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Conference Proceedings
Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal
Pluralism:
American Tribes, Canadian First Nations and Scandinavian Sami
Compared

International Conference
Trento, 24 and 25 October 2013

Roberto Toniatti and Jens Woelk (eds.)

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P. Macklem - S. Memo - S. Pennicino - A. Tomaselli

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Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal Pluralism: American Tribes, Canadian First Nations and Scandinavian Sami Compared

Papers - International Conference

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Objective: The conference wanted to explore the constitutional framework of **judicial autonomy** as a component of the right to self-government of American Tribes, Canadian First Nations and Sami people in Scandinavia in a comparative perspective.

The papers are based on the presentations and discussion during the conference which has been organized and coordinated by Carlo Casonato, Roberto Toniatti, and Jens Woelk.

Their focus is on the **judicial interaction** with the Constitutions and the legal and judicial systems of the concerned States in North America and Europe. Particular attention has been paid to independent indigenous judicial powers and courts as well as to issues of (independently) determining membership to the indigenous group (and judicial *locus standi*).

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Judicial Space and Legal Pluralism: American Indian Tribal Courts and the Federal Constitution

N. Bruce Duthu

This paper focuses on the interplay between the American Indian tribal and federal court systems in two specific types of cases: (1) disputes over tribal membership and (2) the scope of tribal criminal jurisdiction. I call attention to these two case studies because they illustrate two radically distinct responses from the state in terms of the latitude accorded to tribal judicial systems to adjudicate these matters. In the case of disputes over tribal membership, the United States accords extraordinarily wide berth to tribal legal systems to mediate and resolve claims by individuals who challenge a tribe's substantive and/or procedural membership rules. On the other hand, we see a high degree of state intrusion into tribal judicial systems when it comes to the adjudication of criminal matters. The explanation for the state's differential response, I will argue, has to do with the relative impact of tribal judicial action on fundamental state interests and the limits of the state's tolerance for a deeper form of tribal political autonomy in the context of legal pluralism operating in the United States. Questions about the scope of tribal criminal jurisdiction necessarily implicate the tribe's role in limiting individual liberty and therefore trigger a more intense, almost visceral reaction from state rulemakers. As I explain in *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism*, "[v]indicating tribal power in these circumstances would potentially touch sensitive and fundamental principles that go to the core of the nation's beliefs and values about legitimate government, individual rights, and the adhesive

social contract that binds the two. The ideological challenge, in short, is determining precisely when we have reached the point of too much pluralism."¹

Intra-Tribal Disputes over Tribal Membership

Recent disputes over tribal membership have catapulted into the national consciousness in the United States, largely because of the actions of one specific tribe, the Cherokee Nation of Oklahoma. In 2007, the Cherokee Nation amended its constitution's provisions for tribal membership to require proof of blood lineage from a Cherokee ancestor. This action effectively disenfranchised a group of tribal citizens known as the Cherokee Freedman, the descendants of former slaves of the Cherokee Nation who had gained citizenship in the tribal nation pursuant to an 1866 treaty between the tribe and the United States following the Civil War. From the perspective of the Cherokee Nation, the action of repatriating its constitution and amending the rules for tribal membership represented an act of sovereignty, and more particularly, the expression of a political body determining its constituent membership. From the perspective of the Freedman, however, the action smacked of racism. The Freedman turned to the courts for relief, both in the tribal and the federal courts. The Cherokee Nation Supreme Court ultimately affirmed the authority of the Cherokee people to amend their own constitution but related litigation in the federal courts continues to this day.² As a general matter, the federal courts have

¹ N. Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* (Oxford University Press 2013), 35.

² See generally, Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press 2002); Celia E. Naylor, *African Cherokees in Indian Territory: From Chattel to Citizens* (Chapel Hill: University of North Carolina Press 2008).

refused to hear claims by individuals who allege that tribal governments have violated their rights, including their rights to membership in the tribal nation. Such claims are often premised on a federal law, the 1968 Indian Civil Rights Act (ICRA), which provides most, though not all, of the legal protections of the United States Bill of Rights. In the case of *Santa Clara Pueblo v. Martinez* (1978), however, the United States Supreme Court ruled that federal courts lacked jurisdiction to hear claims based on the ICRA. According to the court, the interests protected under the ICRA (including rights of due process and equal protection of the tribe's laws) may only be asserted and resolved in tribal courts. This was Congress' way of balancing competing policy interests, the vindication of individual civil rights, on the one hand, and minimizing the intrusion on the sovereign prerogatives of Indian tribal nations, on the other.

The claimant in this case, Julia Martinez, challenged her own tribe's membership rules as being discriminatory on the basis of gender since, in the case of mixed-race marriages, membership followed only the father's line, not the mother's. The tribe's membership ordinance was adopted in 1939, but according to tribal leaders, the ordinance merely served to codify tribal customary law. There was credible evidence introduced by Martinez's lawyers showing that tribal customary law, in fact, did not operate along gendered lines. In any event, the Supreme Court did not reach the merits of her challenge.³ In closing the doors of the federal courthouse to such claims, the court acknowledged that "the tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."⁴ The court refused to sanction federal court review into such delicate matters out of concern that such intrusion would disrupt the tribe's prerogative to "maintain itself as a

³ See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and Federal Courts*, 56 University of Chicago Law Review 671 (1989).

⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

culturally and politically distinct entity."⁵ According to the court, tribal nations "remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State governments."⁶

The Cherokee Freedman, perhaps in recognition of the precedent established in *Martinez*, did not limit their advocacy to the judiciary but also sought relief from members of Congress. They found a receptive audience among members of the congressional Black Caucus who were sympathetic to the argument that the Cherokee Nation's actions were rooted in racism. For a time, it appeared Congress might even withhold federal appropriations to the tribe until it restored the citizenship rules mandated by the treaty of 1866. Ultimately, the politicians in Congress agreed to defer to the courts and that is where the matter rests at present.

The Cherokee Nation is not the only tribe to have its membership rules challenged in this way but their case has surely attracted the most attention in the United States. This is because their case involves the interweaving of two complicated, contentious and unresolved national narratives. First, it implicates the nation's pernicious history of discrimination against racial minorities and the sensitivity to claims of injustice arising solely from membership in such groups. Secondly, it exposes the fault lines in the national government's treatment of Indian tribes as political bodies with powers of self-government. Federal Indian policies alternately aimed to support or to obliterate the tribal political systems. In urging Congress to step into the fray, the Cherokee Freedman were effectively recalling historical federal policies that ran roughshod over tribal systems of government, no matter the nature and impact on Native peoples and their way of life. At the same time, their claims exposed the risks tribal nations take

⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

when they are perceived to be acting in illiberal ways, or in other words, in disregard of national commitments to individual rights like those of due process and equal protection of the laws.

That Congress ultimately stood aside in this matter in deference to the judicial system(s) is a mark of some progress in respecting the plurality of legal systems operating in the United States. But it also serves as a cautionary note to the tribes about just how far to push the envelope of legal pluralism in defense of tribal sovereignty. It behooves the tribes to recall that during the 1980s, members of Congress sought to amend the Indian Civil Rights Act of 1968 to provide for federal court review of all tribal court decisions, a move that would have effectively overruled the result in the *Martinez* case. Such efforts could be reprised in the modern era if members of Congress felt sufficiently motivated (or outraged) to establish a system of external review of tribal judicial actions. The *Martinez* court expressly contemplated that possibility in the final paragraph of the majority opinion:

"As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of [federal] courts in adjusting relations between and among tribes and their members correspondingly restrained. Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the Indian Civil Rights Act], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [the ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."⁷

⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

There are certainly indications that other tribes around the United States recognize the delicate balancing of interests in these cases and are adapting their juridical responses accordingly so as not to tempt the federal government into making an additional intrusion on tribal sovereignty. The Saginaw Chippewa Indian Tribe of Michigan, for example, interpreted the tribe's constitution as treating membership in the manner of a vested individual right, revocable in limited circumstances and only after according the member the full rights of "due process and cultural respect."⁸ It is critically important that tribal court rulings like this receive the national prominence and publicity they deserve. They stand as an alternative and corrective narrative, in contrast to the Cherokee Nation's example, of tribal courts recognizing, respecting and mediating the competing individual and communal tribal interests at stake in these membership disputes without unduly trenching on vital national concerns.

Tribal Jurisdiction in Criminal Justice Matters

In contrast to the wide berth accorded to tribal judicial bodies in cases of intra-tribal membership disputes, the United States has adopted a highly intrusive approach in matters of criminal justice, particularly in cases involving non-Indian offenders. The leading precedent in this area is another US Supreme Court case from 1978, *Oliphant v. Suquamish Indian Tribe*. In this case, the court held that Indian tribes lacked the inherent sovereign authority to prosecute non-Indian offenders for violations of tribal law. The alleged offender, Mark Oliphant, a non-Indian resident of the reservation, was charged with assaulting a tribal police officer and prosecuted in

⁸ *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, 32 Indian Law Reporter 6047, 6050 (Saginaw Chippewa Indian Tribe of Michigan Appellate Court 2005).

Suquamish tribal court. Using the writ of habeas corpus in the Indian Civil Rights Act, Oliphant entered the federal court system to challenge the tribe's jurisdiction over him. The lower courts ruled in favor of the tribe's retained authority over all offenders who violate tribal law on the reservation. In reversing this ruling, the Supreme Court held that Indian tribes are prohibited from exercising powers that were expressly terminated by acts of Congress or by treaties, and those that are implicitly divested by virtue of the tribes' status as domestic dependent nations. In the words of the court:

"Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir right to complete sovereignty, as independent nations, [are] necessarily diminished.'"⁹

The *Oliphant* ruling and its reliance on the doctrine of *implicit divestiture* of tribal powers have been subjected to stinging criticism by scholars and the courts. In abandoning, without analysis, a decades-long understanding about the nature and limits of inherent tribal sovereign powers, the court exposed Indian tribes to challenges not just about their *exercise* of sovereign power but the very *existence* of that power. Established federal precedent dating back to 1934 acknowledged that tribal powers historically were limited by "special treaties and [federal] laws," but that "[w]hat is not expressly limited remains within the domain of tribal sovereignty."¹⁰ This was the law recognized and applied by the lower courts and by the dissenting opinion in *Oliphant*. Justice Thurgood Marshall's terse dissenting opinion (joined by

⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

¹⁰ US Department of the Interior, *Opinions of the Solicitor*, 55 I.D. 14, 447 (Oct. 25, 1934).

Chief Justice Burger) stated that "the power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed. . . . In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."¹¹

What did the *Oliphant* majority find so compelling about this issue that warranted the wholesale stripping away of a wide swath of inherent tribal authority? After all, Congress had already enacted the Indian Civil Rights Act of 1968 to provide legal protections to all persons subject to the tribe's jurisdiction, including access to the federal courts via the writ of habeas corpus to challenge the legality of their detention by tribal governments. At least part of the answer, suggested by the court's own language, is the court's profound mistrust of tribal courts when it comes to mediating claims that implicate individual liberty. The court identified the nation's "great solicitude" for personal liberty as among those overriding state interests that necessarily resulted in a concomitant diminishment of the tribe's inherent sovereign authority: "By submitting to the overriding sovereignty of the United States, Indian tribes thereby necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."¹² According to the court, this principle "would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] competent tribunals of justice.' It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents."¹³ The availability of rights under the Indian Civil Rights Act of 1968 did not fully assuage the court's

¹¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

¹² *Id.* at 210.

