Explanatory Power versus Normative Appeal: Assessing Justificatory Models of Aboriginal Rights

Dimitrios Panagos
Queen's University
dpanagos@gmail.com

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Introduction

This paper finds its genesis in an exchange between Avigail Eisenberg and Joyce Green in the *Canadian Journal of Political Science* regarding the normative foundations for aboriginal rights in Canada.[1] Eisenberg's 'difference perspective' posits that rights have the potential to protect identity-related differences and argues that, as a consequence, they can be normatively justified vis-a-vis this protective capacity. For her part, Green argues that the difference perspective provides an inadequate account of aboriginal rights because it mischaracterizes aboriginality and fails to encompass a variety of significant claims advanced by aboriginal peoples.

This exchange, however, cannot be settled in Eisenberg's or Green's favour. If we bring Eisenberg's work into the Canadian legal literature on aboriginal rights (a literature that does not often engage with her work) and ground her work in the case law, we realize that the difference perspective provides an accurate explanatory account of the jurisprudence on existing aboriginal rights in Canada. And yet, when we examine Green's critique of Eisenberg's work it becomes clear that the difference perspective is not a normatively appealing case for aboriginal rights. As a consequence, settling this exchange between Eisenberg and Green ceases to be a question of 'either-or' and, instead, becomes a question of 'when'. The primary aim of this paper is to address this question of 'when' by properly situating Eisenberg's work in the scholarship on aboriginal rights in Canada. The analysis contained herein traces the potential contribution of Eisenberg's difference perspective, as well as its limitations. The analysis raises a second question to which the paper responds in a preliminary fashion: what does a normatively appealing case for aboriginal rights look like?

Part I of the paper outlines Eisenberg's difference perspective and builds the case that an identity-based focus is necessary in order to provide an accurate account of the current construction of aboriginal rights in Canada – that is, for understanding the normative case

[1] Even though s.35(1) of the Constitution Act, 1982 includes both existing aboriginal rights and treaty rights, this paper focuses exclusively on the former. For a discussion about the differences between existing aboriginal rights and treaty rights see Leonard Rotman, "Defining Parameters" and Brian Slattery, "Making sense of Aboriginal and Treaty Rights."

for aboriginal rights spelled out by the Supreme Court of Canada (SCC). Part II of the paper starts off with Green's critique of Eisenberg and builds the case that the difference perspective and s.35(1) rights suffer from the same two shortcomings – they both fail to provide an adequate characterization of aboriginality and they both cannot encompass significant claims of historical injustice advanced by aboriginal peoples. Part III of the paper argues that one constitutive aspect of a normatively appealing case for aboriginal rights would be the ability to include aboriginal claims of historic injustice.

Part I: Understanding s.35(1) and the Difference Perspective

Eisenberg builds a normative case for aboriginal rights that hinges on the connection between identity-related differences and the potential protection afforded by constitutional rights. In her view, an important result of adopting such a case for aboriginal rights is a deeper understanding of the connection between identity, rights and the law. In what follows I trace Eisenberg's case for aboriginal rights and identify its important advantages.

In *The Politics of Individual and Group Difference in Canadian Jurisprudence*, Eisenberg challenges what she considers to be the dominant approach employed in the literature on Canadian jurisprudence and constitutionalism dealing with conflicts involving individuals, groups and rights claims. "Many commentators," she argues, "proceed from the assumption that much of our jurisprudence is characterized by a struggle between individual and collective rights. They frame conflicts between individuals and groups in terms of this struggle, and then develop an approach that highlights putative clashes between individual and group rights."[2] According to Eisenberg, this approach is problematic for three reasons. First, the dominant approach lacks conceptual precision, insofar as it collapses identity-related claims into other types of claims, resulting in an unsatisfactory characterization of the nature of certain

[2] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.4. For some examples of this individual v. group rights construction which pertain specifically to aboriginal rights see Gillian Brock, "Are There any Defensible Indigenous Rigths?" p.286-292; Thomas Isaac, "Individual versus Collective Rights"; Douglas Sanders, "Collective Rights"; Darlene Johnston, "Native Rights as Collective Rights" and Allen Buchanan, "The Role of Collective Rights."

