sovereignty is limited by international interdependency and that the division of power in confederal associations allows for drawing and innovating old legal traditions, bringing about, for example, the overthrowing of male elites from power. But, going back to the previous question, is it not possible for a given culture to deny these features of contemporary constitutionalism? Is it not possible to say that these features of contemporary constitutionalism are a new attempt to impose universal models in every culture?

The Taliban regime in Afghanistan poses a difficult problem. One cannot feel the same sympathy for the Taliban regime as the one felt for indigenous peoples in general (sympathy that allows for accepting their forms of government). It is difficult to accept that the Taliban deserve mutual recognition, consent or, worse, continuity, and that following their recognition, for instance, the situation of women in Afghanistan will somehow improve. It is impossible to say that, in their own ways, the Taliban are trying to achieve political virtues like political participation or freedom of expression. One could argue that their government is not legitimate according to the three features of contemporary constitutionalism. However, the Taliban could answer using the same framework, either by saying that in their culture participation or people's consent is not necessary, or by saying that the three features of contemporary constitutionalism are also

a form of intellectual imperialism, that violence is a legitimate part of their culture, or even that legitimacy is not a meaningful concept for them. The argument could go on infinitely.

Likewise, in Iran some journals and newspapers associated with the reformist party have been shut down and recently many well-known journalists have been imprisoned (after the reformist party's victory in the parliamentary elections in February, 2000), under the charge of trampling on revolutionary and Islamic principles.[76] The conservatives in Iran have justified these measures as necessary to save the revolution and the faith. One leader of the conservatives has said that "you cannot save Islam with liberalism and tolerance". Their point is that the government of Ayatollah Ali Khamenei is legitimate, not thanks to public support (as the reformists' victory showed), but because it represents the will of Allah. Its legitimacy comes from an act of faith: it represents the true Islamic principles. Therefore, their answer to the concept of sovereignty in contemporary constitutionalism would be that their government's legitimacy comes from a higher authority, and therefore they are allowed to suppress the freedom of their subjects, for by doing so they are only complying with Allah's will. According to them, when the people voted for the reformist party they were simply acting incorrectly, and the Islamic leaders are there to correct such a mistake. When one is faced with regimes such as the Taliban in Afghanistan or that of the Islamic Government of Iran, the multicultural argument seems at odds with our moral intuitions. We feel tempted to "steer the other's vessel".

[76] See "Saving the Faith" *The Economist* 356:8184 (August 19, 2000) 39.

Thus there is a question of balance which must be achieved. In general, I think that Tully's arguments are valid and appropriate, even considering the examples seen above. Although each culture can claim distinctiveness and particularity in its customs and traditions, there is always a basic common ground of understanding between human beings. For this purpose, it is possible to trace some ideas in Leibniz's metaphysics, in order to provide a powerful metaphor to understand, and perhaps in part theoretically justify, such common ground of understandings.[77] Thus, Leibniz explains in *The Monadology* that the "Monads" are "the true Atoms of nature, and, in fact, the Elements of things", and that they are independent from one another.[78] However, Leibniz states:

> 56. Now, this interconnection, relationship, or this adaptation of all things to each particular one, and of each one to all the rest, brings it about that every simple substance has relations which express all the others and that it is consequently a perpetual living mirror of the universe.
>
> 57. And as the same city regarded from different sides appears entirely different, and is, as it were, multiplied perspectively, so, because of the infinite number of simple substances, there are a similar infinite number of universes which are, nevertheless, only the aspects of a single one, as seen from the special point of view of each Monad.
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> 58. Through this means has been obtained the greatest possible variety, together with the greatest order that may be; that is to say, through this means has been obtained the greatest possible perfection.[79]

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[77] It is not my purpose here to embark on a study of Leibniz's metaphysics, not only because it would go beyond the purposes of this thesis, but also because such task would imply a thesis on its own. My idea is just to cast some light on the problem I'm dealing with, holding the hand of a great philosopher.

[78] G. Leibniz, *The Monadology* (Chicago: Open Court Publishing, 1902) at 251.

[79] *Ibid.* at 263. This idea is explained by Leibniz in a letter to Count Ernst von Hessen-Rheinfels (dated I/II February, 1686) in the following way: "[t]hat every individual substance expresses the whole universe in its own manner, and that in its full concept is included all its experiences together with all the attendant circumstances and the whole sequence of exterior events." G. Leibniz, *Correspondence Relating to the Metaphysics (Correspondence with Arnauld)* (Chicago: Open Court Publishing, 1902) at 69.

Hence, each Monad looks at the universe from its own perspective, but at the same time it has in it, in its inner nature, an expression of all the rest. Even though each Monad is different to the rest, at the same time they have something in common: they have in their own outlook an expression of the whole universe. From that common feature and looking from their own place, each Monad can know the rest without abandoning its inner perspective. We can use this approach as a metaphor to analyze relations between cultures. The dialogue between members of different cultures is possible because they are all formed of human beings (they are formed with the same sort of Monads) and therefore they can have a common ground of understanding. Each culture is not a closed world, but a "living mirror of the universe". They have representations, in their own perspectives, of the features present in the others. Even though they are different and distinctive, they also have a commonality; they reflect the same nature in different manners, seeing the same reality from different sides, each one from its own place.[80]

Thus the philosophy of Leibniz stands as a metaphor for a process whereby we try to account for both diversity and commonality. Applying that framework to the previous discussions, it is possible to say that the dialogue between cultures must be regulated by two concomitant principles. First, each party must recognize the value and distinctiveness of all the others, respecting their ways and their languages. Second, each party must recognize the existence of a common ground of understanding, to which, each one from its own perspective and endeavoring to learn the others' ways, they must agree.

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[80] For example, Stephen J. Toope points out: "Bien que le langage des droits de la personne soit d'origine occidentale, il est possible d'établir certaines analogies culturelles. N'est-il pas possible d'envisager une terminologie indigene, soit africaine ou asiatique, pour exprimer le respect des individus et des groupes?" S.J. Toope, "Cultural Diversity and Human Rights" (1997) 42 McGill L.J. 169 at 184.

This process attempts to avoid any kind of imperialism or ethnocentrism, but at the same time imposes the obligation on the different parties to reach a preliminary agreement on the common ground of understandings from where the discussion will be deployed. In this manner, the dialogue takes place recognizing that there is something in common which allows us to talk, without pretending to override the particular outlooks of each other. Thus, it respects the cultural plurality and at the same time establishes certain common patterns as a basis for the dialogue. The Supreme Court of Canada has a similar position to that just described:

> In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. (...) It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.[81]

The value of cultural membership Kymlicka has proposed as the basis upon which to ground minority cultures' rights provides a starting point in the search for a common ground of understanding. At this point Kymlicka's liberal ideas meet the multicultural concerns we have been describing. Cultural membership may be valuable both from a liberal point of view and from an indigenous point of view. If the dialogue is to lead to the achievement of recognition of indigenous rights within a liberal society, cultural membership certainly provides a firm basis for that purpose. Moreover, the value of cultural membership complies with the two mentioned conditions. First, cultural membership implies a respect for the distinctiveness and value of different societies.

[81] *R.* v. *Van Der Peet*, *supra* note 39 at 550.

Second, it is valuable for both cultures and allows respect for different outlooks. Recognition of indigenous peoples entails the recognition of the value of cultural membership, providing the ground for indigenous peoples' rights. In the second part of this thesis we will see how such a purpose is being accomplished in Venezuela through the reconciliation between indigenous peoples and the larger society.