¹³ *Id.* at 210.

concerns about the brand of justice operating in tribal courts, although it did prompt the court to concede that with the act's protections, "many of the *dangers* that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared."¹⁴ (Emphasis added)

The court nowhere explained what "dangers" await the unsuspecting criminal defendant in tribal courts or why it endorsed such a brazenly ahistorical and atavistic view of tribal justice systems. It also did not seriously consider the proposition that the legal protections of the Indian Civil Rights Act were sufficient, in the eyes of Congress, to allow tribal courts to exercise jurisdiction over *all* persons, just as the act says.

The broader legacy of the *Oliphant* case, of course, extends beyond its (mis)characterization of tribal judicial systems. In endorsing the doctrine of implicit divestiture, the court arrogated onto itself (and the lower federal courts) the prerogative of policing the bounds of inherent tribal sovereignty using a rudderless standard that merely inquires whether the power in question is consistent with the tribes' status as domestic dependent nations. The *Oliphant* rule has also been extended to cases that deal with civil and regulatory matters¹⁵ and it was applied in another criminal case, *Duro v. Reina* (1990) to remove non-member Indian offenders from the jurisdictional reach of tribal courts. In the *Duro* decision, the court relied on the "consent of the governed" principle to explain why the tribe's criminal jurisdiction could not extend beyond its own membership to include political outsiders like Mark Oliphant, a non-Indian, or Albert Duro, a non-member Indian. In the process, the court could not resist casting further aspersions on the justice-rendering capacity of tribal courts: "The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate.

¹⁴ Id. at 212.

¹⁵ *Montana v. United States*, 450 U.S. 544 (1981)

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'"¹⁶

Congress legislatively overruled the *Duro* decision but it left the *Oliphant* precedent intact. In *United States v. Lara* (2004), the Supreme Court narrowly upheld the power of Congress to adjust the scope of tribal criminal jurisdiction, although given the change in the composition of the court personnel since then, there are serious questions as to whether the current members of the court would support that holding if the issue arose again.

The court will soon get another opportunity to consider whether Congress, in fact, has the constitutional authority to expand the reach of tribal criminal jurisdiction beyond the tribe's own members. In 2013, Congress reauthorized the Violence Against Women Act (VAWA) and included within this legislation provisions that effectively overruled the *Oliphant* decision for a narrowly defined class of sex offenses. In other words, Congress recognized and affirmed tribal criminal jurisdiction over *all* persons in cases involving domestic violence, stalking, and violation of protective orders. The price tag for exercising this enhanced jurisdictional authority is, however, considerable. Tribes must adapt their judicial systems to ensure that criminal defendants are accorded the full panoply of constitutional protections that would be available to them in state or federal courts, and must ensure that both the trial judge and defense counsel have formal law training (i.e. law degrees from an accredited institution). In short, Congress' response to the jurisdictional gaps created by the US Supreme Court was to remove whatever traces of legal pluralism might have existed between tribal courts and their state and federal

¹⁶ *Duro v. Reina*, 495 U.S. 676, 693 (1990).

counterparts. In criminal cases involving non-Indians, the federal law raises serious questions as to whether, and to what extent, tribal courts may continue to rely upon customary substantive law and procedures, including their use of traditional justice systems (e.g. Peacemaker Courts) that are non-adversarial in nature.

The tribal provisions are set to go into effect in 2015 but Congress created latitude for tribes to begin exercising this enhanced authority immediately upon successful application to the US Attorney General demonstrating their full and present compliance with the act. To date, three tribes - the Pascua Yaqui Tribe of Arizona, the Tulalip Tribe of Washington and the Umatilla Tribe of Oregon - have received federal authorization to begin exercising this enhanced jurisdictional authority.¹⁷

It is quite reasonable to assume that the first non-Indian offender to be charged under this new regime will challenge the power of Congress to subject non-Indians to criminal trials before the tribal courts. That challenge will most assuredly build upon arguments long asserted by Associate Justice Anthony Kennedy of the US Supreme Court. In his majority opinion for the court in *Duro* (1990), and in his concurring opinion in *Lara* (2004), Justice Kennedy expressed serious doubts as to whether Congress actually possesses the constitutional authority to subject US citizens to criminal trial in tribal courts unless they are also citizens of those tribal nations. During the legislative deliberations on the VAWA, the non-partisan Congressional Research Service issued an opinion, based primarily upon Justice Kennedy's jurisprudence in this area, that concluded the following: "It is not clear that the Court considering a tribal court conviction under

¹⁷ <http://indiancountrytodaymedianetwork.com/2014/02/06/three-tribes-exercise-jurisdiction-over-non-indian-perpetrators-under-vawa-153444>.

these bills would find that Congress has authority to expand the inherent sovereignty of tribes to try non-Indian defendants."¹⁸

It bears recalling that the reauthorized VAWA effectively requires the elimination of any traces of legal pluralism existing between the tribal judicial system and its state and federal counterparts before the tribe can prosecute a non-Indian offender. This is a modern-day form of juridical assimilation in which the tribal judiciary is required to transform itself before being allowed to adjudicate the liberty interests of a non-Indian US citizen. Given the justices' repeated misgivings about the integrity of tribal judicial systems, it is doubtful that even this transformation into the image of the dominant justice system will assuage their concerns.

Conclusion

The noted scholar Frank Pommersheim has written that tribal courts serve as the crucible of sovereignty. Within these juridical spaces, litigants and judges engage in a form of legal discourse that goes far beyond the merits of the particular case or controversy. In nearly every instance that a tribal forum is convened, the integrity of that tribe's legal system is on display and in some respects, at risk. Sovereign tribal authority is at stake, the modern-day expressions of indigenous legal systems that were historically targeted for erasure as a matter of US Indian policy. Federal policymakers and American society as a whole perform a rough calculus as to the limits of legal pluralism, or in other words, the extent to which the nation should permit or tolerate "nations within a nation" operating within shared territories. On some matters, (intra-

¹⁸ Jane M. Smith and Richard M. Thompson II, Congressional Research Service, *Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act*, April 18, 2012, at p. 7.

tribal disputes over membership, for example) the tolerance level is rather generous. On others, (criminal trials of non-Indian US citizens), the tolerance level, until recently, is nil.

The daily work of effectuating tribal sovereignty on the ground is a struggle for building up institutional legitimacy in the process of serving the ends of justice. It involves overcoming contested histories and mutual misunderstandings. It also involves a willingness on the part of all to revise notions of legitimate government and sovereign power. Above all, it requires that a certain degree of respect for the right of indigenous nations to exist as sovereign bodies circulate throughout the various institutional arrangements that have or might be developed between the tribal and national legal systems. Tribal courts do their part when they ensure that their rulings reflect the cumulative wisdom of their traditions while also paying due regard for the values and interests of the broader society. Pommersheim summarizes this ethos in the following words:

"[I]t is the wisdom and integrity of tribal law and tribal courts, properly and consistently informed by tradition and evolving contemporary tribal standards, that will stand as the best bulwark against federal encroachment. Without this continuing development, there can be little expectation for stability and equilibrium."¹⁹

¹⁹ Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 97.

INDIGENOUS PEOPLES' SOVEREIGNTY AND THE LIMITS OF JUDICIAL AND LEGAL PLURALISM: AMERICAN TRIBES, CANADIAN FIRST NATIONS AND SCANDINAVIAN SAMI COMPARED

Trento, 24-25 October 2013

JUDICIAL SPACE IN LEGAL PLURALISM: AMERICAN TRIBAL COURTS AND THE FEDERAL CONSTITUTION

Contribution

Mia Caielli

It is widely recognized that tribal courts play a fundamental role in affirming and fostering Indian self-government, but it is also quite clear that indigenous justice systems represent the aspect of tribal sovereignty which is more vulnerable to erosion because of federal and state pressures.

In this short presentation, I would like to draw the attention on two different but interdependent challenges that American Tribal courts have to face.

First of all, as Pommersheim pointed out, these courts must operate taking into account the federal and state pressures but, in the meantime, they cannot forget the cultural values of the tribe and therefore the imperatives coming from within, meaning that they must remain relevant to the traditions that have sustained them¹. A crucial problem might arise from this judicial duty of respecting tribal culture and customs that is the possible clash of values between Indian tribes and United States: Duthu focused his analysis on the compatibility of legal pluralism and liberalism, admitting that some groups do pose a challenge for liberal democracies, for example limiting the freedom of religion and by employing sexually discriminatory rules².

I would like to draw the attention to the well known *Santa Clara Pueblo v. Martinez* case decided by the US Supreme Court in 1978³. The respondent was a member of *The Pueblo*, but her daughter had been denied enrollment on the grounds that her father was a Navajo Indian: a 1939 membership ordinance denied enrollment to the children of female members who married outside the tribe but not to similarly situated children of men of that tribe. The Court held that tribal courts are the only judges allowed to resolve claims concerning the violation of the *Indian Civil Rights Act* (ICRA), except for claims challenging the legality of one's detention under tribal law: therefore, this was a question of Indian sovereignty to be resolved by the tribe. This decision is often considered one of the strongest judicial statements in favour of tribal self-determination and preservation of tribal culture, but it also had far-reaching implications for Indian tribes. Many scholars expressed some concern since it operated to legitimate sex discrimination in Indian country. A question then arises: should federal or state courts intervene under the ICRA for all human rights violations and not only for reviewing habeas corpus claims? An affirmative answer seems to be particularly problematic, even for mainstream feminists like MacKinnon: «[the *Martinez* case] poses difficult tensions, even conflicts between equality of the sexes, on the one hand

¹ F. Pommersheim, "Tribal courts: providers of justice and protectors of sovereignty", 79 *Judicature* 110 (1995), 111.

² B. Duthu, *Shadow nations. Tribal Sovereignty and the Limits of Legal Pluralism*, Oxford - New York: OUP, 2013, 44-73.

³ 436 U.S. 49 (1978).

and the need to approach those questions within their particular cultural meanings in an awareness of history and out of respect for cultural diversity and the need for cultural survival, on the other [...]. I find *Martinez* a difficult case and I don't usually find cases difficult»⁴. The Author ends up by criticizing the Supreme Court's decision like the majority of legal scholars, but she does not forget that many Indian women affected by *Martinez* have defended the decision, arguing that real change must come from within, not from Congress or federal judges⁵. The key point is: «*should Martinez be content with struggling for change from within or should the white government have stepped in on her behalf?*»⁶. Quite interestingly, Kymlicka, according to whom «*the most enduring forms of liberalization are those that result from internal reform*»⁷, argues that even if the Santa Clara Pueblo case is an example of a non-liberal minority, an intervention by the state would be illegitimate⁸. Therefore, the primary focus for liberals outside the group should be to lend their support to any efforts the group makes to liberalize their culture: liberalism, and in the mentioned case, gender equality, should not be used as a way to erode tribal sovereignty. A sustainable solution is hard to be found⁹, but I agree with those who express some doubts on the opportunity of a mediation through the judicial process and, consequently, Duthu's proposal of a creation of spaces for indigenous perspectives to be heard and discussed seems to represent the most proper way to approach the question¹⁰.

The second challenge is related to the organization and functioning of tribal judiciary system. Judicial systems differ considerably from tribe to tribe since some of them evolved from courts set up by the *Bureau of Indian Affairs* attempting to assimilate indigenous people into the predominant Anglo legal system, while others were created with the aim of bringing back traditional dispute resolution techniques. As a result of this, many Indian courts mirror the federal and state justice systems, while the administration of justice in some tribes differs dramatically from the federal or state judiciary.