individual/group conflicts.[3] Second, this approach relies on an "individual versus group" discourse that is substantively different from the language used by the courts.[4] Third, the approach lends itself to the generation of a false impression of judicial inconsistency and arbitrariness that is not an accurate reflection of the existing jurisprudence.[5] As a result, Eisenberg concludes that "this dominant perspective describes actual judicial practice poorly."[6]

Having identified the numerous problems associated with the dominant account, Eisenberg goes on to outline her own approach to understanding how Canadian law deals with conflicting rights claims made by individuals and groups, which she has termed the 'difference perspective'. The difference perspective is a purposive approach to rights and rights conflicts.[7] As such, it works by "translat[ing] rights into the purposes that they are meant to serve."[8] "[O]ne of the purposes rights serve," Eisenberg explains, "is to protect individual and group identity-related differences."[9] As a consequence, the difference perspective leaves aside the obfuscatory 'individual versus group' discourse that marks the dominant approach and instead focuses on identity-related differences.

Eisenberg argues that this refocusing "provides a perspective from which to understand better how various political devices including both individual and group rights may be fruitfully interpreted as predicated upon a concern to preserve distinctive identities."[10] The contention here is that, if we are to understand the way in which Canadian law handles certain conflicting claims (that is, ones that include identity-related considerations), we must be cognizant of the fact that identity-related difference is one of the courts' primary concerns.

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[3] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.4.
[4] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.4.
[5] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.4.
[6] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.4.
[7] Avigail Eisenberg, "Identity and Liberal Politics," p.256.
[8] Avigail Eisenberg, "Identity and Liberal Politics," p.256. This paper uses the term 'identity-related differences' in the manner similar to that outlined by Bhikhu Parekh in his work on multiculturalism – that is, it refers to characteristics, acquired both voluntarily and involuntarily, that define individuals as certain kinds of persons or members of certain kinds of groups and are constitutive parts of their self-understanding (Bhikhu Parekh, *Rethinking Multiculturalism*, p.1).
[9] Avigail Eisenberg, "Identity and Liberal Politics," p.257.
[10] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.14.

Eisenberg grounds her argument in an analysis of the *Sparrow* case, the *Thomas v. Norris* case and the *Ford* case. [11] Her discussion of these cases advances that applying the difference perspective generates an account of how conflicting claims have been settled by Canadian courts that is more coherent and representative than the dominant 'individual versus group' approach. She argues that "[t]he difference perspective retrieves the court's reasoning and frames it in terms of the principles and values which it actually sought to protect. In each case, the identity-related differences are the crucial values at stake."[12] Eisenberg cautions that "[w]ithout the difference perspective […] the courts' decisions in cases involving conflicting identity-related claims appear to be arbitrary and have been described as biased […]. Such mistaken descriptions lead us to lose sight of the evolving jurisprudence about identity-related claims."[13]

From this view, a distinguishing feature of Eisenberg's approach is that it posits that particular rights are meant to protect identity. As a consequence of this approach, certain rights (both individual and collective) are normatively justified vis-a-vis their capacity to accomplish this end. Moreover, as Eisenberg points out, a significant amount of the appeal of this approach is its power to explain certain aspects of Canadian jurisprudence. The difference perspective accomplishes this by anchoring the analysis of the law securely to the principles and values identified by the courts as 'at stake' in these cases.

Eisenberg's work is significant because she makes a compelling case about the need for scholars of rights and the law to take identity seriously and because she has demonstrated that, at times, identity-related considerations shape the principles and values that underpin judicial decisions in Canada. Thus, she successfully directs us away from discussions about the normative superiority of individual or collective rights and redirects us to what is, in her view, a more fruitful discussion – a discussion about the conditions under which identity-related considerations normatively justify rights.

[11] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.15-20.
[12] Avigail Eisenberg, "The Politics of Individual and Group Difference," p.21.
[13] Avigail Eisenberg, "Using Difference to Resolve Rights-Based Conflicts," p.163.