II. Indigenous Peoples' Rights in Venezuela

On December 15, 1999, the people of Venezuela approved a new Constitution (Constitution of 1999),[82] the last in a series of political changes that Venezuela underwent during 1998 and '99. Mr. Hugo Chávez was elected President in December 1998. Afterwards, he called two more elections in order to select members for the Constitutional Assembly, whose purpose was to draft a new constitution. The draft presented to the people of Venezuela in the referendum of December 15, 1999 was approved. Many changes have been incorporated in the Constitution of 1999; however, what it is relevant here are the rights for indigenous peoples entrenched in the Constitution.

In the following sections, I will analyze the rights of indigenous peoples entrenched in the Constitution of 1999. This analysis will be based on the conceptual framework set forth in the previous chapter and on the case law regarding indigenous peoples' rights developed by the Supreme Court of Canada. The idea is to examine the meaning, scope and content of the new constitutional provisions regarding indigenous peoples' rights in the Constitution of 1999. Before addressing the new situation derived from its promulgation, I will briefly explain the legal situation of indigenous peoples in Venezuela before the Constitution of 1999.

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[82] See *Constitución de la República Bolivariana de Venezuela*, Official Gazette dated March 24, 2000, No. 5453 [hereinafter *Constitution of 1999*].

1. The Legal Situation of Indigenous Peoples in Venezuela prior to the Constitution of 1999

The main characteristic of the legal treatment accorded to indigenous peoples in Venezuela before the Constitution of 1999 was the desire to integrate them into the larger community of Venezuela. Thus, Article 77 of the Constitution of 1961 stated that the goal with respect to indigenous peoples was their gradual incorporation as individual Venezuelan citizens into the national society.[83] Textually, this Article stated: "the law will establish the exceptional regime required for the protection of the indigenous communities and their progressive incorporation into the Nation's life."[84] This provision was viewed as a premise by which the larger society of Venezuela could subdue or assimilate culturally distinct indigenous groups, impose upon them the dominant culture and incorporate them into the Venezuelan society. The provision was intended to eradicate indigenous cultures in order to turn indigenous peoples into common peasants or farmers.[85]

Article 77 of the Constitution of 1961 reflected a point of view with respect to indigenous peoples that had been present in the Venezuelan legal system since the country's independence from Spain in 1811.[86] For example, before independence, the indigenous communities had communal land titles called "*resguardos*". The *resguardos* were the

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[83] See *Constitución de la República de Venezuala*, Official Gazette dated January 23, 1961, No. 662.
[84] *Ibid.*
[85] E.g. see N. Arvelo-Jimenez, "The Political Struggle of the Guayana Region's Indigenous Peoples" (1982) I J. of Int'l Affairs 43 at 50.
[86] See J. L. Salcedo-Bastardo, *Historia Fundamental de Venezuela* (Caracas: UCV, 1972) at 274.

inalienable lands reserved for indigenous peoples. It was the indigenous form of landholding. However, in 1836 a law was passed with the purpose of dividing such *resguardos* into individually-held portions of full dominion and property.[87] This law established that the partition should be made in favor of each indigenous family living in the community in question, according to their numbers. The idea was to provide the indigenous peoples with individual property titles over their lands, as a way of respecting their property rights as citizens of Venezuela. The aim was to assimilate the indigenous peoples with the rest of the population, granting them the same rights as granted to every citizen. Full integration into the nation's economic life, through the granting of property rights, was seen as the best mechanism to protect indigenous peoples and help them to live a civilized life. Those measures were viewed as ensuring their cultural and human advancement, that is to say, as a method of raising them from a backward culture to a superior one.[88] This legislation, seen with the benefit of hindsight, facilitated the division of indigenous communal lands and led to the loss of those lands. Indigenous peoples lost their title over their traditional lands. As can easily be expected, the indigenous peoples living within the old *resguardos* had no chance against wealthier landowners, who bought the lands from them. Thus, in addition to the loss of indigenous peoples lands in the northern part of the country, the legislation led to the loss of their cultures and traditional ways of life.

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[87] See *Ley que ordena el repartimiento de los resguardos indigenas*, (1836) *Fuero Indigena Venezolano* (Caracas: Montalban, 1977) [hereinafter *Fuero Indigena*].

[88] See R. Kuppe, "The Indigenous Peoples of Venezuela and the National Law" (1987) 2 L. & Anthrop. 113 at 116 [hereinafter "The Indigenous Peoples of Venezuela"].

This pattern of legislation was to be followed throughout the whole nineteenth century. For example, in 1840 a Decree to civilize the indigenous peoples was passed with the purpose of settling and civilizing the indigenous peoples.[89] Article 5 of this Decree established that all members of the Goajiro ethnic group, located in the western state of Zulia, were prohibited from attempting to make reprisals for injuries or offences suffered, either within or outside the Goajiro territory, in clear contradiction with their traditional means of social control. The Decree also provided that any person caught violating the prohibition was as liable as any other citizen for taking justice into his own hands.[90] As in the case of land rights, the idea behind such legislation was to subject indigenous peoples to ordinary law, as a means of respecting their rights as Venezuelan citizens. Otherwise, it was thought, they would be discriminated against and treated without respect for their right of equal protection of the law.

The legislation concerning the *resguardos* was directed at those indigenous peoples who had settled in missions during Spanish times. There were other types of indigenous peoples, usually called tribes, whose main characteristic was their nomadic lifestyle. In 1915, a legal framework was established to be applied to these latter groups: the Missions Law (*Ley de Misiones*).[91] The basic aim of the Missions Law was to "settle" and "civilize" those tribes living in specific parts of the country (mainly in the south and west). In order to realize its goal, the State made arrangements with the Catholic Church to establish religious missions in those regions. The missions were vested with authority

[89] See *Decreto ejecutivo sobre reduccion y civilizacion de indigenas*, (1840) *Fuero Indigena*, *supra* note 87.
[90] See "The Indigenous Peoples of Venezuela", *supra* note 88 at 120.
[91] See *Ley de Misiones*, *Fuero Indigena*, *supra* note 87.

to maintain order among the indigenous peoples and with the task of settling and civilizing them. The missions were also vested with disciplinary power over the indigenous groups and with administrative powers related to land rights. From a social perspective, the missionary system has been described as leading to the total destruction of traditional settlement patterns for many indigenous tribal groups. For example, regarding the missions' educational system, Kuppe has observed that "civilizing has meant that curricula and materials were used in the missionary boarding-schools without any adaptation to the indigenous socio-cultural world. (...) An educational system like this gives the people no preparation at all for their life as future shifting-cultivators."[92]

Although the missions were in charge of protecting traditional indigenous lands, the missions system was not powerful enough to stop the invasions of formerly indigenous lands. For example, the Bari, an indigenous Chibcha-speaking group, who inhabit the tropical rainforest southwest of Lake Maracaibo in western Venezuela, lost approximately eighty five per cent of their traditional territory between 1900 and 1983.[93] As Lizarralde explains, the mission founded in 1945 in the Bari region was supposed to civilize and pacify the Bari. The mission opposed most of the new invasions by ranchers and multinational oil companies, but the mission was settled only after the major invasions had already taken place.

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[92] See "The Indigenous Peoples of Venezuela", *supra* note 88 at 128.

[93] See R. Lizarralde, *Indigenous Survival Among the Bari and Arhuaco: Strategies and Perspectives* (Copenhagen: IWGIA, 1987) at 28.