During the discussions on the proposed ICRA, many tribal leaders expressed their fear for federal intrusion into intra-tribal matters and they stressed the importance of remaining faithful to customary law and protecting traditional dispute resolution methods given the differences between the Anglo and Indian world views in regards to law and justice. The imposition of jury trials onto tribes is seen as inconsistent with tribal tradition, as well as the requirement that the judge has no prior knowledge of the case is seen as contrary to the many tribes' conception of fairness, requiring full community involvement in the controversy together with the participation of elders. There is a perception of the superiority of the Anglo justice system and of the fact that indigenous methods of dispute resolution are inferior and have nothing to contribute. The risk is the elimination of some peculiar indigenous justice systems such as talking circles, restorative justice processes and consensus building practices since they depart from federal law and from constitutional due process rules. A recent trend among several Indian tribes has been to restore the traditional ways Native

⁴ C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, MA: Harvard University Press, 1987, 66.

⁵ *Ibidem*, 63–69.

⁶ A.P. Harris, "Race and Essentialism in Feminist Legal Theory", 42 *Stanford Law Review* 581 (1990), 594.

⁷ W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995, 168.

⁸ *Ibidem*, 165.

⁹ With regard to the *Martinez* case, some scholars suggested a compromise between tribal sovereignty and the primacy of sex equality: see A.R. Riley, "(Tribal) Sovereignty and Illiberalism", 95 *California Law Review* 799 (2007), 813.

¹⁰ B. Duthu, *op. cit.*, 175-177.

people settle disputes and to make these methods a part of the tribal court system, but, for example, the *Navajo Nation's Peacemaker court* incorporating Navajo religion and ceremony in the dispute resolution process is now at risk¹¹.

This potential conflict between the Anglo-american and the different Indian judicial systems reminds me of the recent European Court of Human Rights (ECtHR) and the UK Supreme Court (UKSC) dialogue. The Strasbourg judges had ruled against UK with the 2009 *Al-Khawaja and Tahery v. United Kingdom* judgment, founding that while it was justifiable to allow hearsay evidence in some circumstances, it was likely never permissible for a conviction to be based solely or decisively on such evidence¹². The UK Supreme Court, in its decision *R. v. Horncastle*¹³, expressed its concern that the ECtHR insufficiently appreciated or accommodated particular aspects of the domestic process, trying to persuade the Grand Chamber to hear the *Al-Khawaja* case and to reach a different conclusion: in other words, the UKSC was seeking for a dialogue with the ECtHR¹⁴. In 2011, the Grand Chamber, following the appeal by the United Kingdom, agreed with UK courts that the use of hearsay evidence does not automatically prevent fair trials¹⁵. A more flexible approach was applied and the details of the national – English – legal system were eventually taken in greater account.

This example shows the importance of a meaningful judicial dialogue: efforts should be done within the state and federal judiciaries to promote cooperation and understanding in their interaction with tribal courts, especially when it comes to the interpretation and application of the ICRA norms. This would prevent federal or state judges from expanding their jurisdiction into tribal communities with the risk of wiping out Indian differentness: it has been underlined how federal courts are ill equipped to differentiate between the hundreds of Indian nations and their differences in laws, cultures and traditions¹⁶. Besides, such dialogue would avoid a loss in legitimacy for Tribal courts adjudicating upon fundamental rights issues.

The *Tribal Courts Council* might play an important role since it was created for advancing the American Bar Association's goal of promoting diversity in the legal profession, for encouraging lawyers to become familiar with laws relating to Native Americans and for pressing Congress to nominate more Native American federal judges. This second mission of the Tribal Courts Council is closely linked to another aspect of judicial space in legal pluralism I believe is worth discussing. Citing Kymlicka again, "*Most Indian tribes do not oppose all forms of external review. What they object to is being subject to the constitution of their conquerors which they had no role in drafting and being answerable to federal courts, composed solely of non-Indian justices*"¹⁷. I believe that this sort of fear of non-Indian justices is not only related to the demand for a competent and qualified court who knows Indian law and is able to understand Native Americans' values and demands. It is more a feeling that the legitimation of the judiciary derives also from its being somehow representative of minorities. In other words, the creation and maintenance of Indian tribal courts seems of great importance for many reasons that have already been underlined, and among these reasons, because of the increasing need of judicial bodies that, independently from the selection method of their members, are reflective of minorities because of their composition. I do not think there is a need for judicial elections as embodied, for example, by the *Judicial Elections Referendum Act 2010* asking Navajo voters whether or not Navajo Nation District Court

¹¹ A.R. Riley, *op. cit.*, 839-842.

¹² (2009) ECHR 110.

¹³ (2009) UKSC 14.

¹⁴ M. Amos, "The dialogue between United Kingdom Courts and the European Court of Human Rights", 61 *International and Comparative Law Quarterly* 557 (2012), 566-567.

¹⁵ (2011) ECHR 2127.

¹⁶ A.R. Riley, *op. cit.*, 58.

¹⁷ W. Kymlicka, *op. cit.*, 169.

Judges and the Navajo Nation Supreme Court Justices should be elected positions or if the positions should continue to be appointed positions by the Navajo Nation President¹⁸. What is important is to try to discuss legal pluralism also considering the symbolic role of courts and the problem of judicial legitimacy in a broad sense.

¹⁸ B. Sullivan, "Judicial Selection Methods, Tribal Politics and Strong Government: Navajo Nation at the Crossroads", 12 *Tribal Law Journal* 1 (2011-2012),

PRIN Jurisdictions and Pluralisms

**Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal Pluralism:
American Tribes, Canadian First Nations and Scandinavian Sami Compared**

International Conference

Thursday 24 October (afternoon) and Friday 25 October 2013

Trento, Faculty of Law, Conference Room

COMMENTS ON

N. Bruce Duthu

Samson Occom Professor & Chair, Native American Studies, Dartmouth College

Paper

**“The Juridical Space of American Indian Tribal Courts: The Limits of Legal Pluralism in the
American Constitutional Order”**

Alexandra Tomaselli

I am extremely grateful to the organizers for having given me the opportunity to participate in this workshop and to comment on Prof. Bruce Duthu's excellent paper and works.

The topic of Indigenous Peoples' sovereignty and the limits of judicial and legal pluralism is extremely challenging, as well as highly debated among indigenous experts worldwide. In addition, I have been mainly tackling indigenous rights in Latin American and European countries. Having said this, my aim today is to discuss Prof. Duthu's paper by raising and, possibly, enhancing further debate on two general but fundamental aspects that are relevant also for the US case, namely antinomy and humility. The former concerns the potential clashes between indigenous customary laws and/or practices and the domestic and international legislation, especially vis-à-vis human rights law more broadly conceived. The latter is discussed in terms of the *necessity* to adopt a humble approach when approaching legal pluralism, and more specifically indigenous customary law/practices. As it will be briefly discussed below, these issues are intimately interlinked with each other and have been underlined by Duthu both in his paper and in his book *Shadows Nations. Tribal Sovereignty and the Limits of Legal Pluralism*.

Thus, taking stock of the US experience and broadening the discussion, I would like to tackle the first aspect, i.e., the antinomy, by bringing into discussion a recent sad case of misinterpretation and misuse of the recognition of the legitimacy of indigenous customary law in Bolivia. As widely known, the Constitution of Bolivia entered into force in February 2009 after a suffered referendum and a long-debated Constituent Assembly. Leaving apart the most salient aspects of such interesting and incisive reform, such as, *inter alia*, the 'plurinational' definition of the State, the right to indigenous customary law has been recognized in art.30, para.II, no.14 and art.179, and regulated by arts.190-192 as well as by the following the Jurisdictional Law/*Ley de Deslinde Jurisdiccional* (Law No.073/2010), which was enacted on 29 December 2010.

The Bolivian Constitution states clearly the supremacy of human rights standards over the constitutional provisions and the need to interpret the latter according to the former (see arts.13, para. IV; 14, para. III; 256; and 410, para. II). In addition, art.190, para.II, states the respect for the right to life, the due process and the other fundamental rights and guaranties recognized in the Constitution. Lastly, the above-mentioned Jurisdictional Law also contains the respect for the fundamental rights (art.5) and, in particular, the absolute prohibition of lynching and the death penalty.

Notwithstanding these guarantees, the Bolivian Ombudsman (*Defensoría del Pueblo*) have recently released statistics which report that between 2005 and 2013 there have been 53 cases of lynching, possible lynching, attempted lynching and correlated threats in seven Bolivian cities: La Paz, El Alto, Cochabamba, Chapare, Cobija, Potosí and Llallagua. Among these, 35 of such events were registered between April and August 2013.¹

Besides these serious human losses, worrying happenings such these ones lead to two extremely relevant consequences that undermine the legitimacy and the recognition of judicial and legal pluralism. On the one hand, who commit such crimes, giving vent to personal frustrations and revenges, may feel legitimized to (mis)use the label 'indigenous customary law' to justify such horrible crimes. On the other hand, the public opinion may easily be negatively influenced, misunderstand the aims of both indigenous customary law and its legal recognition, and start to hold or reinforce their negative stereotypes vis-à-vis indigenous cultures.

In the specific case of Bolivia, the act of recognizing indigenous customary systems is clearly an attempt to protect and enhance indigenous cultures, and not certainly a way to allow the commitment of horrible crimes such as the ones above-mentioned. Thus, on the one hand, it is undeniable that some

¹ Franz Chávez, "Falsa justicia comunitaria arropa linchamientos en Bolivia", 7 December 2013, *Inter Press Service*, at <http://www.ipsnoticias.net/2013/12/falsa-justicia-comunitaria-arropa-linchamientos-en-bolivia>.

customary practices across the world are clearly contrary to human rights standards, such as female genital mutilation. On the other hand, it would be too easy to accuse indigenous culture to allow such kind of crimes without an accurate analysis of the happenings in every specific context.²

In addition, indigenous customary law cannot be reduced to mystic traditional practices. Again, in the case of Bolivia, according to the indigenous *Aymara* judicial system, all members of the community are obliged to participate in the judgments for both didactical and transparency purposes. Firstly, all the youngsters are obliged to take part in these trials with the aim to learn the judicial system and the procedure, both of which the other older participants already know. Secondly, in case there would be lacunae or misuses by the authorities, the participants can intervene. In this way, also the 'watchers' are 'watched', and this gives further guarantees to the defendants. The ultimate goal of this indigenous customary law is thus to give remedy to the caused damage and to rebuild 'social peace'.³

This leads me to second aspect I would like to flag today in the light of Prof. Duthu's writings and with which I conclude, i.e., the concept of humility. As Duthu writes, "[h]umility is often mis(associated) with weakness and timidity [...]. On a closer examination, however, we find that humility also means the absence of arrogance, a posture of openness, and spirit of deference".⁴

Thus, as Prof. Duthu rightly reminds us, my humble suggestion based on my fieldworks with indigenous communities in Latin America is thus to approach indigenous communities with profound humility and with a spirit of openness and deference, especially when tackling the delicate aspect of their customary law and practices.

² See also Alexandra Xanthaki, "Indigenous Cultures And Languages: Limitations To Autonomous Regimes" (2012), Submissions to the Expert Mechanism on the study on indigenous peoples' languages and cultures, at <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyLanguages/AlexandraXanthaki.docx> or <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/SubmissionsStudyLanguages.aspx> under the author's name.

³ Q'apaj Conde Choque, "Hacia la construcción del pluralismo jurídico entendido como el derecho de acceso a la justicia: Una pregunta sobre el 'tribunal competente' en Bolivia", in Alexandra Tomaselli, Silvia Ordoñez and Claire Wright (eds.), *Pueblos indígenas: Justicia y formas de participación. Casos latinoamericanos y comparados*, Cuadernos Derechos Humanos, Universidad de Deusto, forthcoming.