S.35(1): Accommodation and Protection of Aboriginality

The linkages identified by Eisenberg between identity, rights and the law are of paramount importance if one hopes to understand the jurisprudence on existing aboriginal rights in Canada. In essence, s.35(1) rights aim at protecting and accommodating a specific identity-related difference – that is, aboriginality.

From the outset, the Supreme Court of Canada (SCC) incorporated the notion of accommodation and protection of aboriginality in its interpretation of s.35(1). The *Sparrow* decision begins as follows: "This appeal requires this Court to explore for the first time the scope of s.35(1) of the *Constitution Act 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada."[14] Reviewing the reasoning in the *Sparrow* decision it becomes evident that the aforementioned "promise" was, in effect, a promise of accommodation.

The SCC based a significant portion of its analysis in *Sparrow* on what it identified as the purposes underlying the inclusion of s.35(1) in the *Constitution Act, 1982*. The court stated that "the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples."[15] Put differently, this provision was not meant to constitutionalize the existing state of affairs between aboriginal peoples and the state, but was meant to signal a change in the status quo – a change that would bring about 'a just settlement for Canada's aboriginal peoples'.

Even so, the SCC also included a statement about the boundaries of this just settlement. The SCC explained that:

> While it [s.35(1)] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is

[14] SCC, *R. v. Sparrow*, p.11.
[15] SCC, *R. v. Sparrow*, p.32.

required to bear the burden of justifying any legislation that has some negative effect on any aboriginal rights protected under s.35(1).[16]

Here, a list of factors, including modernization, economic considerations, interdependency, and the like, are offered as reasons to explain the absence of a constitutional guarantee of immunity from governmental regulation.[17] This part of the *Sparrow* decision explicitly states that the rights covered by s.35(1) and the aboriginal interests that they protect are not absolute. Consequently, the manner in which the Crown may exercise its power is altered (a result of the necessity to justify legislation that infringes on rights covered by this constitutional provision), but the ultimate scope of its power remains fundamentally unchanged. This, then, is the just settlement envisioned by the SCC; this is the strength of the promise mentioned in *Sparrow*. The Court envisioned an alteration of the existing relations between the Crown and aboriginal peoples, rather than a complete replacement of these relations. In other words, the "just settlement" in *Sparrow* involved some kind of accommodation, but not revolution. It is this understanding of the promise contained within *Sparrow* that underpins the argument here that the normative case for s.35(1) rights offered by the SCC centers on the issue of accommodation.

An ancillary question that follows from this argument concerns the content of the accommodation in question. Stated differently, what exactly is being accommodated by s.35(1) rights? The existing jurisprudence on this constitutional provision demonstrates that these rights are meant to protect aboriginal identity and/or aboriginality. In the case of *R. v. Van der Peet* Lamer C.J., writing for the majority of the SCC, advances that aboriginal rights "arise from the fact that aboriginal people are aboriginal."[18] Citing academics Michael Asch and Patrick Macklem he states that "aboriginal rights 'inhere in the very meaning of aboriginality'."[19] He goes on to explain that the task before the court

[16] SCC, *R. v. Sparrow*, p.37-38.
[17] For a more precise list of these factors consult the following cases: *R. v. Sparrow* p.37-38 and *R. v. Gladstone* para.75. For academic commentary on these factors and their impact on s.35(1) rights see Kent McNeil "Defining Aboriginal Title in the 90s"; John Borrows, "Domesticating Doctrines," p.647-649.
[18] SCC, *R. v. Van der Peet*, para. 19.
[19] SCC, *R. v. Van der Peet*, para. 19.

was "to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. […]The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights."[20] The former Chief Justice reasoned that a purposive analysis represented the best way to proceed.[21] Such an analysis, he explained, revealed that aboriginal rights were constitutionalized in order to reconcile the Crown's sovereignty with the pre-existence of aboriginal societies.[22]

Lamer C.J. is clearly outlining the relationship between s.35(1) rights and aboriginality in this part of the judgment. First, the rights are intimately linked with the collective identity in that they owe their genesis to the existence of that identity. Moreover, the question of who may hold and exercise s.35(1) rights is settled by identity-related considerations. Lastly, these rights are portrayed as aiming to accommodate the bearers of this collective identity vis-à-vis the reconciliation of their distinctive cultures and/or societies with their non-aboriginal counterparts. In short, s.35(1) rights aim at accommodating and protecting aboriginality.