The case of the Bari ethnic group is a perfect example of how the application of alien legal concepts can be dangerous to an indigenous culture. Thus, with the lofty aim of treating indigenous peoples like other Venezuelan citizens, the government and other public organizations insisted on giving individual land titles to those Bari living outside their reserved land during the 1970s. In this way, it was thought, they would be treated like any Venezuelan farmer, with property rights over the lands they were cultivating. However, individual land ownership was an alien concept to the Bari culture, and results in each individual holding tracts of land much smaller than the area required for the traditional system of subsistence practiced by the Bari, including subsistence on an individual level. As a consequence, the application of the law governing land property rights only accelerated the process of acculturation and disintegration of the Bari by fragmenting the social unit of their communal lifestyle, which has an important cohesive and economic function in the Bari culture.[94]

Behind these attempts to acculturate and civilize indigenous peoples like the Bari was the idea that to treat them justly implied vesting them with the same rights as possessed by every Venezuelan. This point of view reflects the position that a system of individual rights applied in the same manner to every citizen, without paying attention to cultural differences, entails equalitarian treatment. It also reflects a certain ethnocentrism, since it was thought that what the indigenous peoples really needed was to enjoy the same rights and freedoms as those enjoyed by the larger society, not to adapt those rights to indigenous patterns of understanding. The aim was to equalize indigenous peoples with

[94] See *ibid.* at 32.

the rest of the society, based on the premise that such equalization implied adapting indigenous peoples to the larger society's culture and values. For this reason, they were vested with individual property rights over the land. Through their own individual land titles, they would have the same status (as landowners) desired by every farmer and peasant in the country.

This process of granting property rights to indigenous peoples began in 1960, with the enactment of the Agrarian Reform Law (*Ley de Reforma Agraria*).[95] The aim of this law was to eliminate the latifundium system that predominated in Venezuela, through the granting of property rights to small farmers over the lands they were occupying.[96] With respect to indigenous peoples, the law recognized and guaranteed to the indigenous populations that preserved their communal condition, the right to enjoy the lands, forest, and water that they occupied or that pertained to them in the places where they habitually lived.[97] Thus, indigenous land rights were established under the structure of the Agrarian Reform Law. Under the provisions of the Law, it was possible to take the lands of private owners if these lands were not being used for agricultural purposes, through a process of expropriation. However, the preferred types of lands subjected to the agrarian reform were those lands belonging to the Republic, the states or the municipalities (public lands). The lands granted to indigenous peoples through the agrarian reform were mainly lands that used to belong to the Republic. The Agrarian Reform Law thus granted to the

[95] See *Ley de Reforma Agraria*, Official Gazette dated March 19, 1960, No. 611.
[96] See R. Duque Corredor, *Derecho Agrario* (Caracas: Editorial Juridica Venezolana, 1985).
[97] See *Ley de Reforma Agraria, supra* note 95 Art. 2(d).

indigenous peoples a special right over the lands where they had traditionally lived or which had traditionally belonged to them. [98]

Therefore, the Agrarian Reform Law was used to establish a sort of indigenous land right. However, the legal procedure for granting non-indigenous titles established in the law was also applied to indigenous peoples. This application put considerable assimilating pressure on indigenous groups, because the land titles based on the agrarian reform were designed to fit the commercially-orientated cultivation pattern of non-indigenous farmers. Indigenous peoples receiving land titles in accordance with the Agrarian Reform Law were encouraged to establish themselves as agrarian co-operatives, with the purpose of tilling and trading. This process ignored the fact that, for indigenous peoples, cropping fields is only one component of economic activity within a broader economic system. This economic system needs enough space to select and cut new sites in the forest, and for hunting, fishing and gathering, activities that play an important role in subsistence. Aboriginal people needed enough territory in their economic system in order to avoid putting too much human pressure on the natural environment within their territories. However, the government, in granting communal land titles to indigenous peoples, did not consider those facts. The government did not take into account that uncultivated lands are a crucial part of indigenous economic life, and that such lands are fundamental for the survival of aboriginal cultural patterns, as the example of the Bari ethnic group shows.[99]

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[98] See R. Kuppe, "The Indigenous Peoples of Venezuela Between Agrarian Law and Environmental Law" (1997) 9 L. & Anthro. 244 at 248 [hereinafter "Between Agrarian Law and Environmental Law"].
[99] See *ibid* at 246.

It is important to mention that the Agrarian Reform Law states explicitly that national parks are not affected by it.[100] The effect of this disposition had an enormous impact on indigenous communities in Venezuela, since at least fifteen per cent of the indigenous population of Venezuela lives in national parks. This law implied that these indigenous peoples could not be granted land titles over the lands they occupied, and that their rights to exploit the land for their subsistence were somehow limited. The national parks regulation seemed to ignore the fact that indigenous peoples perceived themselves to be - and perhaps truly are- the guardians of the earth. The subsistence systems used by the indigenous peoples achieves an equilibrium with the environment without endangering the habitat. Indigenous peoples are perhaps the most environmental friendly peoples of the world. They have developed forms of economic subsistence that ensures their sources of food without damaging the environment.[101]

As can be seen from the previous examples regarding the extinction of the *resguardos*, the land rights provided for in the Agrarian Reform Law and the environmental legislation, the legal situation of indigenous peoples before the Constitution of 1999 was precarious. The main aim of all these legal provisions was to ensure the integration of indigenous peoples into the mainstream society and culture of Venezuela. This was seen as fair treatment, since through their integration they could enjoy the same rights as the rest of its citizens. Those laws also reflected a lack of awareness about the value of

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[100] See *Ley de Reforma Agraria*, *supra* note 95 Art. 28.
[101] See R. Kuppe, "Derechos Indígenas y Protección del Ambiente ¿Dos Estrategias en Contradicción?" (1998) 10 L. & Anthro. 244 at 248.

indigenous cultures and their fragility against the larger society. These views are clearly reflected in Article 77 of the Constitution of 1961. The fundamental point was to ensure egalitarian treatment, and indigenous peoples' cultures were considered as an obstacle to that objective.[102]

The situation began to change in the late 1980s. In 1986, a Commission for the National Indian Council of Venezuela was established, which led, four years later, to the founding of the National Indian Council of Venezuela (*Consejo Nacional Indio de Venezuela*).[103] The main issues tackled in the Council were the development of an indigenous movement in Venezuela with its proper self-understanding and, in general, the defense of the cultural identities of the several indigenous cultures in the country. This respect for the cultural identity of each indigenous ethnic group is evident in the process for electing the representatives of each group. Thus, even though they are required to elect such representatives democratically, the exact criteria for such election is not determined, allowing each group to reach a decision through its traditional means. The idea was to respect those groups where the concepts of majority voting or democratic representation are not present or are in contradiction with traditional methods of decision-making.[104]

Also, an Indigenous Law Project was introduced into the Congress by Alexander Luzardo, a Professor at the *Universidad Central de Venezuela*, in 1990.[105] The Project

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[102] See Arvelo-Jimenez, *supra* note 85 at 54.
[103] See R. Kuppe, "Recent Trends in Venezuela's Indigenist Law" (1996) 8 L. & Anthro. 161 at 167 [hereinafter "Recent Trends"].
[104] See *ibid.* at 168.
[105] See *ibid.* at 172.

addressed many areas of interest for indigenous peoples, such as protection of family life, religious freedom, ethno-medicine, land rights, nature conservation, traditional political structures, and so on. Even though the sole introduction of a project of law aimed to protect indigenous peoples was a step further in the recognition of their rights, specially in light of the legal uncertainty they were suffering, the Indian Council rejected the Project, arguing that an indigenist law should bring further legal protections than were already present in the Constitution. Their concern was that the Project did not adapt the fundamental rights entrenched in the Constitution to their particular cultural background and special socio-cultural situation. For example, even though freedom of religion is a right guaranteed in the Constitution, through the system of the missions the government was sponsoring a *de facto* religious indoctrination by Christian missionaries among indigenous peoples. They also argued that the system of education in the missions, where the needs of indigenous peoples and their languages were normally ignored, served to undermine some traditional indian beliefs and value systems.[106] Therefore, the argument behind the rejection of the Indigenist Law Project was that it failed to recognize the particular situation of indigenous peoples vis-à-vis the larger society.