⁴ N. Bruce Duthu, *Shadows Nations. Tribal Sovereignty and the Limits of Legal Pluralism*, Oxford University Press, Oxford, New York, 2013, at 187.

Indigenous Peoples and the Ethos of Legal Pluralism in Canada

Patrick Macklem*

ABSTRACT

In a luminous book entitled *Shadow Nations*, Bruce Duthu reconstructs relations between Indian nations and the United States according to a founding "ethos of legal pluralism." In its afterglow, many scholars will be inspired to approach their jurisdictions with a similar objective in mind. Writing from Canada, with its strong ties to legal pluralism in theory if not in practice, *Shadow Nations* led me to ask the following questions. How receptive is the Canadian constitutional environment to conceiving of Indigenous-Canadian relations in accordance with similar ethos of legal pluralism? Are there institutional and doctrinal openings for such a reconstruction to take root? What forms of structural and political resistance might act as impediments?

This chapter offers some preliminary reflections on these questions. It first outlines legal pluralism's promise in early encounters between Indigenous peoples and colonists in New France and British North America and offer reasons why legal pluralism thus far fails to characterize Indigenous-Canadian relations. It then identifies three developments that could form a foundation for its resurgence. Two are occurring inside Canadian law, looking out to Indigenous legal norms. The third is occurring beyond Canadian law, and is not necessarily looking in to Canadian legal norms. My reflections on these developments provide little more than a foundation from which answers to these questions might flow. But I hope they shed some light on the receptivity of relations between Indigenous peoples and the Canadian state to an ethos of legal pluralism.

Indigenous Peoples and the Ethos of Legal Pluralism in Canada

Patrick Macklem*

In a luminous book entitled *Shadow Nations*, Bruce Duthu reconstructs relations between Indian nations and the United States according to a founding "ethos of legal pluralism."¹ In its afterglow, many scholars will be inspired to approach their jurisdictions with a similar objective in mind. Writing from Canada, with its strong ties to legal pluralism in theory² if not in practice, *Shadow Nations* led me to ask the following questions. How receptive is the Canadian constitutional environment to conceiving of Indigenous-Canadian relations in accordance with similar ethos of legal pluralism? Are there institutional and doctrinal openings for such a reconstruction to take root? What forms of structural and political resistance might act as impediments?

This chapter offers some preliminary reflections on these questions. It first outlines legal pluralism's promise in early encounters between Indigenous peoples and colonists in New France and British North America and offer reasons why legal pluralism thus far fails to characterize Indigenous-Canadian relations. It then identifies three developments that could form a foundation for its resurgence. Two are occurring inside Canadian law, looking out to

*William C. Graham Professor of Law, University of Toronto. I would like to thank Sara Pennicino, Czinia Piciocchi, and Jens Woelk for their insightful comments on a previous draft of this paper.

¹ Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* (New York: Oxford University Press, 2013), at 1.

² A fact duly noted in *Shadow Nations*, which engages the work on legal pluralism by several Canadian theorists, including Roderick MacDonald and Tim Schouls. See Roderick A. MacDonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism," 15 *Ariz. J. Int'l & Comp. L.* 69 (1998); Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: University of Vancouver Press, 2003).

Indigenous legal norms. The third is occurring beyond Canadian law, and is not necessarily looking in to Canadian legal norms. My reflections on these developments provide little more than a foundation from which answers to these questions might flow. But I hope they shed some light on the receptivity of relations between Indigenous peoples and the Canadian state to an ethos of legal pluralism.

I.

By “legal pluralism,” I take Bruce Duthu’s lead to refer to the existence of a plurality of legal orders existing within or across the territorial boundaries of a sovereign state.³ Many institutional mechanisms give formal expression to the presence of a plurality of legal orders. A federal system constitutionally vests lawmaking authority in two levels of government, each relatively autonomous from the other in the production of legal norms. A state can also devolve power to regional and local levels of government, enabling the exercise of delegated lawmaking authority to a subsection of its population. Forms of minority protection may also promote legal pluralism, to the extent that they contemplate a minority community having a measure of lawmaking authority relatively shielded from the legislative power of the broader political community in which it is located.

But the legal pluralism relevant to *Shadow Nations* – and indeed to all rich accounts of Indigenous-settler relations – is one where the sources of legal validity themselves are

³ *Supra* note 1, at 11-12 (“the legal pluralist is intensely interested in identifying the forms of normative ordering, including legal systems, that have meaning to the socially plural societies occupying the same social field and examining the operation of those normative ordering systems in relation to the power of the state”). For more discussion of legal pluralism, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2002); Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the Law* (2002); William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995).

plural in nature. In the above examples, norms produced by legal actors other than the central government appear to possess legal validity by a plurality of sources. A provincial law is legally valid because it was enacted by a legislature possessing jurisdiction to enact it. A municipal bylaw is legally valid because it was enacted in accordance with relevant enabling legislation. A law promulgated by a minority community possesses legal validity because the community has a legal right to promulgate it. But ultimately the legal validity of each of these norms is derived from a singular source, the constitution of the state itself. In contrast, the legal pluralism that captures salient properties of Indigenous-settler relations is one of constitutional pluralism, where there exists a plurality of constitutional orders within and, conceivably, across state boundaries. In such an environment, there are multiple legal norms of different content, multiple sites of legal norm production, multiple legal sources for these sites, and multiple forms of norm enforcement. As a result, “legal reality,” according to John Griffiths, is “an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation.”⁴

At the time of initial contact between Indigenous peoples and Imperial powers and their colonial representatives, “legal reality” appeared receptive to an ethos of legal pluralism. Manifold Indigenous legal orders exercised lawmaking authority over territories and peoples in the Americas. The legal norms that constituted these legal orders specified and regulated the economic, social and political practices of individuals and groups belonging to distinct Indigenous nations as well as relations between and among Indigenous

⁴ John Griffiths, “What is Legal Pluralism?” (1986) 24 J. Leg. Pluralism 1, at 4. Legal scholars, myself included, often cite this article as a classic articulation of legal pluralism. David Schneiderman’s work on the British legal and political pluralists, including F.W. Maitland, Harold Laski, and John Neville Figgis, of the early twentieth century reveals Griffiths to have been a relative latecomer to the field. See David Schneiderman, “Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century” (1998) 48 U.T.L.J. 521; David Schneiderman, “Haldane Unrevealed” (2012) 57 McGill L.J. 593.

nations. The legal validity of these norms lay in the nature of the legal orders from which they emanated. European settlement imported colonial legal norms whose validity ultimately depended on the legal systems of France and the United Kingdom. Colonial settlement also marked the genesis of a series of inter-societal encounters, some friendly, others hostile, with mistrust, trust, suspicion and expectation alike participating in the formation of a pluralist ethos characteristic of their relations. In the words of Jeremy Webber, “the distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other’s customs, and shaping the beginning of a common normative language.”⁵

Contact thus set the stage for legally plural relationships between Indigenous peoples and colonial powers. Treaties negotiated early in the history of European expansion formalized efforts to achieve peaceful co-existence between Indigenous nations and newcomers to the continent. A 1665 peace treaty between the French Crown and four Indigenous nations belonging to the Iroquois Confederacy, for example, confirmed a cessation of conflict and a state of peace between the parties. The text of the treaty indirectly acknowledged the First Nations’ continuing title to their territories and certain territorial rights of the French Crown in the settlements of Montréal, Trois-Rivières, and Québec City.⁶

It would be a stretch, I think, to construe the 1665 treaty and others like it as formal evidence of a strong ethos of legal pluralism animating relations between Indigenous and colonial

⁵ Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L.J. 623 at 627.

⁶*Treaty of Peace between the Iroquois and Governor de Tracy*, New York Papers 111 A28. The text of the treaty can be found in Clive Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry: Oceana. 1969-1986), vol. IX, at 363; and E.B. O’Callaghan, ed., *Documents Relative to the Colonial History of the State of New York* (Albany: Weed, Parsons, 1856-61), vol. III, at 21. For more discussion of the treaty, see Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinction* (Ottawa: Minister of Supply and Services Canada, 1995), at 18-20.

legal orders. “Legal reality” likely becomes legally plural gradually, as repeated interactions deepen inter-societal commitments to plural legal orders. But the early treaties do suggest a nascent legal pluralism at play among the parties. Premised on mutual recognition, they stand as formal markers of early encounters and interactions that had the potential – if deepened and multiplied – to evolve into a durable form of legal pluralism structuring Indigenous- settler relations on the continent.

Fast forward to today. There exist more than five hundred treaties between Indigenous peoples and the Crown in Canada from the shores of the Atlantic Ocean to the Yukon in the western Canadian Arctic. Where territories have not yet been subject to treaty, in most of British Columbia, First Nations are negotiating new treaties to structure their relationships with federal and provincial authorities. The enactment of s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada,” has ushered in significant changes to the constitutional relationship between Indigenous peoples and the Canadian state.

The promise of a “common normative language” informing this relationship, however, remains unfulfilled. There are many complex reasons for its absence – reasons that span many domains, including epistemology, economics, politics and law. But one account merits attention, even though it glosses over the complexity of what it seeks to explain. The ethos of legal pluralism immanent in early encounters between Indigenous and colonial peoples failed to take root and was replaced by its antithesis: a monistic account of constitutional order, with decidedly non-Indigenous sources of legal authority initially grounded in British law and subsequently grounded in the Constitution of Canada.

The question, of course, is why did legal pluralism not come to pass? Although the Crown initially entered into treaties with Indigenous people to secure their precarious legal and factual footing on Indigenous territories by acts of mutual recognition, the Crown began to negotiate treaties for different reasons. International law had come to stabilize claims of sovereignty by imperial powers over Indigenous territory. Constitutional law assumed a singular, hierarchical conception of sovereignty incapable of comprehending multiple sovereign actors on a given territory. As a result, the Crown no longer regarded a treaty as necessarily linked to its sovereignty over Indigenous territory.⁷

During the nineteenth century, perhaps as a result of the dramatic shift in demography and in the balance of military and economic power between Indigenous nations and the Crown, the treaty process from the Crown's perspective instead became a means of facilitating the relocation and assimilation of Indigenous people. The Crown increasingly saw the treaty process as a means of formally dispossessing Indigenous peoples of ancestral territory in return for reserve land and certain benefits to be provided by state authorities, rendering remote the possibility of legal pluralism becoming "legal reality."

Moreover, although in the early treaties signalled a nation-to-nation relationship of mutual respect, the parties did not initially regard them as creating legal rights enforceable in a court of law. Instead, the treaty served as evidence of an ongoing relationship; rights and obligations flowed not from the document itself but from the relationship formalized by the treaty.⁸ This early process of generating norms of conduct and recognition operated against

⁷ Compare P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York: Oxford University Press, 2004) ("constitutional lawyers and courts intellectually to the unitary common law model of sovereignty – itself ... largely a nineteenth-century model – were unable to recognize a shared or multiple version").

⁸ Compare William Blackstone, 1 *Commentaries on the Laws of England* (Oxford 1765-9), at 428 (vision of a contract as dependent on the existence of a social relation and pre-existing rights and obligations). See also Patrick

the backdrop of a colonial legal imagination that had yet to experience a radical separation of law and politics, in which certain issues are regarded as legal and others as political.