Academic commentary on *Van der Peet* and other s.35(1) cases supports this view. In his work on the *Sparrow case*, Macklem cites aboriginal identity as an interest underlying the constitutionalization of aboriginal rights. He advances that "in the Court's opinion, the practice [that is, fishing] deserved the status of a constitutional right because it was and is integral to Aboriginal culture and identity. The interest underlying the right to fish, in other words, is Aboriginal identity."[23] Macklem makes a similar claim regarding aboriginal title (a subset of aboriginal rights). In his view, while there is a great deal of uncertainty regarding to what degree the protection and preservation of aboriginal territory is an underlying interest of s.35(1), he states, quite categorically, that "insofar as Aboriginal identity is inextricably linked to the land, Aboriginal territory is as

[20] SCC, *R. v. Van der Peet*, para.20.
[21] SCC, *R. v. Van der Peet*, para.21.
[22] SCC, *R. v. Van der Peet*, para.31.
[23] Patrick Macklem, "Aboriginal Rights and State Obligations," p.108.

fundamental a value as Aboriginal identity."[24] Along the same lines, Gordon Christie, commenting on the *Van der Peet* case, advances that the "Supreme Court has determined that Aboriginal rights are meant to protect 'Aboriginality', which is understood to encompass those aspects of traditional Aboriginal cultures that define these cultures as peculiarly 'Aboriginal' in nature."[25] Here, Christie is making the same point as Macklem: the primary purpose of s.35(1), as outlined by the SCC, is the accommodation and protection of aboriginal identity.

The review of the jurisprudence and academic commentary on s.35(1) work to underpin the claim that a proper understanding of the current construction of existing aboriginal rights in Canada requires an identity-based focus. In order to present an accurate account and assessment of these rights one must include the identity-based raison d'etre for these rights offered by the SCC – that is, the SCC's argument that s.35(1) rights exist to protect and accommodate aboriginality. Consequently, Eisenberg is correct to advocate for the inclusion of identity-based considerations in our analyses of aboriginal rights in Canada.

Part II: Green and the limitations of the difference perspective

Green's central difficulty with the difference perspective is the fact that this approach limits the justificatory case for aboriginal rights to identity-related considerations. Green argues that, as a result, Eisenberg has mischaracterized aboriginality and has produced an unsatisfactory account of the normative case for aboriginal rights. She states that

> Eisenberg's "difference approach" [which is] designed to mediate between competing societal claims, reduces aboriginality to one of many presumptively equal cultural identities […]. It dehistoricizes it, and strips it of rights potency. It places all cultural identities on the same legal footing, without regard for anteriority or constitutional location. It removes responsibility from the dominant society and the state for the subordination of indigenous peoples.[26]

[24] Patrick Macklem, "Aboriginal Rights and State Obligations," p.109.
[25] Gordon Christie, "Aboriginal Citizenship," p.483. Russel Lawrence and James Young Blood Henderson make a very similar argument in "The Van der Peet Trilogy," p.997.
[26] Joyce Green, "The Difference Debate," p.138.

Green is critical of the "dehistoricized" difference perspective because she contends that it mischaracterizes aboriginality and the rights that follow from this identity. Green is of the view that aboriginal peoples' collective identities, and so their rights, are rooted in and flow from a particular history – a history of colonization.[27] She argues that ignoring this historical context falsely equates aboriginality with other cultural identities, and treats aboriginal rights claims as one among many minority rights claims made against the state. Moreover, Green holds that this dehistoricization works to absolve the dominant society of its role in creating and maintaining aboriginal subordination.[28]

What is of particular interest here is the problematic parallel drawn between aboriginality and aboriginal rights claims, on the one hand, and other minority identities and non-aboriginal minority claims, on the other. Also of interest here is the minimization/elimination of the role played by the state in the ongoing subordination of aboriginal peoples. These elements expose that a substantial part of Green's critique of Eisenberg's approach is that Eisenberg has "gotten aboriginality wrong" and, as a consequence, has failed to provide a raison d'etre for aboriginal rights that can encompass and satisfy the various significant claims advanced by aboriginal peoples.