According to what we established in the previous part of this thesis, the arguments raised by the Indian Council against the Project were sound and correct. What indigenous peoples needed was not to have their freedom of religion recognized, but to have the norms related to this freedom adapted to fit their special circumstances. Indigenous peoples in Venezuela have been subjected, for many reasons, to a process of

[106] See Arvelo-Jimenez, *supra* note 85 at 53.

acculturation and evangelization, through which many of them have lost their traditional beliefs, and in consequence, their culture. So the simple recognition of their freedom of religion is not sufficient to protect their culture. For example, although church and state have been separated since Venezuela's independence from Spain (1811), the Roman Catholic Church has enjoyed a special status in Venezuela, including the provision of funds for its activities. This policy is reasonable and sound: the Roman Catholic Church manages orphanages, old people's homes, hospitals, schools and many other charitable institutions. Furthermore, the majority of Venezuelans are Roman Catholic. However, this situation represents discrimination against other religions, and especially against indigenous religions in light of the work done in the missions. Therefore, the government has the duty to grant special protection and recognition to the religious beliefs of indigenous peoples, prohibiting for example evangelization in the missions, but at the same time, given the support and help that the missions give to indigenous peoples, guaranteeing their permanence.

As has been established, the legislation regarding indigenous peoples in Venezuela prior to the Constitution of 1999, was marked by attempts to integrate them into the larger society. It would be anachronistic to criticize or judge from our moral point of view those ideas. However, with the benefit of hindsight it is now possible to analyze the mistakes embedded in a previously dominant set of ideas and determine ways to repair the damage done. To treat indigenous peoples justly does not imply an equal treatment in comparison with the rest of Venezuelan citizens. On the contrary, what they need is to be treated differently, in a way that respects their cultural identities. Like any other citizen,

they have rights derived from their cultural membership. However, since indigenous cultures in Venezuela are extremely fragile and in danger of disappearing,[107] and have been subjected to a process of acculturation, the protection they need exceeds the normal scope of cultural rights. In the next section I will analyze how the newly indigenous peoples' rights entrenched in the Constitution of 1999 meet those needs.

2. The Indigenous Rights Entrenched in the Constitution of 1999

The Constitution of 1999 is the first Venezuelan constitution to entrench the rights of indigenous peoples. Formerly, marginal references, such as the one in Article 77 of the Constitution of 1961, were the only legal references that indigenous peoples received. With the promulgation of the new Constitution the whole situation has changed utterly, since the rights of indigenous peoples have been constitutionally recognized and enshrined and therefore are shielded from legislative intervention, at least in relation to their core areas. In the following, I will analyze indigenous peoples' rights as established in the Constitution of 1999, to determine their meaning and scope.

In the analysis of indigenous rights in Venezuela I will use the case law developed by the Supreme Court of Canada, since it reflects to a large extent the approach towards minority cultures' rights I have explained in the first part of this thesis. Additionally, it must be noted that, since the dispositions regarding indigenous rights in the Constitution

[107] See Lizarralde, *supra* note 93 at 35.

of 1999 are necessarily general for being constitutional dispositions, there is a broad scope for their interpretation. For this reason, in interpreting the dispositions regarding indigenous rights in the Constitution of 1999, I will rely on the balanced approach described above.

A. The Constitutional Recognition of Rights for Indigenous Peoples

Article 119 of the Constitution of 1999 establishes that the State shall recognize the existence of indigenous peoples and communities, their social, economic and political organization, their cultures, customs, languages and religions.[108] It seems as if there was a need to recognize the existence of indigenous peoples, which might sound illogical and unnecessary. However, having witnessed the legal uncertainty that indigenous peoples suffered before the promulgation of the Constitution of 1999, such recognition appears to have been a necessity.

As we saw in the last section, indigenous peoples have suffered from the threat of assimilation into the larger society of Venezuela for many years. Many indigenous ethnic groups have been assimilated and have lost their cultures and traditions. One of the

[108] Article 119 textually establishes: "El Estado reconocerá la existencia de los pueblos y comunidades indígenas, su organización social, política y económica, sus culturas, usos y costumbres, idiomas y religiones, así como su hábitat y derechos originarios sobre las tierras que ancestral y tradicionalmente ocupan y que son necesarias para desarrollar y garantizar sus formas de vida. Corresponderá al Ejecutivo Nacional, con la participación de los pueblos indígenas, demarcar y garantizar el derecho a la propiedad colectiva de sus tierras, las cuales serán inalienables, imprescriptibles, inembargables e instransferibles de acuerdo a lo establecido en esta Constitución y la ley." *Constitution of 1999, supra* note 82, art 119. It is important to mention that when the Constitution of 1999 refers to the State, it is including the Executive, Legislative and Judicial branches of both the Federal and Provincial Governments, and also the rest of public institutions, including municipalities.

causes of that situation has been the constant denial in legal texts of the existence and importance of indigenous peoples. The lack of recognition of their existence, and therefore of their cultures, traditions and uniqueness, has accelerated their acculturation.[109] For this reason, with regard to indigenous peoples, the constitutional recognition of their existence is perhaps the most important part of the Constitution of 1999. What this means is that, as of the promulgation of the Constitution, all the indigenous ethnic groups living within the boundaries of Venezuela are recognized as distinct communities, with distinctive cultures and organizations. Moreover, this recognition of indigenous peoples' existence serves as a means of reconciliation between Venezuelan society and the indigenous peoples. Even though it does not erase the past and the sufferings of indigenous peoples in Venezuela, it does reflect the commitment of the Venezuelan society to repair what was done and to build a new society in harmony with its ancestral peoples. A similar desire has been expressed by the Supreme Court of Canada in reference to section 35(1) of the *Constitution Act, 1982*:[110]

> Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained.[111]

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[109] See G. Moron, *A History of Venezuela* (London: George Allen, 1964) at 24-26.
[110] See *Constitution Act, 1982*, *supra* note 16.
[111] *R.* v. *Gladstone*, [1996] 2 S.C.R. 725 at 774.

There are currently twenty eight different indigenous ethnic groups living in Venezuela, with a total population of approximately 315,800 people.[112] Among them there are very large groups like the Goajiros or Wayuu, whose population accounts for approximately 170,000 individuals. However, most of the ethnic groups are relatively small, ranging, for example, from ethnic groups like the Warao (population 24,000) to the Bari (population 1,500). Some ethnic groups, such as the Goajiros, are well integrated into the larger society, most of them speaking fluent Spanish, while at the same time keeping their own traditions and language. Others groups are extremely isolated and live in pretty much the same manner as before the arrival of the Spaniards in the sixteenth century, like, for example, the Yanomami ethnic group (whose population is around 15,000). The Yanomami live in the south of the country, well inside the Amazon jungle, protected by and adapted to its environment. Although some institutions had previously recognized the distinctiveness of some of these twenty eight ethnic groups,[113] prior to the Constitution of 1999 they did not have a real legal status. This is why it is so important that the fundamental legal document of the country has acknowledged the existence and distinctiveness of indigenous peoples in Venezuela.