When law gradually emerged as a relatively autonomous sphere of social life, the judiciary began to address the legal consequences of the treaty process. Judicial interpretation of treaties only started to occur in Canada in the late 1800s, when courts held treaties to be political agreements unenforceable in a court of law. International law provides that an agreement between two “independent powers” constitutes a treaty binding on the parties to the agreement.⁹ But because courts regarded Indigenous nations as uncivilized and thus not independent, they refused to view Crown promises as legally enforceable obligations under international or domestic law. This view gradually was replaced by more accommodating approach that regarded a treaty as a form of contract.¹⁰ Indigenous people were imagined as possessing legal personality similar to that possessed by non-Indigenous in Canada and were therefore capable of entering into domestically binding agreements with the Crown.

But because treaties assumed the legal form of contract, their terms were subject to the exercise of unilateral legislative authority. Prior to 1982, this had the effect of permitting Parliament to unilaterally regulate or extinguish existing treaty rights. Moreover, when courts viewed treaties as contractual agreements, they initially interpreted their substance in a manner that was blind to Indigenous expectations of the treaty process. Treaty rights were

Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), at note 40, 143 (eighteenth century legal consciousness invoked the notion of promise “to support an independently existing duty”); Owen Kahn-Freund, *Blackstone’s Neglected Child: The Contract of Employment*, 93 L.Q.R. 508, at 512 (“the contract is only an *accidentale*, not an *essentiale* of the relation”).

⁹ See, e.g., Brownlie, *Principles of Public International Law*, *supra* note 52, at 58-70. It should be noted that, even if treaties between the Crown and First Nations were accorded “international treaty” status, this fact alone would not render them enforceable in domestic courts; implementing legislation would be required: see *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.).

¹⁰ See, e.g., *Pawis v. The Queen* (1979), 102 D.L.R. (3d) 602 (F.C.T.D.), at 610 (“[t]he right acquired by the Indians in those treaties was ... necessarily subject to restriction through acts of the legislature, just as the person who acquires from the Crown a grant of land is subject in its enjoyment to ... legislative restrictions”).

interpreted solely by reference to non-Indigenous legal norms and values. In the words of Dale Turner, treaties were “textualized in the language of the dominant European culture.”¹¹

Despite its nascent presence in early treaties, legal pluralism thus did not take root in Canada in part because the Crown began to negotiate treaties for reasons antithetical to pluralism's promise. And when treaties assumed legal form in Canadian law, Canadian legal institutions did not comprehend them as instruments of mutual recognition, where each party acknowledged a measure of legitimacy of the legal order of the other and accordingly made arrangements for the co-existence and interaction of legal norms emanating from the two or more legal communities they represented. Their legal form as contracts rendered them unintelligible as instruments of mutual recognition. As contracts, they assumed a hierarchical legal relation between the Crown and Indigenous parties, given that the Crown in its legislative capacity had the authority to unilaterally override their terms. Their substance, too, rendered them unintelligible to legal pluralism as Indigenous legal norms played no role in clarifying their terms.

Another set of factors contributing to the failure of legal pluralism relates to how Canadian law comprehended the legality of Indigenous interests in their territories. With British sovereignty came underlying Crown title, with a particularly brutal twist. The fiction of underlying Crown title was developed in feudal times to legitimate the then-existing kaleidoscopic pattern of landholdings in England by treating the Crown as the original occupant and actual landholders as holding title by way of (mostly fictional) grants from the

¹¹ Dale Turner, *From Valladolid to Ottawa: The Illusion of Listening to Aboriginal People*, in Jill Oakes et al., eds., *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998), 53-68, at 64. For a good example of this phenomenon, see *Pawis v. The Queen*, *ibid.*, at 609-10 (interpreting a treaty provision establishing a “full and free privilege to hunt and fish” to mean that “no consideration is to be extracted from those entitled to hunt and fish”).

Crown. Its transplantation to the colonial context was not accompanied by the complementary fiction that the actual Indigenous landholders held title by way of a grant from the Crown. The fiction of underlying Crown title became a legal technology of Indigenous dispossession, radically disrupting the actual pattern of Indigenous landholding in British North America.

In the late 1800s, Canadian law, with its belated acceptance of a tepid form of common law Aboriginal title, did acknowledge that Indigenous peoples lived on and occupied the continent prior to European contact and, as a result, possess certain interests worthy of legal protection. This body of law prescribed ways of handling disputes between Indigenous and non-Indigenous peoples, especially disputes over land. It recognized, in common law terms, Indigenous occupation and use of ancestral lands,¹² described rights associated with Aboriginal title in collective terms vesting in Indigenous communities,¹³ and purported to restrict settlement on Indigenous territories until these territories had been surrendered to the Crown.¹⁴ It prohibited sales of Indigenous land to non-Indigenous people without the approval of and participation by Crown authorities.¹⁵ And it prescribed safeguards for the manner in which such surrenders can occur and imposed fiduciary obligations on government in its dealings with Indigenous lands and resources.¹⁶

¹²See, for example, *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (F.C.T.D.).

¹³See, for example, *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.).

¹⁴See, for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 383 (“[t]he purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited”).

¹⁵See, for example, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at 677 (Aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown).

¹⁶See, for example, *R. v. Guerin*, [1984] 2 S.C.R. 335, at 382 (Aboriginal title “gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians”); see also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1108 (“the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples”).

The common law of Aboriginal title, however, historically failed to protect Indigenous territories from settlement and exploitation. Law's inability to protect Indigenous territories was in part a function of broader social and historical realities associated with colonial expansion. Governments and settlers either misunderstood or ignored the law of Aboriginal title. Crown respect for the law of Aboriginal title was eroded by the decline of the fur trade and the waning of Indigenous and non-Indigenous economic interdependence. Increased demands on Indigenous territories occasioned by population growth and westward expansion, followed by a period of paternalistic administration marked by involuntary relocations, only exacerbated the erosion of respect.

In addition to these external factors, law's failure to protect Indigenous territories can also be internally traced to legal choices of the judiciary. On more than one occasion, the judiciary suggested that Indigenous territorial claims might not possess any independent legal significance at all.¹⁷ The possibility that Indigenous territories might not generate legal recognition by the Canadian legal order served as a legal backdrop for almost a century of relations between the Crown and Indigenous peoples, shaping legal expectations of governments, corporations, citizens, and other legal actors. It contributed to a perception that governments and third parties were relatively free to engage in a range of activity on ancestral lands—a perception which, in turn, legitimated unparalleled levels of government and third party development and exploitation of Indigenous territories, which continue relatively unabated today.

¹⁷See, for example, *St. Catherine's Milling v. The Queen* (1888), 14 A.C. 46 (P.C.) (Aboriginal rights with respect to land and resources did not predate but were created by the Royal Proclamation and, as such, are "dependent on the good will of the Sovereign").

Moreover, until recently, the legal significance that the judiciary attached to Indigenous territorial interests was minimal. Courts resisted characterizing Aboriginal title in proprietary terms, preferring instead to characterize it as a right of occupancy or a personal or usufructuary right,¹⁸ or, more recently, as a *sui generis* interest.¹⁹ Constructing Aboriginal title as a non-proprietary interest enabled its regulation and indeed its extinguishment by appropriate executive action,²⁰ disabled Indigenous titleholders from obtaining interim relief,²¹ and frustrated access to the common law presumption of compensation in the event of expropriation.²² Courts also indicated a willingness to view Aboriginal title as a set of rights to engage only in traditional practices on Aboriginal territory, that is, those practices that Indigenous people engaged in at the time the Crown acquired territorial sovereignty.²³ Each of these legal choices had a profound effect on the ability of Indigenous peoples to rely on Canadian law to protect ancestral territories from non-Indigenous incursion. Each also represented another nail in legal pluralism's coffin.

¹⁸*St. Catherine's Milling Co v. The Queen* (1888), 14 A.C. 46 (P.C.), at 54; see also *Smith v. The Queen*, [1983] 1 S.C.R. 554.

¹⁹*Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at 658 (Aboriginal title refers to an "Indian interest in land [that] is truly *sui generis*"); see also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1112 ("[c]ourts must be careful ... to avoid the application of traditional common law concepts of property as they develop their understanding of ... the *sui generis* nature of Aboriginal rights").

²⁰See, for example, *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at 575 ("whatever may have been the situation upon signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve").

²¹A number of cases held that Aboriginal title does not constitute an interest in land sufficient to support the registration of a caveat or certificate of *lis pendens*, which would temporarily prevent activity on ancestral territory pending final resolution of a dispute. See, for example, *Uukw v. A.G.B.C.* (1987), 16 B.C.L.R. (2d) 145 (B.C.C.A.); *Lac La Ronge Indian Band v. Beckman*, [1990] 4 W.W.R. 211 (Sask. C.A.); *James Smith Indian Band v. Saskatchewan (Master of Titles)*, [1994] 2 C.N.L.R. 72 (Sask. Q.B.); but see *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

²²See, for example, *British Columbia v. Tener*, [1985] 1 S.C.R. 533, at 559, quoting *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, at 542, per Lord Atkinson ("a statute is not to be construed so as to take away the property of a subject without compensation").

²³See, for example, *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518, at 559 ("the common law ... can give effect only to those incidents of that enjoyment that were ... given effect by the [Aboriginal] regime that prevailed before"); *A.G. Ont. v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1, at 3 (Ont. S.C.) ("essence of Aboriginal rights is the right of Indians to live on the lands as their forefathers lived").

II.

Notwithstanding this history, and to return to the questions posed at the outset, how receptive is the Canadian constitutional environment to conceiving of Indigenous-Canadian relations in accordance with the ethos of legal pluralism that animated their origins? Are there institutional and doctrinal openings for such a reconstruction to take root? What forms of structural and political resistance might act as impediments? There are three developments that could form a foundation for the recovery of legal pluralism. Two are occurring inside Canadian law, looking out to Indigenous legal norms. The third is occurring beyond Canadian law, and is not necessarily looking in to Canadian legal norms.

The first development relates to the form and substance of treaty rights as understood by the Canadian judiciary. With the enactment of s. 35(1) of the *Constitution Act, 1982*, treaty rights now assume the form of constitutional rights. No longer enforceable merely in the face of Crown inaction, treaties now constrain the exercise of legislative authority. To illustrate, in *R. v. Badger*,²⁴ at issue was whether the right to hunt contained in Treaty 8 provided a defence to a charge under Alberta's *Wildlife Act* which prohibited hunting out-of-season and hunting without a licence. The Supreme Court of Canada held that Treaty 8 protected hunting for food on private property that was not put to a "visible, incompatible use," and that the right to hunt was a treaty right within the meaning of s. 35(1) of the *Constitution Act*. The Court stated that "a treaty represents an exchange of solemn promises [and] an agreement whose nature is sacred." It reiterated that treaties should be interpreted

²⁴*R. v. Badger* [1996] 1 S.C.R. 771.

in “a manner which maintains the integrity of the Crown” and that ambiguities or doubtful expressions in the wording of the treaty should be resolved in favour of Indigenous people.

Badger marks a significant transformation in the judicial understanding of a treaty’s form and substance. No longer mere political agreements or contractual agreements, treaties now possess formal constitutional status. Their substance ought to be determined in a manner consistent with Indigenous understandings, flexible to evolving practices, inclusive of reasonably incidental practices, and in a way that best reconciles the competing interests of the parties.