Thus, while an identity-based focus is necessary in order to provide an accurate account of the existing jurisprudence on aboriginal rights in Canada – and is important for understanding the normative case for aboriginal rights spelled out by the SCC – Green is arguing that a better normative case for aboriginal rights would include more than identity-based considerations. A better normative case for aboriginal rights would be able to encompass the significant claims advanced by aboriginal peoples that are currently excluded from consideration. In short, Green is advancing that we must go beyond the difference perspective.

The need to go beyond the difference perspective and so move beyond the SSC's current interpretation of s.35(1) is aptly demonstrated by the avalanche of academic criticism challenging the efficacy and utility of s.35(1) rights. For example, John Borrows and

[27] Joyce Green, "The Difference Debate," p.142.
[28] Joyce Green, "The Difference Debate," p.138.

Leonard Rotman advance that "[t]he judiciary's focus on aboriginal rights [..]often appears to be more on the limitation of those rights than on facilitating their understanding or protection."[29] Taiaiake Alfred takes the position that s.35(1) and the rights contained therein are of little consequence to prescriptive work on restructuring aboriginal/non-aboriginal relations in Canada.[30] In their work, Halie Bruce and Ardith Walkem insist that "S.35 rights – defined so as not to upset any existing political order or interests of Canada – are not tools of our [aboriginal peoples'] survival, but markers of our colonized status."[31] This criticism is important for the purposes of this paper because it reveals that, although an identity-based analysis of aboriginal rights provides an accurate account of the existing jurisprudence on aboriginal rights in Canada, it does not explain why these and other scholars find s.35(1) rights so problematic.

The remainder of the paper explains this dissatisfaction with s.35(1) rights. It does so by pursuing an analysis of these rights. This analysis is structured by two principle questions that find their origins in Green's critique of Eisenberg. The first question is, *to what degree do aboriginal rights actually perform the function outlined by the SCC (that is, to what degree do these rights accommodate and protect aboriginality)?* The second question is, *is the raison d'etre for aboriginal rights outlined by the SCC satisfactory?* Stated somewhat differently, can rights that aim at the protection and accommodation of aboriginality encompass and satisfy the various claims advanced by aboriginal peoples? The analysis that follows generates the following conclusions: First, s.35(1) rights as they are currently constructed do not protect and accommodate aboriginality. Second, these rights do not encompass, and so cannot satisfy, a number of significant claims advanced by aboriginal peoples.

Analysis

In terms of the first question, numerous scholars express serious doubt about the capacity of s.35(1) rights to protect and accommodate aboriginality. Commenting on the evolving jurisprudence on aboriginal rights (and specifically on the *Van der Peet* decision),

[29] John Borrows and Leonard I. Rotman, Aboriginal Legal Issues, p.436.
[30] Taiaiake Alfred, Wasase, p.20-21.
[31] Halie Bruce and Ardith Walkem, "Bringing our Living Constitutions Home," p.356-57.

Borrows indentifies one source of the dissatisfaction with s.35(1). He argues that "the Supreme Court of Canada developed its definition of Aboriginal rights by using a questionable definition of aboriginality."[32] He explains that:

> Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today. […]In order to claim an aboriginal right, the court's determinations of Aboriginal will become more important than what it means to be Aboriginal today.[33]

Borrows' concerns are based on the way in which aboriginality is conceptualized by the SCC. Borrows builds the case that s.35(1) rights, as defined by the majority in *Van der Peet*, are only capable of protecting a court produced and imposed version of this collective identity. This version of aboriginality, he insists, is backward looking and tethered to a pre-contact past, making it unable to encompass the significant constitutive elements that characterize contemporary aboriginality. This last point underpins Borrow's worry that the SCC's characterization of this collective identity will be accorded greater weight in aboriginal rights litigation than the determinations of those who actually bear this collective identity.[34]