The question is what legal effects result from the recognition of the existence and distinctiveness of indigenous peoples. Such recognition is, by itself, a big step forward in the fight for indigenous peoples' rights, for the reasons stated above. However, there are other legal consequences derived from the recognition. First of all, when the Constitution

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[112] See *Censo Indigena de Venezuela. Oficina Central de Estadistica e Informática* (Caracas: OCEI, 1999).
[113] For example, in 1979 the Ministry of Education issued a Decree on Intercultural Bilingual Education, and a program with bilingual schools and text books was implemented. See "Recent Trends", *supra* note 103 at 166.

establishes that the State shall recognize the existence and culture of the indigenous peoples, it means that they legally constitute distinct cultures within Venezuela. Therefore, they have the right as Venezuelans and as members of indigenous communities, to keep their cultures and traditions, and, perhaps more important still, they have the right to be protected against attempts to integrate them into the larger society.

The recognition of the distinctiveness of the indigenous cultures in the Constitution entails the right to be free from assimilation and acculturation. In other words, the right to the survival and preservation of indigenous cultures stems from the fact that they are recognized as distinct cultures within Venezuela. This is why Article 119 includes the recognition by the State not only of the existence of indigenous peoples, but also of their political, economic and social organization, their languages and religions, and their cultures and customs. Once it is acknowledged that within a society there are distinct cultures with features different from those of the larger society, then it must be accepted that these minorities have a right to preserve their cultures and traditions. Hence, the recognition of distinctiveness implies, for indigenous peoples, the collective right to preserve their cultures and the collective right to be protected against any attempt to assimilate them into the larger society.

The content of these collective rights will vary in accordance with the particular circumstances of each indigenous ethnic group.[114] For example, ethnic groups like the

[114] The Supreme Court of Canada has stated that "the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has

Yanomami need more protection against external influences than bigger integrated groups like the Goajiro. The Yanomami live in a remote area and have kept their culture almost intact. Still, their culture is very fragile, as it is easily spoiled by external influences. In this case, the State has the duty to protect them from those external forces, for example, by limiting the influence of the missions on the education of their children, and fighting against the illegal Brazilian miners who contaminate their environment.[115]

As we saw in the first part of this thesis, collective rights for cultural minorities (such as Venezuelan indigenous peoples) are necessary in order to do justice to their particular culture and circumstances. For example, the Civil Code establishes a whole regime for marriage and kinship that is framed in accordance with the moral and social standards of the larger society of Venezuela.[116] However, this regime is completely unknown and strange to some indigenous ethnic groups. For example, the Piaroa ethnic group (who live in the southern part of the country) has very specific and complicated customs related to marriage and kinship that are, in certain instances, at odds with those established in the Civil Code. Under the Piaroa's system of kinship, marriage between certain kinds of relatives, prohibited under the Civil Code rules, is nevertheless allowed. This system reflects the social and cultural environment where they live and which has been developed since ancestral times.[117] As we have seen in the first chapter, to demand

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already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interest aboriginal rights are intended to protect relate to specific history of the group claiming the right. Aboriginal rights are not general and universal: their scope and content must be determined on a case-by-case basis." *R.* v. *Van Der Peet, supra* note 39 at 559 (Emphasis original).

[115] See Chagnon, *supra* note 34 at 198. See also S. Kellman, "The Yanomamis: Their Battle for Survival" (1982) I J. of Int'l Affairs 15.

[116] See *Código Civil de Venezuela*, Official Gazette dated July 26, 1982, No. 2990.

[117] See J. Kaplan, *The Piaroa, A People of the Orinoco Basin* (Oxford: Clarendon Press, 1975) at 127-145.

compliance from the Piaroa to the marriage rules established in the Civil Code would be unjust. The marriage rules established in the Civil Code reflect the moral views upheld by the larger society. For the majority, following these rules does not go against its culture and morality but encourages and affirms them. But for the Piaroa, those rules would imply a complete change to their ancestral customs, and also a cultural change for which they are unprepared. Marriage and kinship are very important features of the Piaroa's culture, and have a special meaning for them. They *need* their ancestral system of kinship and marriage to make sense of their family life. To follow the marriage and kinship rules of the Civil Code would entail for the Piaroa not only losing their culture, but also living in accordance with social rules having no meaning for them. An application of the Civil Code's rules regarding marriage and kinship to the Piaroa would be unjust. First, it would entail discrimination: the larger society would have its moral family system upheld by the law whereas the Piaroa would, in effect, have theirs abolished. Second, while the majority feels at ease with the system, the Piaroa would lose their family values and would be constrained by a strange and meaningless system.

One could ask why, under the same reasons, should the rule allowing only monogamy established in the Civil Code be applied to those groups whose religion allows polygamy, like Muslims for example. Are not they in a similar situation to that of the Piaroa? The answer is that, in reality, they are not in the same moral situation as the Piaroa. Although a group such as the Muslims is entitled to certain kind of polyethnic rights (because they are a cultural minority), they have chosen to live in Venezuela, and therefore, when they

immigrated they tacitly consented to be bound to the laws of the country.[118] The moral standing to claim cultural rights pertains to the Piaroa and the rest of indigenous ethnic groups in Venezuela, because they were in the territory of Venezuela before the arrival of the Spaniards. Even though both groups are entitled, being cultural minorities, to certain cultural rights, the scope of such rights is much broader in the case of indigenous peoples (as Article 119 of the Constitution of 1999 recognizes and affirms), because they did not consent to be bound by Venezuelan laws until the approval of the new Constitution.

As established before, rights are grounds for imposing duties on others, and there has to be an interest morally relevant to justify imposing duties on others. Rights, in this vein, must have a moral justification. Indigenous peoples have a moral standing to hold cultural rights because they are a cultural minority. But both the proper justification and scope of these rights is determined by their position as prior occupants and possessors of the territory now known as Venezuela. Their moral standing comes both from the fact that they are cultural minorities (for the reasons stated above) and from the fact that they are the original inhabitants of their lands. This double moral standing accounts for the existence of rights like the right to be exempted from the Civil Code's rules on marriage and kinship. Similarly, the Supreme Court of Canada has established that the doctrine of aboriginal rights is based on the fact that aboriginal peoples were living in America before the arrival of the Europeans:

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[118] See *Multicultural Citizenship*, *supra* note 30 at 176.

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[119]

This reasoning is perfectly applicable to the Venezuelan case. The indigenous peoples currently living within the Venezuelan boundaries were there before the arrival of the Spaniards. They had been living and developing their cultures there for centuries before the Discovery.[120] This fact is expressly recognized in the Constitution of 1999, when it states that the indigenous peoples are cultures of ancestral roots (Article 126).[121] Hence, the Constitution of 1999 has recognized the ancestral presence of indigenous peoples in Venezuela and the rights that for that reason morally belong to them.

B. Indigenous Self-Government Rights

Article 119 establishes that the State shall recognize the existence and social, political and economic organization of indigenous peoples, as well as their religions, customs and languages. Thus, the Constitution of 1999 has entrenched the right to self-government

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[119] *R.* v. *Van Der Peet, supra* note 39 at 538-539 (Emphasis original).

[120] See C. Siso, *La Formación del Pueblo Venezolano* (Caracas: Academia Nacional de la Historia, 1950) at 35-58.