Badger’s requirement that treaties be interpreted in a manner consistent with Indigenous understandings implicitly rests on an ethos of legal pluralism. Though each treaty is unique in its terms and scope of application, Indigenous understandings of treaties are relatively uniform. Indigenous people entered into treaties with the Crown to formalize a relationship of continental co-existence. They initially sought military alliances before and during the war between Britain and France and also sought to maximize benefits associated with economic interdependence. As the nineteenth century progressed, Indigenous peoples sought to maintain their autonomous legal orders and traditional ways of life in the face of railway construction, surveying activity, non-Indigenous settlement of Indigenous territory, and an unprecedented rise in hunting, fishing and trapping by non-Indigenous people. They sought to retain traditional authority over their territories and to govern their communities in the face of colonial expansion. In James Youngblood Henderson’s words, “Aboriginal nations entered into the treaties as the keepers of a certain place.”²⁵ Indigenous people regarded the treaty process as enabling the sharing of land and authority with non-Indigenous

²⁵ James [Sákéj] Henderson, *Interpreting Sui Generis Treaties*, 36 Alta. L. Rev. 46, at 64 (1997).

people while at the same time protecting their territories, economies and forms of government from non-Indigenous incursion.

The new constitutional status of treaties also recovers the promise of legal pluralism. Understanding treaties as constitutional instruments opens the pluralist legal door to comprehending treaties as constitutional accords. As constitutional accords, they articulate basic terms and conditions of social co-existence and making possible the exercise of constitutional authority. Unlike legal contracts between the Crown and private citizens, which distribute power delegated by the state to private parties in the form of legally enforceable rights and obligations, treaties establish the constitutional parameters of state

power itself.²⁶ Accordingly, treaties do not distribute delegated state power, they distribute constitutional authority. Treaties are therefore as much a part of the constitutional history of Canada as the *Constitution Act, 1867*, which distributes legislative power between the federal and provincial governments. Treaty rights are constitutional rights that flow to Indigenous people in exchange for allowing European nations to exercise a measure of sovereign authority in North America.

As constitutional accords, treaties operate as instruments of mutual recognition. Negotiations occur against a backdrop of competing claims of constitutional authority. The Crown enters negotiations under the assumption that it possesses jurisdiction and rights with respect to the territory in question; a First Nation enters negotiations on the assumption that it possesses jurisdiction and rights with respect to the same territory. The treaty process is a means by which competing claims of authority and right can be reconciled with each other

²⁶ Compare Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (New York: Oxford University Press, 1997), at 105 (“[I]n American Indian visions of law and peace, a treaty connected different peoples through constitutional bonds of multicultural unity”).

by each party agreeing to recognize a measure of the authority of the other.²⁷ Recognition can occur geographically, as with a number of contemporary land claims agreements that distribute jurisdiction between the parties based on different geographical categories of land within the territory in question. Recognition can also occur by subject, whereby the parties distribute jurisdiction between themselves based on various subject matters suitable for legislation. As an instrument of mutual recognition, a treaty is an ongoing process, structured but not determined by the text of the original agreement, by which parties commit to resolving disputes that might arise in the future through a process of dialogue and mutual respect.

Viewing treaties as constitutional accords is consonant with recent scholarly attempts to construct alternative legal histories of Indigenous-Crown relations. Legal histories typically trace the legal position of Indigenous people under Canadian law over time to demonstrate the redemptive potential, or lack thereof, of Canadian law for protecting Indigenous peoples from assimilation. What such histories lack, and what recent scholarship attempts to provide, is an appreciation of how Indigenous people actively participated in the production and reproduction of legal norms that structured their relations with non-Indigenous people on the continent. This scholarship, I believe, is consistent with what *Shadow Nations* identifies as “critical legal pluralism,” an approach introduced by Kleinhaus and MacDonald that “focuses the spotlight on the citizen-subject and views them as sources

²⁷ See generally Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services Canada, 1995).

of normativity in the sense that they are *law inventing*, not merely *law-abiding*, forces within a society.”²⁸

James Tully, for example, has interpreted the treaty process as a form of “treaty constitutionalism” whereby Indigenous people participate in the creation of constitutional norms governing Aboriginal-Crown relations.²⁹ Robert Williams has written of the “long- neglected fact that ... Indians tried to create a new type of society with Europeans on the multicultural frontiers of colonial North America.”³⁰ Henderson has interpreted the treaty process as producing “treaty federalism”—a constitutional order grounded in the consent of Indigenous and non-Indigenous people on the continent.³¹ What such scholarship shares is an appreciation of the active participation by Indigenous people in the production of basic legal norms governing the distribution of constitutional authority in North America.³² Viewed through the prism of legal pluralism, the treaty process is a formal manifestation of such participation through its active production of constitutional accords that distribute constitutional authority on the continent.

The second development relates to the form and substance of Aboriginal title and rights. With the enactment of s. 35(1) of the *Constitution Act, 1982*, and confirmed by the Supreme Court of Canada in *Delgamuukw v. British Columbia*,³³ Aboriginal title shed its common law status and assumed the form of a constitutional right. Although the Court

²⁸ *Shadow Nations*, *supra*, at 77, drawing from Martha-Marie Kleinhaus and Roderick A. MacDonald, “What is a Critical legal Pluralism?” (1997) 12 Can. J. L. & Soc. 25

²⁹ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), at 117.

³⁰ Robert A. Williams Jr., *Linking Arms Together*, *supra*, at 9.

³¹ Henderson, *Empowering Treaty Federalism*, *supra*.

³² See generally Jeremy Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples,” *supra*; see also Sidney L. Harring, *White Man’s Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998).

³³ [1997] 3 S.C.R. 1010.

extensively described the nature and scope of Aboriginal title and the circumstances under which it can be justifiably interfered with by the Crown, it offered little insight into why Aboriginal title merits constitutional protection, holding simply that a “plain meaning” of the Constitution and precedent were conclusive of the issue.³⁴

But a deeper account of the constitutional status of Aboriginal title rests on the ethos of legal pluralism. On this account, Aboriginal title is a constitutional – as opposed to a common law or statutory – norm because it is an entitlement that is not conditional on the exercise of judicial and legislative authority. Instead, it is logically and historically antecedent to the exercise of judicial and legislative authority and owes its origins to facts and norms that predate the establishment of the Canadian state. Indigenous peoples possessed title to their territories according to their own laws prior to the establishment of a sovereign entity that assumed the legislative power to redistribute title to its citizens. In the words of Swepson and Plant, “rights of ownership already accrue to indigenous populations, and are

not ceded to them through the actions of nation-states.”³⁵ Canada became a nation-state against the backdrop of a pre-existing distribution of territory among Indigenous nations. By recognizing and affirming Aboriginal title, s. 35(1) extends constitutional validity to Indigenous legal norms that inform and make sense of this pre-existing distribution of Indigenous territory. It ensures that state power will be exercised in a manner that respects these Indigenous legal norms and the Indigenous legal orders to which they owe their existence.

³⁴ The Court held that the text of s. 35(1) and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 both suggest that s. 35(1) provides constitutional status to those rights that were “existing” prior to 1982 and, given that Aboriginal title was a common law right existing in 1982, s. 35(1) accords it constitutional status.

³⁵ L. Swepson & R. Plant, *International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations*, 124 *International Lab. Rev.* 91, at 97 (1985).

Also relevant to a recovery of legal pluralism's promise is a shift in how the judiciary assesses the validity of a claim of Aboriginal title. Indigenous legal norms can participate in establishing the requisite exclusive occupation on which Aboriginal title rests. In the words of Lamer C.J. in *Delgamuukw*:

[I]f, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of laws which are the subject of a claim of Aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.³⁶

Elsewhere in his reasons, Lamer C.J. stated that Indigenous laws governing trespass and conditional land use by other Indigenous nations, as well as treaties between and among Indigenous nations also might assist in establishing the occupation necessary to prove Aboriginal title.³⁷

Constitutional recognition of Indigenous legal norms is not restricted to the proof of Aboriginal title. Elsewhere the Court has suggested that Indigenous laws compatible with the assertion of Crown sovereignty survived its assertion, were "absorbed into the common law as rights," and, if not surrendered or extinguished, received constitutional recognition as Aboriginal rights by s. 35(1).³⁸ This suggests that at least part of the reason something is an Aboriginal right in Canadian law is because it was an Indigenous legal norm at the time of the assertion of Crown sovereignty. Understanding Aboriginal rights as Indigenous legal norms renders s. 35(1) a provision performative of legal pluralism by formally acknowledging the constitutional significance of Indigenous legal orders.

A third development relevant to a resurgence of an ethos of legal pluralism lies outside the confines of constitutional recognition and affirmation of Aboriginal and treaty

³⁶ *Supra*, at para. 148.

³⁷ *Ibid.*, at para. 157.

³⁸ *Mitchell v. MNR*, 1 S.C.R. 911, at para. 10 per McLachlin C.J.

rights. Indigenous legal scholars have begun ambitious tasks of recovering and modernizing Indigenous legal norms or traditions that historically contributed to the social ordering of different Indigenous societies. This is no easy task, given the relative inaccessibility of oral traditions and Indigenous languages as well as the need to recover Indigenous patterns of being and ways of life damaged by the history of colonialism.³⁹ One must then seek to identify the ideas and beliefs that underpin such legal norms – in order to make sense of them and understand their normative significance. And then they need to be placed alongside non-Indigenous norms for comparison and contrast to determine ways in which they might assist in structuring Indigenous and non-Indigenous legal and political relations.

John Borrows, for example, in *Canada's Indigenous Constitution*, details legal norms from the Mi'kmaq, Haudenosaunee, Anishnabek, Cree, Métis, Canarrier, Nisga'a and Inuit legal traditions.⁴⁰ Val Napoleon and Hadley Friedland focus on the *wetiko* in particular, a concept in Cree and Anishnabek societies that describes a person who is harmful to others in prohibited ways and the traditions, processes and principles developed to address people who fell within this legal category.⁴¹ A number of law schools in Canada have institutionalized this development by offering courses on Indigenous legal traditions. The University of Victoria on Vancouver Island has taken this one step further, by working to offer a joint common law and Indigenous law degree.

Judicial decisions occasionally hint at an ethos of legal pluralism informing their characterizations of relations between Indigenous peoples and the Canadian state. Chief

³⁹ For thoughtful reflections on the challenges this work faces given the ongoing effects of colonialism on Indigenous identity formation, see Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions," (2007) 6 Osgoode Hall L.J. 13.

⁴⁰ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 59-106.

⁴¹ Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance," (2013) (on file with author).

Justice McLachlin, in *Haida Nation* and *Taku River*, wrote of treaties as instruments that “reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty or “*de facto* Crown sovereignty.”

⁴² The Court regularly refers to “the pre-existing societies of aboriginal peoples,”⁴³ Indigenous “legal systems,”⁴⁴ “pre-existing systems of aboriginal law,”⁴⁵ and “aboriginal peoples occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures.”⁴⁶ And, in the following passage, Chief Justice McLachlin, in her dissent in *Van der Peet*, clearly summoned the spirit of legal pluralism:

The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement.⁴⁷

Indeed, this passage seems to suggest that legal pluralism has always characterized the “the interface of Europeans and the common law with aboriginal peoples.” But history tells us otherwise. Canadian courts describing relations between Indigenous peoples and Canada as legally plural, as important as this development is, does not make them so. For the ethos of legal pluralism to restart animating relations between Indigenous peoples and Canada, constitutional recognition of Indigenous governments sovereign within their spheres of authority, capable of exercising exclusive and concurrent lawmaking powers formally

⁴² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 20; *Taku River Tlingit First Nation v. British Columbia Project Assessment Director*, [2004] 3 S.C.R. 550. For an extended reflection of this approach, see Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).

⁴³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 39, per Lamer C.J.;

⁴⁴ *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686, at para. 45, per Bastarache J.

⁴⁵ *Delgamuukw*, *supra*, at para. 145, per Lamer C.J.

⁴⁶ *Mitchell v. MNR*, [2001] 1 S.C.R. 911, at para. 9, per McLachlin C.J.