Lee Maracle's assessment of s.35(1) mirrors Borrow's critique. She argues that "Aboriginal Rights in cases interpreting s.35 have amounted to nothing more than the reduction of nationhood to anthropological definitions of the nature of Indigenous Peoples in pre-colonial times."[35] She goes on to caution that "accept[ing] that our rights should be defined under s.35 is to accept colonial authority."[36] The basis of Maracle's critique of s.35(1) is the way in which the SCC (mis)handled an important part of her vision of aboriginality – that is, aboriginal nationhood. What is important here is that

[32] John Borrows, *Recovering Canada*, p.61.
[33] John Borrows, *Recovering Canada*, p.60.
[34] For an analysis of the way in which the SCC's understanding of aboriginality takes precedence over the understanding of this collective identity advanced by aboriginal claimants in the construction of aboriginal title see Dimitrios Panagos, "The Multiple Meanings Shouldered by the Term 'Aboriginality'."
[35] Lee Maracle, "The Operation was Successful, But the Patient Died," p.312.
[36] Lee Maracle, "The Operation was Successful, But the Patient Died," p.312-13.

both Borrow's and Maracle's critiques are premised on, first, the mischaracterization of aboriginality and, second, on the consequences of constitutionally protecting and accommodating this mischaracterization.

In terms of the second question underpinning the analysis here – that is, the degree to which the raison d'etre for aboriginal rights outlined by the SCC is satisfactory – some scholars contend that the SCC's interpretation of s.35(1) produces rights that are unable to encompass a number of significant claims put forward by aboriginal peoples. In their work on s.35(1), Bruce and Walkem characterize the provision as entailing a particular kind of uneven exchange between aboriginal peoples and the state. They argue that,

> [i]n order for Indigenous Peoples to achieve any protection under s.35(1), all of the following are recognized and protected first: (1) Canadian sovereignty and nationhood; (2) Canadian Crown title to all of our [aboriginal] territories; and (3) Canadian governments' rights to make laws about our [aboriginal] territories and resources. In exchange for recognizing Crown sovereignty, title and jurisdiction, Indigenous Peoples are entitled to Aboriginal Rights.[37]

Here, Bruce and Walkem are advancing that protecting aboriginality (or, rather, the SCC's version of aboriginality) comes at a very high price: aboriginal acceptance of the legitimacy of the Crown's claims to sovereignty, title and jurisdiction.

Larry Chartrand and James Tully argue that the Crown's sovereignty, title and jurisdiction are the very state mechanisms that have led to aboriginal peoples' dispossession, displacement and disappearance (that is, the very causes of their subordination).[38] In fact, Tully advances that, at least since the mid-nineteenth century, what is referred to as 'aboriginal resistance' in Canada is constituted by attempts to challenge these very state mechanisms.[39] In other words, aboriginal claims during this period include concerns about the Crown's assertions of sovereignty, title and jurisdiction. And yet, if Bruce and Walkem are correct, these claims cannot be

[37] Halie Bruce and Ardith Walkem, "Bringing our Living Constitutions Home," p.350.
[38] Larry Chartrand, "The Aboriginal People's Movement," p.462; James Tully "The Struggle of Indigenous Peoples," p.39-40.
[39] James Tully, "The Struggle of Indigenous Peoples," p.38.

encompassed by the SCC's interpretation of s.35(1), because this interpretation presupposes that the Crown's sovereignty, title and jurisdiction are unproblematic and even unquestionable.