[121] Article 126 states: "Los pueblos indígenas como culturas de raíces ancestrales forman parte de la Nación, del Estado y del pueblo venezolano como único, soberano e indivisible. De conformidad con esta Constitución tienen el deber de salvaguardar la integridad y la soberanía nacional.
El término pueblo no podrá interpretarse en esta Constitución en el sentido que se le da en el derecho internacional." *Constitution of 1999, supra* note 82.

for indigenous peoples in Venezuela. This right to self-government is the logical derivation of their double moral standing to claim indigenous peoples' rights: first their position as national minorities;[122] and second, their position as original occupants of the lands now belonging to Venezuela.

The exact content of those self-government rights for each indigenous ethnic group in Venezuela will greatly depend on their particular circumstances and history. It is the particular political organization of each indigenous ethnic group that has been recognized in the Constitution of 1999. Hence, the content of the self-government rights of each group will depend on their peculiar social and political organization. But the scope of the right to self-government has been clearly established by the Constitution: indigenous peoples have the power to decide by themselves their social, political and economic organization. They also have the power to decide over their religious matters, their language and the education of their people. And, as we will see in the next section, they also have rights over the lands on which they have traditionally lived.

It is impossible to establish here what the self-government rights entrenched in the Constitution of 1999 will entail for each indigenous ethnic group. Only time and the development of constitutional dispositions will set the exact boundaries of those self-government rights. However, it is obvious that the Constitution of 1999 has already

[122] Kymlicka describes a country with national minorities as "a country which contains more than one nation is, therefore, not a nation-state but a multination state, and the smaller cultures form 'national minorities'. The incorporation of different nations into a single state may be involuntary, as occurs when one cultural community is invaded and conquered by another, or is ceded from one imperial power to another, or when its homeland is overrun by colonizing settlers." *Multicultural Citizenship, supra* note 30 at 11.

abrogated (*ipso iure*) some of the legal texts described in section 1 of this chapter regarding the prior legal situation of indigenous peoples. Thus, some dispositions of the Missions Law (enacted in 1915 and still in force) are now unconstitutional. For example, the disciplinary powers vested on the missions to decide whether an indigenous offender should be subjected to the public criminal law or to the sanctions applied by the missions, is no longer permissible under the new Constitution.[123] Also, the educational powers that missions used to have are now subject to the approval of each ethnic group or community where the mission is settled. In general, every law that deals with indigenous peoples' organization is now subject to the parameters established in the Constitution, and must be viewed in the light of the self-government rights outlined therein.

Indigenous peoples are now more free to determine and preserve their social and political organizations without the interference of any public or private institution. Probably areas such as commerce, communal property of the land and family law will be immediately affected by this new system, and the courts will be in charge, if thus requested by indigenous peoples, of enforcing their legal traditions related to those areas. The future of the missions is now in their hands. They will decide whether the missions can stay within their territories and how they will work. Also, the judicial system will have to take into account the indigenous perspective in order to decide legal questions regarding indigenous peoples. The courts will be obliged to apply and enforce, when the case so necessitates and in accordance with the circumstances of each case, the legal customs and traditions of indigenous peoples. A good example of the application of the indigenous

[123] See "The Indigenous Peoples of Venezuela", *supra* note 88 at 123.

perspective in the judicial system was recently given by the Supreme Court of Canada when it stated that in sentencing aboriginal offenders, the sentencing judge must pay attention to the unique circumstances of aboriginal peoples. In order to do so, the Court stated that the sentencing judge must take into account, among other things:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[124]

However, it is important to bear in mind that the self-government right vested in indigenous peoples is limited by and can be exercised only within the Venezuelan system of law. Thus, Article 126 of the Constitution of 1999 states that indigenous peoples are part of the Nation, State and people of Venezuela, which is defined as sovereign and indivisible.[125] Although this Article may be interpreted as denying self-government rights, I think the correct meaning that must be assigned to it is that indigenous self-government rights are limited by the Constitution and laws of Venezuela and can be exercised only within the boundaries of the country. That is why Article 126 also states that the term "people" in the Constitution cannot be interpreted using the meaning it has under international law. In relation to the limits of indigenous self-government rights, the following remarks about Canadian law are perfectly applicable to the Venezuelan case:

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[124] *R* v. *Gladue*, [1999] 1 S.C.R. 688 at 724. See also *R.* v. *Wells*, [2000] 1 S.C.R. at 234.
[125] See *Constitution of 1999*, *supra* note 82, Art. 126.

> Under this view, First Nations possess inherent and sovereign authority over their own affairs, which does not owe its existence to the Indian Act or other legislation. This Aboriginal right of self-government has been entrenched in section 35 of the Constitution Act, 1982. However, as with the Federal and Provincial governments, the powers of aboriginal governments are limited in scope and can be exercised only within the context of the Canadian Confederation.[126]

Indigenous government will be, in this way, limited by the Venezuelan laws like any other government (the National Executive and the States of the Republic). But in their area of jurisdiction, they are absolutely sovereign, and their decisions are binding. Therefore, it is possible to say that the new Constitution has created a *de facto* type of federation. The Constitution has created a new level of government in Venezuela, which has its own areas of jurisdiction and powers, but which is also limited by the Constitution and the laws. The scope of such indigenous jurisdiction is set out in Articles 119, 121, 123 and 125 of the Constitution of 1999. I will analyze Articles 121 and 123 in the next sections.

Along with self-government rights, Article 125 of the Constitution of 1999 states that indigenous peoples have the right of political participation, and that the State shall guarantee indigenous representation in the National Assembly and also in the provincial and municipal legislatures where indigenous communities are located. Indigenous peoples have the right to group representation in the legislative branch of each level of the Venezuelan government (national, provincial and municipal levels).[127] This

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[126] B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 262.

[127] For a good analysis on group representation see *Multicultural Citizenship*, *supra* note 30 at 131.

constitutional provision has already been applied in the Electoral Law (*Estatuto Electoral del Poder Público*), which regulated the national elections held on July 30, 2000.[128] Articles 6, 7 and 8 of the *Estatuto* established that indigenous peoples were allowed to elect three members to the National Assembly, to the Provincial Legislative Councils and to the Municipal Councils through their traditional methods of decision-making.

It is important to note that the members of indigenous ethnic groups, like individual Venezuelan citizens, have had political rights since the promulgation of the first Venezuelan Constitution in 1811.[129] What they have acquired in the Constitution of 1999 is their right to participate in politics *as a group*; they have been granted the collective right of political participation. However, the indigenous group representation in the National Assembly can be easily outvoted given its number (three members out of 165). Even though not established in the Constitution of 1999, I think it would be possible to grant a veto right for all matters directly affecting indigenous peoples to their group representation, in order to balance their relative power, given the rights to self-government and the scope of that jurisdiction in the Constitution of 1999.

C. Indigenous Land Rights

We have already seen that since the abrogation of the *resguardos* system in the nineteenth century until the enactment of the Agrarian Reform Law in 1960, the

[128] See *Estatuto Electoral del Poder Público*, Official Gazette dated February 3, 2000, No. 36,884.
[129] See Moron, *supra* note 109 at 93.

indigenous peoples of Venezuela did not have any communal title over their lands. The only title they could have was an individual property right, like any other Venezuelan citizen. As we also saw, lands rights based on the Agrarian Reform Law are derived from the Government, and are not considered as "indigenous rights".[130] Therefore, the rights over the lands indigenous peoples have under the Agrarian Reform Law system did not resemble the common law concept of Aboriginal Title.[131]

This situation has been radically changed by the Constitution of 1999. Article 119 establishes that the State shall recognize indigenous peoples' original rights over the lands they traditionally and ancestrally occupy, in order to develop and guarantee their forms of life.[132] With these words, the Constitution of 1999 has returned to indigenous peoples their original rights over the lands they occupy. It is possible then to say that indigenous peoples in Venezuela have regained a proper indigenous title over their lands.