⁴⁷ *Van der Peet*, *supra*, at para. 263,

equivalent to their federal and provincial counterparts, would need to occur, coupled with a deepening of the recent developments traced in this paper.

Nor is legal pluralism a one way street. When Indigenous legal orders themselves pay homage to the premises of legal pluralism, then it will truly begin to become “legal reality.” The capacity of Indigenous legal orders to do so turns on, first, their capacity to resurrect Indigenous legal norms that can carry this message, and second, the willingness of the Canadian constitutional order to recognize, and affirm, its constitutional significance. Until then, Indigenous nations remain, to borrow Bruce Duthu’s haunting phrase, shadow nations, waiting and working for a new dawn.

Comment on Patrick Macklem's Indigenous Peoples and Ethos of Legal Pluralism in Canada

By Sara Pennicino

Patrick Macklem's presentation dealt not only with topics he covered in the paper *Indigenous Peoples and Ethos of Legal Pluralism in Canada*, but it also addressed other issues that went beyond the scope of his original three research questions, i.e. «how receptive is the Canadian constitutional environment to conceiving of Indigenous-Canadian relations in accordance with similar ethos of legal pluralism? Are there institutional and doctrinal openings for such a reconstruction to take root? What forms of structural and political resistance might act as impediments?». On my part, I would like to raise two points with regard to Patrick's insight on Canada's constitutional receptiveness of the *ethos of legal pluralism* as a foundation of Indigenous-Canadian relations.

First of all, notwithstanding the fact that Patrick's paper draws direct inspiration from Bruce Duthu's book, there is one consistent difference between the two. In *Shadow Nations*, Bruce argues in favor of the creation of a confederation through a reform of the U.S. constitutional framework. In fact, in his 2008 piece entitled *American Indians and the Law*¹ he had already called for a «return to bilateral arrangements between tribes and the federal government as the preferred vehicle to secure and advance tribal sovereignty» and he now reaffirms this idea by conceptually referring it to a confederation-like political union (as opposed to an incorporating model).² The latter should be the result of a constitutive process characterized by a bilateral and equal participation of both parties bound by reciprocal duties. Reasoning outside the given constitutional framework is not, on the contrary, Patrick's chosen option; while addressing the possible enactment of the *ethos of legal pluralism* he focuses on the space available in the existing Canadian constitutional system. His main thesis revolves around the idea that constitutional recognition of indigenous difference promotes a just distribution of constitutional powers and, more specifically in this paper, he argues in favor of using aboriginal legal sources as instruments to allocate constitutional powers.³ In other words, Aboriginal difference should be valued and enhanced in the constitutional framework of Canada for the sake of equality. However, a prime challenge to this idea is posed by the necessity of designing the rule of validity in such a way that it can contain the *ethos of legal pluralism*. In fact, since Patrick's theory develops inside the existing constitutional framework, a first concern would be assessing whether the rule of validity in the Canadian legal system can contain (*rectius* justify) legal pluralism.

With regard to this first aspect, my idea was to follow Patrick's lead and try to outline the space available for *ethos of legal pluralism* in the Canadian Constitution and, accordingly, I spotted a fertile overlapping "area", amongst the following concepts: federalism, bi-juridicalism (in the sense of legal pluralism, however limited to two systems, i.e. common and civil law) and the system of sources of law. This specific "area" is, in my opinion, the space in which *ethos of legal pluralism* could find a constitutional justification; however, in order to clearly identify it, it would be necessary to construe sec. 35, par. 1 as an imaginary window, through which federalism, bi-juridicalism and the system of sources of law can be interpreted. This approach is not so different from the one Patrick adopted in his piece; in fact, he lists three main openings for legal pluralism in Canadian constitutionalism, two of which refer to judicial interpretive authority and the other to

¹ B. Duthu, *American Indians and the Law*, Viking Penguin, New York, 2008.

² B. Duthu, *Shadow Nations. Tribal Sovereignty and the Limits of Legal Pluralism*, Oxford University Press, Oxford, 2013, pp. 175-184.

³ See P. Macklem, *Indigenous difference and the constitution of Canada*, University of Toronto Press, Toronto, 2001.

Aboriginal legal scholarship. First, the Supreme Court of Canada in *R v. Badger* (1996)⁴ elaborated several principles in interpreting treaties. The principles that are of particular relevance herein are, on one hand, mutual recognition between the settlers and first Nations at the time of their first encounter and, on the other hand, the idea that the treaties are constitutional instruments providing for mutual commitment to solve controversies that may arise. Second, in *Delgamuukw v. British Columbia* (1997),⁵ the Court upheld the argument according to which the common law aboriginal title has become a constitutionally entrenched right. Third, the scholarly contribution.

I will focus on this last aspect. Recently, «Indigenous legal scholars have begun ambitious tasks of recovering and modernizing Indigenous legal norms or traditions that historically contributed to the social ordering of different Indigenous societies»⁶. This is by no means easy for evident historical reasons, however, of all the Authors mentioned in the paper – among others Christie and Napoleon –, I am more familiar with John Borrows and I will therefore devote my attention to his work. When recalling John's writings, Patrick refers to the detailed analysis that he carries out of legal norms from the Mi'kmaq, Haudenosaunee, Anishnabek, Cree, Métis, Canarrier, Nisga'a and Inuit legal traditions in his book *Canada's Indigenous Constitution*.⁷ However, I would like to draw attention to his thought on federalism as interpreted in the light of sec. 35, par. 1. Borrows' argument is that this clause has not been sufficiently oriented towards its original *ratio*, i.e. the project of Nation building, and, as a consequence, Canadian federalism has not been fully implemented (given that it has not been interpreted in combination with sec. 35, par. 1), thus excluding Aboriginal people from the federal project of Canada. Again, according to Borrows, this happened because «Courts became focused on few specific practices that courts decided were integral to Aboriginal people prior to the arrival of the Europeans and therefore art. 35 is increasingly used to justify government infringement of Aboriginal title».⁸ In other words, due to the fact that the story of Canadian federalism is one of inclusion and recovery of unity, the case law which elaborated principles on enhancing provincial legislative powers should apply also to Aboriginal decision making power and to Aboriginal legal norms. Looking out of the window of sec. 35, par. 1, Canadian federalism offers ample opportunities to enhance the *ethos of legal pluralism*.

On the contrary, using sec. 35, par. 1 as an isolated interpretive tool leads to the only practical utility of identifying specific practices relevant to the Aboriginal title. In this perspective, the relationship between what is historically true and what is legally relevant becomes crucial. According to Borrows, «when Indigenous legal traditions are measured by historians, the wrong questions are often asked»,⁹ but there are other worse consequences. An example will clarify my point. In *R. v. Marshall*,¹⁰ a case about a treaty right to fish, Chief Stephen Augustine presented stories and read wampum related to Mi'kmaq law. Sec. 35, par. 1 requires his testimony to be accounted for as he was presenting an historical fact proving past events and not illustrating Mi'kmaq jurisprudential norms. Accordingly, it is no surprise that when one of the wampums that Chief Augustine had presented and said to be from the 17th century was proved (by an anthropologist) to be from 200 years later, his testimony was deprived of all relevance. As a matter of fact, when it comes to Aboriginal legal traditions, it is the Constitution itself which, according to sec. 35, par. 1¹¹, requires that courts judging these types of controversy should «evaluate law by

⁴ *R. v. Badger*, [1996] 1 S.C.R. 771.

⁵ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

⁶ See P. Macklem, *Indigenous difference and the constitution of Canada*, cit., p. 9.

⁷ J. Borrows, *Canada's Indigenous Constitution*, University of Toronto Press, Toronto, 2010), pp. 59-106.

⁸ *Ibidem*, p. 99.

⁹ *Ibidem*, p. 68.

¹⁰ *R. v. Marshall* (No. 1) [1999] 3 S.C.R. 456.

¹¹ It could be useful, at this point, to quote the exact text of this clause: «The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed».

measuring how closely it correlates with a historian's explanation of the past»¹². In other words, Chief Augustine was called to the stand as an historian and not as an expert of legal traditions, implying that his credibility as an expert of Aboriginal law was strictly related to his reliability as an expert of history. On the contrary, it is well known that all legal norms are the result of a process by which the historical and legal account of facts can diverge from one another. The latter principle is, among other things, constantly applied by judges and lawyers with regard to civil and common law. Using sec. 35, par. 1 as an isolated interpretive tool therefore evidently depends on the answer to the following question: can history speak the law? Indeed, it cannot and, in fact, it does not in regular controversies. Consequently, in order to avoid narrowtailoring the scope of sec. 35, par. 1, Aboriginal laws should be considered part of the system of sources of law, or at least this constitutional clause should be read so as to require an Aboriginal input in interpreting Aboriginal legal concepts. This would also be an effective option with regard to the implementation of the *ethos of legal pluralism* in terms of identification and organization of legal sources. Moreover, it should be underlined that the system as it looks like today is, in any case, not as coherent as it may seem. For example, is the so called recognition legislation compatible with an *ethos of legal pluralism* (intended in Patrick's sense, i.e. a new allocation of constitutional powers)? What is then the space left to aboriginal legal norms? New solutions can be found outside the Constitution and inside Treaties, as for example the Labrador and Inuit Land Claims Agreement. The 2002 Labrador Inuit Constitution itself regulates the cases of contrast between positive Inuit law and traditional Inuit law, or positive Inuit law and positive Canadian law, and all other possible combinations. This last issue raises a lot of questions about territory, membership and about the individual status of an aboriginal community member.

I would now like to turn to bi-juridicalism observed from the window of sec. 35 par. 1. Considering the definition of legal pluralism which Patrick adopted in his paper (i.e. «the existence of a plurality of legal orders existing within or across the territorial boundaries of a sovereign state»), its reflections in the judicial sphere can be analyzed from two different angles: an institutional one, which I think is what we were referring to yesterday as reflective judiciary (i.e. a judiciary which reflects in its composition the relevant social body) and an interpretative one, which I believe is closer to what Patrick is arguing. However, with regard to the interpretive angle, I think the idea of giving judicial relevance to cultural elements should be kept distinct from binding the interpreter to the acquisition of an input from the Aboriginal community when interpreting legal concepts. The mere legal recognition of relevance to cultural elements is actually detrimental with regard to the enhancement of an *ethos of legal pluralism*, and it often leads to a diminished protection of Aboriginal interests.¹³ On the contrary, judicial pluralism in the proper interpretive sense requires a mandatory input from Aboriginal legal culture during the interpretation of specific legal concepts. In particular, the latter solution could represent a positive realization of the adjustment of Canadian bi-juridicalism, now limited to common and civil law, in the light of sec. 35, par. 1.

Having spoken of the judiciary and of legal scholarship, one might wonder what role is left to Parliament as an operator of the *ethos of legal pluralism*. Probably scholars are correct when they say that Parliament should take the lead in building the Nation. During the debate regarding his book, Bruce told us about the fact that, in the US, people from the Nations had to seek support for

¹² *Ibidem*, p. 66.