Asch's work on the Crown's sovereignty and aboriginal rights illustrates how this a priori assumption works to exclude aboriginal claims that challenge the sovereignty of the Crown. He explains that:

> Aboriginal rights as constitutional rights are defined as the means by which the prior facts of Crown sovereignty and of the original occupation of the land by indigenous peoples are reconciled. Described in this manner, even if it included fundamental political rights, the concept of Aboriginal rights could never challenge Crown sovereignty, for, logically, a means to reconcile prior facts cannot also challenge the nature of those facts.[40]

Asch concludes that "the [*Van der Peet*] judgment therefore implies that the courts will not acknowledge that Aboriginal peoples hold, or indeed ever held, fundamental rights if such acknowledgment challenges the sovereignty of the Crown."[41] The central point in Asch's discussion of the *Van der Peet* decision is the following: built into the very meaning of s.35(1) is the requirement that whatever rights emerge from this constitutional provision, they cannot *by definition* challenge the sovereignty of the Crown. In this way, s.35(1) rights cannot address one of the three principle mechanisms of aboriginal subordination identified by Chartrand and Tully.

The analysis presented in this part of the paper aims to demonstrate that the SCC's interpretation of s.35(1) has produced rights that protect and accommodate a version of aboriginality not held by the people who bear this collective identity, making it very difficult to say that these rights protect and accommodate aboriginality. The analysis presented also demonstrates that s.35(1) rights as currently constructed by the SCC cannot encompass a number of significant claims advanced by aboriginal people – claims that, some argue, must be addressed in order to end aboriginal subordination in Canada.

[40] Michaal Asch, "From Calder to Van der Peet," p.440.
[41] Michaal Asch, "From Calder to Van der Peet," p.440.

In effect, this analysis demonstrates that approaching rights as Eisenberg suggests generates rights that are vulnerable to the criticisms outlined by Green. Stated somewhat differently, the shortcomings of s.35(1) rights are the same as the shortcomings Green posits would result from the application of the difference perspective.

Part III: A Normatively Appealing Case for Aboriginal Rights

But, why is it so important to ensure that aboriginal claims (such as claims that challenge the Crown's sovereignty, title and jurisdiction) can be encompassed by aboriginal rights and the normative case we provide for these rights? One way to go about addressing this question is to examine what we mean when we employ the term 'aboriginal claims'.

Macklem advances that the various claims made by aboriginal peoples can be divided into five basic categories: claims of prior occupancy, claims of prior sovereignty, treaty related claims, claims of self-determination and cultural minority claims. For Macklem, a sufficient case for aboriginal rights hinges on the account's capacity to encompass all five of these types of claims.[42] Macklem is putting forward that a normative case for aboriginal rights must be sensitive to the history of colonization (an important factor according to Green) by encompassing 'backward looking' claims (that is, claims of prior sovereignty, occupancy, and treaties related claims). For this scholar, claims that seek to address historical injustices must play a role in the normative case for aboriginal rights.

Duncan Ivison illustrates one reason why we need aboriginal claims that aim at addressing historical injustices in our accounts. He argues that,

> Indigenous peoples' claims rest, in part, on the recognition of historical injustices carried out against them by various colonial powers. Downplaying the relevance of historical injustice for considerations of their claims risks misidentifying the nature of the moral wrongs at stake, especially from the perspective of

[42] There are some scholars that question the legitimacy of the claims cited by Macklem. Tom Flanagan, for example, challenges the legitimacy of aboriginal claims to prior occupancy and prior sovereignty (*First Nations? Second Thoughts*, p.44-66). Jeremy Waldron challenges these claims as well ("Superseding Historical Injustice").

indigenous people, and thus potentially the legitimacy and efficacy of those institutions and distributions meant to address them.[43]

Ivison goes on to emphasize that the "reasonableness of 'indigenous rights' – the extent to which they could become the object of collective willing – can not be established independently of the facts of the history of relations between indigenous peoples and the colonial state."[44] Ivison's work suggests that a normative case for aboriginal rights that makes room for aboriginal claims of historical injustice would likely be more acceptable to aboriginal peoples and would produce rights that would be more useful than cases for aboriginal rights that fail to do so. Here, Ivison is putting forward a legitimacy and utility argument, wherein the normative appeal for a case for aboriginal rights hinges on its capacity to secure the acceptance of the bearers of these rights and on the effectiveness of these instruments.