Even though it constitutes an indigenous title, it still does not include all the features that characterize the common law concept of Aboriginal Title. Both concepts have a common core: the title is a legal right derived from indigenous peoples' historic occupation of their tribal lands,[133] which at the same time attempts to recognize the ultimate sovereignty of the "Western" government. Thus, the Constitution of 1999 expressly states that

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[130] See "Between Agrarian and Environmental Law", *supra* note 98 at 251.
[131] For an explanation of the concept of aboriginal title see B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar. Rev. 727 at 741 [hereinafter "Understanding Aboriginal Rights"].
[132] Article 119 textually establishes: "El Estado reconocerá la existencia de los pueblos indígenas (...) así como su hábitat y derechos originarios sobre las tierras que ancestral y tradicionalmente ocupan y que son necesarias para desarrollar y garatizar sus formas de vida." *Constitution of 1999 supra* note 82.
[133] See "Understanding Aboriginal Rights", *supra* note 131 at 729.

indigenous peoples have "original rights" over the lands they occupy. This phrase means that their right is based on the fact that they were occupying those lands before the arrival of the Spaniards and, therefore, before any claim of sovereignty was made by the Spanish Crown or the Republic of Venezuela after its independence. In that sense, the statement made by the Supreme Court of Canada is relevant:

> That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law (...) Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.[134]

However, in the Venezuelan case, the original right has been *returned* to the indigenous peoples, because it had been thoroughly extinguished by the land system in force before the promulgation of the Constitution of 1999. The Law on Fallow Lands (*Ley de Tierras Baldias y Ejidos*) establishes in Article 1 the concept of fallow lands (*tierras baldias*).[135] *Tierras baldias* constitute all territories not subject to individual property titles that pertain to the Republic and are at the disposal of the national administration. The legal concept of *tierra baldia* has extinguished *ipso iure* whatever communal or indigenous title indigenous peoples may have had before. Hence, the Constitution of 1999, in recognizing the original title of indigenous peoples over their lands, has actually returned to them that right.

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[134] *Delgamuukw* v. *B.C.*, *supra* note 40 at 1082 (Emphasis original).
[135] See *Ley de Tierras Baldias y Ejidos*, Official Gazette dated August 19, 1936.

Brian Slattery explains that in Canada, when the British Crown imposed its rule on North America and offered its protection to aboriginal peoples, it also accepted that they would retain their lands, their political institutions and customary laws, unless the terms of the treaties ruled this out or legislation was enacted to the contrary.[136] This is the common law doctrine of aboriginal title and is the base of native landholding in North America.[137] In Venezuela the situation is completely different, because the Spanish Crown (*la Corona*) did not offer its protection to the indigenous peoples. Instead, *la Corona* conquered the territory now comprising Venezuela and claimed absolute sovereignty over it.[138] Then, after its independence, the Republic of Venezuela also claimed absolute sovereignty over the same territory, under the legal principle *uti possidetis iuris* (what you possessed you shall continue possessing). In this way, the Republic of Venezuela claimed to have acquired sovereignty over the former territory of the Spanish province known as *Capitanía General de Venezuela*,[139] and the indigenous peoples lost their titles over their lands, and their political institutions and customary laws were formally abolished. For this reason, the Constitution of 1999 has recognized the indigenous peoples' original rights over the lands they occupy, and has in consequence returned to them such title, which was claimed to have been extinguished according to Venezuelan law.

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[136] See"Understanding Aboriginal Rights", *supra* note 131 at 736.
[137] *Ibid.* The Supreme Court of Canada rejected this doctrine with respect to French Colonization in New France, noting *inter alia* that such a doctrine would create a large degree of injustice and was inconsistent with Section 35 of the Constitution Act, in *R.* v *Adams* [1996] 3 S.C.R. 101 and *R.* v *Cote* [1996] 3 S.C.R. 139.
[138] See Moron, *supra* note 109 at 33-42.
[139] See *ibid.* at 105-106.

Now, since indigenous land rights have been entrenched, the next issue is the determination of the scope of those rights and the lands upon which they are exercised. Article 119 establishes that it is responsibility of the National Executive, with the participation of indigenous peoples, to delimit and guarantee the collective property rights that belong to them. The National Executive is in charge of carrying out the delimitation of indigenous lands, and indigenous peoples are entitled to participate in that process. Also, Article 119 establishes that such lands shall be inalienable, not subject to be acquired by prescription, not seizable and not transferable.[140]

The limits of these processes of demarcation will be set out in a special law, which will be enacted by the National Assembly. However, the Constitution has already set some limits. As we saw, Article 119 states that indigenous peoples have collective property rights over the lands they 'occupy'. This means that the demarcation will consider only those lands currently occupied by indigenous peoples, not those they used to occupy and lost. For example, the Bari ethnic group is not entitled to recover the lands they have lost, which amounts to eighty five per cent of their traditional lands. Therefore, although the Constitution of 1999 reverses the unjust appropriation by the Republic of indigenous lands (through the concept of *tierras baldias*), it does not have a retroactive effect. Indigenous peoples are entitled to maintain the lands they currently occupy, with the legal certainty of their collective property rights.

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[140] Article 119 textually states: "Corresponderá al Ejecutivo Nacional, con la participación de los pueblos indígenas, demarcar y garantizar el derecho a la propiedad colectiva de sus tierras, las cuales serán inalienables, imprescriptibles, inembargables e instransferibles de acuerdo a lo establecido en esta Constitución y la ley." *Constitution of 1999*, *supra* note 82.

The direct effect of the entrenchment of indigenous land rights is, nonetheless, very important. Indigenous peoples will not have to acquire individual property rights over their lands to maintain them, nor will they have to apply for a collective title under the Agrarian Reform Law, as explained before. Indigenous land rights, being constitutionally entrenched, are superior to and abrogate any law contradicting them. For instance, regulation concerning national parks will no longer prevent indigenous peoples from employing their economic practices within the parks or from having rights over those territories. Indigenous peoples will no longer be threatened with the reduction of their lands, which has been their major concern. Finally, the relevant indigenous communities must be informed and consulted before the economic exploitation of natural resources within indigenous lands can be carried out by the State.[141]

D. Indigenous Cultural Rights

The Constitution of 1999 is more detailed with respect to indigenous cultural rights than with respect to land or self-government rights. Thus, Articles 121 through 124 of the Constitution of 1999 are dedicated to cultural rights. In general, they establish the right to maintain and develop the cultural identity of indigenous peoples, the right to maintain and promote indigenous economical practices, the intellectual property right over indigenous traditional knowledge and, finally, the role as protector of those cultures by

[141] Article 120 states: "El aprovechamiento de los recursos naturals en los hábitats indígenas por parte del Estado se hará sin lesionar la integridad cultural, social y económica de los mismos, y está sujeto a previa información y consulta a las comunidades indígenas respectivas. Los beneficios dee este aprovechamiento por parte de los pueblos indígenas están sujetos a la Constitutión y a la ley." *Ibid.*

the State. Even though it is important that the Constitution of 1999 has detailed some cultural rights belonging to indigenous peoples, those rights are nonetheless the necessary derivation of the recognition of distinctive cultures as established by the Constitution. Therefore, the cultural rights entrenched in the Constitution are not a full list of such rights. Only time and the particular cases of each of the 28 ethnic groups existing in Venezuela will set the content and scope of their cultural rights.

The core cultural right of indigenous peoples is the right to preserve their distinctive cultures and social conditions. This includes not only cultural practices, but also all social practices that form their ways of life. The idea is to give them the opportunity to live in viable societies, where their social and cultural understandings are supported and valuable. Article 121 states that indigenous peoples have the right to maintain and develop their ethical and cultural identity, their values, spirituality and sacred places.[142] The exact content of these rights will be determined by the particular circumstances of each group. As the Supreme Court of Canada has stated "the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country."[143] Indigenous peoples will have the same core right to the preservation of their cultures, while the duties of the State and the exact content of their cultural rights will vary in accordance with the particularities of each case.

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[142] Article 121 states: "Los pueblos indígenas tienen derecho a mantener y desarrollar su identidad étnica y cultural, cosmovisión, valores, espiritualidad y sus lugares sagrados y de culto. El Estado fomentará la valoración y difusión de las manifestaciones culturales de los pueblos indígenas, los cuales tienen derecho a una educación propia y a un régimen educativo de carácter intercultural y bilingüe, atendiendo a sus particularidades socioculturales, valores y tradiciones." *Ibid.*

[143] *R.* v. *Gladstone*, *supra* note 111 at 769.

It must be noted that the cultural rights of indigenous peoples are collective rights in the sense specified before. These rights are collective because they are grounded on the collective interest of the members of each indigenous ethnic group to preserve their culture. The sole interest of one indigenous person does not count as a sufficient reason to impose duties on others; instead, it is the shared interest of the members of each ethnic group that provides the reason. The culture thus preserved is a participatory good, because each member needs the community in order to enjoy its benefits.[144]

Now, even though the content of the indigenous cultural rights will be determined on a case-by-case basis, it is possible to establish some limits to these rights. Following the Canadian experience, it may be affirmed that the limits on cultural rights are those marked by the distinctive character of the cultural or social practice in question. Indigenous peoples have the right to preserve their distinctive cultures in order to have viable societies in which to live. Hence, the right protects such aspects of their cultures that are distinctive, and that are significant and relevant to their culture. Only those features of indigenous cultures that define them and make them distinctive are protected. The Supreme Court of Canada has pointed out these limits:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or

[144] The Supreme Court of Canada has stated that "fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group." *R.* v. *Sparrow*, *supra* note 41 at 1112.

> she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly *made the society what it was.*[145]

In addition, the Supreme Court of Canada has established that the practices, customs and traditions relevant to identify the aboriginal rights are those that existed prior to contact with Europeans.[146] The Court expressly established that the relevant time period that a court should consider in identifying practices, customs and traditions that constitute aboriginal rights is the period prior to the contact between aboriginal and European societies, because "it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans (...) it is to that pre-contact period that the courts must look in identifying aboriginal rights."[147]

This latter limitation on indigenous cultural rights pointed out by the Supreme Court of Canada is not applicable to the Venezuelan case. Indigenous peoples' collective rights

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[145] *R.* v. *Gladstone*, *supra* note 111. In this case, the Court, at 745, gave an example of a defining feature of a culture: "The facts as found by the trial judge, and the evidence on which he relied, support the appellants' claim that exchange of herring spawn on kelp for money or other goods was central, significant and defining feature of the culture of the Heiltsuk prior to contact. Moreover, Those facts support the appellants' further claim that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk." See also *R.* v. *Van der Peet*, *supra* note 39 at 553.

[146] See *R.* v. *Van der Peet*, *supra* note 39 at 554. See also *R.* v. *Gladstone*, *ibid.* at 548. Even though the pre-contact test has been severely criticized in Canada (and was the subject of two dissenting opinions in *Van der Peet*), it is not my purpose here to make reference to such a problem. I am using Canadian cases here only as a means to analyze Venezuelan indigenous rights. However, it must be noted that the Supreme Court of Canada in *Delgamuukw* v. *British Columbia* stated: "A concrete application of the first principle can be found in *Van der Peet* itself, where I addressed the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). However, given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) "conclusive evidence from pre-contact times about the practices, customs and traditions of their community". *Supra* note 40 at 1066.

[147] *Ibid.* at 555.

stem from the fact that they were the original occupants of the current Venezuelan territory. As we established, indigenous peoples' rights are derived from the fact that they were there before the arrival of the Spaniards. For this reason, they are entitled to special collective rights. Notwithstanding, the *content* of these rights should not be determined by that fact, but should be determined by their identity-conferring commitments, by the characteristics that define their distinctive cultures. It does not matter whether the distinctiveness of some traditions or customs of their cultures were developed after their contact with European societies. On the contrary, such contact might have had decisive effects on indigenous cultures that now form part of their distinctiveness. Some distinctive features of indigenous peoples' cultures may have resulted precisely from their contact with Europeans cultures, and may have been developed as a defense against that contact. It is possible that current characteristics of indigenous peoples' cultures are framed by their contact with Europeans, and are now an integral part of their customs and way of life.

Rights for minority cultures are derived from the importance of cultural membership, and from the importance their members place on their cultures' protection and preservation. In consequence, the content of such rights cannot be limited by the cultural practices of a determinate period of time, but must include changes to those practices. When Article 121 of the Constitution of 1999 states that indigenous peoples are entitled to preserve their cultural identity, it is referring, in my opinion, to those distinctive features that are necessary for an indigenous person to deploy her or his identity-conferring commitments.

Those features must be distinctive to the particular culture in question, but they may be the result of changes suffered by that culture in its contact with other societies.

It is important to bear in mind that the Supreme Court of Canada was establishing the limits of aboriginal rights in Canada. The Court has stated that "where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right."[148] It is possible to say then that the Court is not ruling out the likelihood of considering that practice, custom or tradition as a cultural right, but only as an aboriginal right, according to Canadian constitutional law. I think that in the Venezuelan case it is possible, for the reasons stated above, to include practices, customs and traditions adopted by indigenous peoples after their contact with European societies in the context of indigenous cultural rights, provided that they comply with the other criteria.

[148] *R.* v. *Van der Peet*, *supra* note 39 at 562.

Conclusion

We have seen that indigenous rights are collective rights: they derive from the shared interest of indigenous peoples in preserving their communities and cultures. These rights are grounded on the value of cultural membership and belong to the individual members of indigenous groups. But also, indigenous rights are based on the fact that indigenous peoples constitute, in Venezuela, national minority groups: they were there, occupying the current Venezuelan territory, before the national society existed.

As we have also seen, indigenous peoples' rights mostly comprise self-government and cultural rights. However, as the Supreme Court of Canada has aptly stated, indigenous rights are *sui generis* precisely because they are *indigenous*. In order to understand and determine their content and scope, the indigenous perspective and background, their reality and history, must be considered. But along with the indigenous perspective, the perspective of the larger society has to play a role in the interpretation of indigenous rights. For this reason, it is possible to describe the relationship between indigenous peoples and the larger society, as James Tully has written, as a partnership in confederation.

Indigenous rights are justified in moral terms and pertain to indigenous peoples. However, in Venezuela they had to wait until the promulgation of the Constitution of 1999 to have those rights constitutionally entrenched. With this Constitution, a new

phase in the relationship between the Venezuelan society and its ancestral peoples has started, whereby a process of reconciliation and mutual understanding must take place. As we have seen, the dialogue between different cultures must be regulated by the commitment to understand each other's perspective.

The Constitution of 1999 has provided such a ground in recognizing the distinctiveness of indigenous peoples. Therefore, the correct interpretation of the new constitutional provisions regarding indigenous peoples must be assessed through the idea of respect for the value of cultural membership and respect for indigenous peoples in their position as the ancestral inhabitants of Venezuela.

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