We can also make the case for the inclusion of claims of historical injustice in our accounts of aboriginal rights by relying on justice-based argument. Margaret Moore's work on the normative arguments underpinning the right to territorial jurisdiction is instructive. She makes the case that a normatively appealing argument for self-government proceeds by outlining the normative basis for any group's claim of territorial jurisdiction and then examining a specific group's actual exercise of this jurisdiction. [45] According to Moore, in the case of aboriginal peoples there is a gap between what is normatively permissible and what actually occurred. She explains that

[t]he fact that indigenous peoples were entirely marginalized from the process of state-creation raises the question of the basis for the state's authority over indigenous peoples. If the exercise of legitimate authority is based on the principles of democratic will and the sovereignty of the people, then the current state does not exercise legitimate authority over them. If indigenous peoples were entitled, through the same normative principles, to exercise collective self-government in the past, then how, normatively, has this right been extinguished? It is counter-intuitive to suppose that the continued subordination and unfair

[43] Duncan Ivison, "Political Community and Historic Injustice," p.326.
[44] Duncan Ivison, "Political Community and Historic Injustice," p.371.
[45] Margaret Moore, "Internal Minorities," p.282-83.

treatment of indigenous peoples has left them also with fewer (moral) rights, and no longer entitled to collective self-government.[46]

For Moore, if principles of democracy and sovereignty (as she outlines above) are the principles underpinning the exercise of legitimate state authority and these principles did not anchor aboriginal peoples' incorporation into the state nor their treatment thereafter then it cannot be said that the state exercises legitimate authority over aboriginal peoples. Moreover, Moore argues that if these same principles underpinned the exercise of aboriginal authority before contact the assertion of state authority is not enough to generate a principled account for how aboriginal authority was replaced by state authority. In essence, what Moore is advancing here is that justice requires that we take into account the historical record and aboriginal claims that emerge as a result of this record.

If we combine the work of Macklem, Ivison and Moore we can begin to trace the argument that a normatively appealing case for aboriginal rights would include aboriginal claims that aim at addressing historic injustices. Macklem's work demonstrates that these claims are actually put forward by aboriginal peoples (they constitute four of the five types of claims advanced by these individuals). Ivison's work highlights that incorporating these claims can enhance both the legitimacy and efficacy of aboriginal rights. Moore's work indicates that justice may in fact require that we construct instruments (such as rights) that work to address these claims.[47]

Conclusion

The first part of the paper outlined Eisenberg's difference perspective and argued that an identity-based focus renders intelligible the normative case for existing aboriginal rights

[46] Margaret Moore, "Internal Minorities," p.284-85.

[47] It is important to keep in mind, at this point, that even though an argument has been made here that aboriginal claims of historic injustice are constitutive elements of an appealing normative case for aboriginal rights, a comprehensive account of what else such a case would entail has not been presented. Significant questions, such as how claims of historic injustice would be evaluated or the degree to which other justice-based considerations (for example, concerns about equality, democracy and harm to non-aboriginals to list only three), are not unaddressed by this paper. A comprehensive account would be required to address these important questions.

offered by the SCC. The second part of the paper identified Green's two central criticisms of the difference perspective (the mischaracterization of aboriginality and the inability to encompass a number of significant claims advanced by aboriginal peoples) and went on to show that the problems inherent in the difference perspective are also inherent in the SCC's interpretation of s.35(1). Together, the first two parts of this paper situate Eisenberg's work. It has extraordinary explanatory power in terms of its ability to provide an account of the existing jurisprudence on aboriginal rights in Canada. It lacks, however, normative appeal. In order for aboriginal rights to become instruments of inter-societal reconciliation they cannot mischaracterize aboriginality and they must be able to encompass the various significant claims advanced by aboriginal peoples. The third part of the paper provides support for this last point. It demonstrated that including aboriginal claims that aim at addressing historic injustice can create a normative case for aboriginal rights that addresses issues of legitimacy, utility and justice. It is the author's view that this is the foundation for an appealing normative case for aboriginal rights.

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