¹³ See for example Subsection 718.2(e) of the Criminal Code which provides for restraint in the use of imprisonment for Aboriginal offenders: «A court that imposes a sentence shall also take into consideration the following principles: [...] e) all available sanctions or options other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders». The purpose of this provision is to address the historical over-representation of Aboriginals in the criminal justice system however its judicial interpretation, but has given origin to a complicated case law. See *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Wells*, [2000] 1 S.C.R. 207.

their initiatives from the black caucus; this made me wonder whether political representation in Canada adjusts (or explicitly refuses to do so) Aboriginal interests. And in the case of an affirmative answer, would they pursue legal pluralism or simply demand more autonomy (i.e. enhancing their competences in the existing federal framework)? It should be underlined that these questions should be kept distinct from those regarding the idea of building an Aboriginal constitutionalism. The latter, in my opinion, might be pursued by walking down multiple roads and diversifying the strategy. In these terms, no matter how ample and solid the constitutional openings may be, I also wonder whether an *ethos of legal pluralism* might be more easily realized by focusing more on litigation and other litigation-related initiatives, as for example associations of Aboriginal lawyers or dedicated law degrees. And what about the role that the legislator could play? For example, the Aboriginal input in interpreting legal concepts could be enhanced through parliamentary activity in the form of mandatory advisory opinions delivered by an *ad hoc* representative body, or by a committee identifying standards relevant to aboriginal issues, that shall be applied both by courts and legislators at all levels.

Finally, going back to the main difference that I identified at the beginning between *Shadow Nations* and Patrick's paper, I think that, notwithstanding the fact that the Canadian Constitution includes numerous openings for an *ethos of legal pluralism*, a better allocation of constitutional powers will not occur through the mere intervention of the judiciary and would most certainly require a constituent phase, as happened during the negotiations in Charlottetown. In fact, fertile soil to grow an *ethos of legal pluralism* can be found by looking at the Canadian Constitution through the window of sec. 35, par. 1, but the seeds still need to be planted by men and women that are masters of their own destiny.

Legal Pluralism and the Sámi: an Indigenous People in Europe

*Christina Allard**

Abstract

The indigenous Sámi people live within the borders of four distinct legal systems, namely within the countries of Norway, Sweden, Finland and Russia. The forming and establishment of the national borders have historically splintered the Sámi as a people, but despite this they still consider themselves as one people. It is therefore complicated to provide a correct picture on issues related to pluralism concerning the Sámi, but this paper will nevertheless try to accomplish this task for the Sámi in Sweden, Norway and Finland. There are quite some substantial differences between these countries when it comes to Sámi rights and the recognition of the country's colonial past, where Norway clearly has a Nordic lead. Norway is also a party to the ILO Convention No. 169 and is more clearly bound by international legal standards protecting the Sámi. The aim of this paper is to highlight and contrast a few key features in the three countries laws of relevance for questions on legal pluralism, such as the constitutional framework, court structure and the role of the Sámi parliaments. Note that the paper only provides an overview of the topic and the ambition has not been to refer to all legal sources and relevant literature. The paper should be read with this in mind.

Introduction

This paper is based on my presentation concerning the Nordic Sámi at the Conference “Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal Pluralism: American Tribes, Canadian First Nations and Scandinavian Sami Compared”, 24-25 October 2013. Although the attention on the conference was on judicial pluralism¹ only little can be said regarding this matter in the Nordic context. For this reason focus is placed on issues of legal pluralism.

Of profound relevance is, firstly, the understanding that the Sámi live within three distinct legal systems (four including Russia as well) that has its own set of rules and understanding of law.² Therefore this paper includes a comparison from three countries, Sweden, Norway and Finland. It is difficult to talk about the European Sámi without acknowledging that there in principle exists a “Swedish Sámi law”, a “Norwegian Sámi law,” and a “Finnish Sámi law”. Even if the Nordic legal

* Assoc. Professor, LL.D. at the Division of Social Sciences, Luleå University of Technology (Sweden) and Assoc. Professor II at the Faculty of Law, Arctic University of Norway.

¹ More precisely issues on judicial autonomy of the indigenous people as well as the relationship between the Constitution and the legal and judicial system.

² For in-depth analyses about the legal situation of the Sámi see the anthology Bankes and Koivurova (eds.), *The Proposed Nordic Saami Convention: national and international dimensions of indigenous property rights* (Hart, Oxford 2013).

systems commonly are considered to form the same legal family,³ there exist, as indicated above, quite substantial differences between the three legal systems. To some extent the historical background of the relationship between the States and the Sámi is also distinctive, which facilitates an understanding of dissimilarities.

Among the general public in Sweden, Norway and Finland, secondly, there are scant knowledge about the history and culture of the indigenous Sámi, and I assume that this is also the case in other European countries. Because of the long historical coexistence between the Sámi and settlers as well as various decrees and decisions by the Danish/Norwegian and Swedish/Finnish Kings, the historical context is naturally crucial for understanding the law of today, including issues of pluralism. The Sámi have been splintered by the national borders, and policy and laws has developed differently. Nonetheless, the draft Nordic Sámi Convention, if agreed upon and ratified, has indeed the potential to bridge some differences and to harmonize the laws in the long perspective.

With this backdrop, this paper aims to highlight and contrast a few key features in the three countries laws of relevance for legal pluralism, in particular the constitutional framework and constitutional protection of the Sámi, the court structure as well as the authority and role of the Sámi parliaments. This is followed by a short commentary. First, however, the paper provides some basic historical knowledge concerning the relationship between the Sámi and the States. It should be noted, though, that this paper simply provides a brief overview and includes only a few references to legal sources and literature. Moreover, the author holds deeper knowledge of the Swedish and Norwegian legal systems and developments related to Sámi rights, than with respect to the Finnish counterpart, which to some extent is reflected in the paper.

Among the three counties Norway has today clearly a lead role when it comes to the reconstruction of the colonial relationship between the Sámi and the State. With the national (and Nordic) Sámi identity movement, occurring after the Second World War, the enhanced organisation structure of the Sámi was furthered by an important event in modern Norwegian history – which proved to be a turning point for the recognition of Sámi rights – the dispute over water power developments in the Alta-Kautokeino watercourse.⁴ There was a strong Sámi (and environmentalist) protest movement, including hunger strikes and civil disobedience, against these development plans that eventually would flood large traditional Sámi areas. Through the attention in media Sámi rights became a national matter.

These events were also an important reason why Norway rapidly ratified the ILO Convention No. 169⁵ in 1990 and had to rethink its position towards the indigenous Sámi. The Finnmark Act from 2005 is an important piece of legislation while it relates to the implementation of the Convention's obligations concerning land rights.⁶ Section 5 of the Act declares that the Sámi have territorial rights in Finnmark: "[t]he Sámi has collectively and individually established rights to lands in Finnmark due to long-term uses of land and waters", which may regard ownership and/or usufruct rights. The

³ See e.g. Zweigert and Kötz, *Introduction to comparative law* (Clarendon Press, Oxford 1998).⁴ This struggle culminated in the Alta case (Rt. 1982 s. 241) in the Norwegian Supreme Court.⁵ The Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

⁶ The Act transferred 96 per cent of the 'state owned' land in Finnmark to a new legal person, the Finnmark Estate, to manage the land and natural resources, and is governed by a board of six persons where at least three of them must be of Sámi ancestry.

existence of such rights is being investigated by the Finnmark Commission, established by the Act, which issues reports on matters investigated.⁷

Neither Sweden, nor Finland has ratified the ILO Convention No. 169, despite several public commissions investigating the matter. The main obstacle for ratification, as with the draft Nordic Sámi Convention, is the controversy around Sámi land rights. Therefore, apart from the establishment of the three Sámi parliaments, providing to some extent cultural and linguistic self-governance, much has evolved around the recognition of territorial rights for the Sámi. Such rights are battled within the general (civil) court system, which until quite recently have had very limited cultural understanding of the traditional Sámi livelihoods.⁸

The Sámi as a people, assimilation policies and equality

The Sámi were formerly known as “Lapps” (*lappar*) or “Finns” (*finner*), which is still traceable in the name of some of their traditional regions. Finnmark, for instance, is the northernmost county in Norway and a core Sámi area. In echo, the northern counties in Sweden and Finland are still called Lappland. In the same vein old documents and maps refer to long-established Sámi areas, such as Ume and Kemi lapplands (*lappmarker*). Today the common homeland area of the Sámi is known as Sápmi.⁹ Sámi comes from the word “Sápmi”, meaning both the Sámi land and the Sámi people.

The Sámi people exist as one nation across four states – in Norway, Sweden, Finland and Russia – with a common language, culture and history. Yet, there exist large varieties among the Sámi dialects, traditions, cultural expressions, etc. The Sámi are the descendants from hunting and gathering clans which followed the borders of the ice cap when it melted. Archeologists agree that the Sámi culture has developed at site in Scandinavia, and the first written records are from around the year around the birth of Christ and refer to a wild people in the high North. Since long, other people have coexisted alongside the Sámi, especially in the coastal regions of Scandinavia as well as along the great rivers. Inter marriages between Sámi and non-Sámi have not been uncommon.

In the past, a diverse economy of hunting and fishing was the basis of the Sámi way of life. Although the traditional Sámi society cannot be regarded as tribal, their society was still highly organized; families and smaller communities formed so called *siidas*,¹⁰ which together formed a network covering the whole of northern Scandinavia. The Sámi used to live on what nature delivered to them through the seasonal changes. Wild reindeer, fur and fish were sold far away, and the Sámi have probably practiced small-scale reindeer herding for thousands of years. They used the reindeers not only for the meat and milk, but for transportation in a landscape empty of roads and for clothing and the making of various tools. Therefor the reindeer was – and still is – a respected and sacred animal.

Traditional Sámi livelihoods include reindeer herding, fishing, hunting, small-scale agriculture, gathering nature's products and making handicrafts. Today, a common way to make a living is to combine these traditional livelihoods with tourism services. Most Sámi have nowadays normal

⁷ Any unsolved disputes, after such a report has been issued, can be brought to the new Finnmark Land Court (*utmarksdomstolen*), and its decisions can finally be appealed to the Norwegian Supreme Court.

⁸ Milestone cases in Norway: the Selbu case and the Svartskogen case (Rt. 2001 s. 769 and Rt. 2001 s. 1229) from 2001, and in Sweden: the Nordmaling case (NJA 2011 s. 109) from 2011. Finland is lacking cases concerning Sámi territorial rights.

⁹ For a good map see <http://www.samer.se/1002> (accessed March 12, 2014). Note that I use the spelling “Sámi” (not Sami or Saami), which is the spelling most close to the Sámi language.

¹⁰ This *siida*-structure still exist in some areas with respect to traditional reindeer herding.

employments in urban areas and those still involved in reindeer herding is only a “minority within a minority”, approximately about ten percent of the Sámi. Those other revenue producing traditional Sámi activities, such as fishing (in coastal areas, lakes and rivers) and handicrafts have generally been overlooked by the States when it comes to acknowledgement and codification of rights.

Despite the relatively few Sámi involved in reindeer herding today, it still retain a culturally important status within the Sámi community while it preserves the language, old traditions and knowledge about the environment. The so called reindeer-herding right, which is the legal recognition of the protracted usage, is in principle recognized as a civil law based right in all three countries' laws.¹¹

In statistical terms the Sámi in Norway are more numerous, approximately between 50 000 to 65 000, somewhat less in Sweden with 20 000, in Finland there are about 9 000 Sámi and in Russia, in the Kola Peninsula, some 2 000 Sámi. The actual numbers are, however, very uncertain. The official figures are based on old estimations, and in Sweden, for instance, recent estimations by researchers suggests a minimum of 50 000 Sámi in Sweden. In the Finnish case the statistics are based on the number of the Sámi listed in the electoral roll to the Sámi parliament, which gives the right to vote in the elections.

There is not a generally applicable definition of who is Sámi in any of the three countries. Definitions of who is if Sámi decent are connected to the voting to the Sámi parliaments and is essentially based on a language criterion. The definition is, however, not exhausted; others may be regarded as Sámi even if they are not or can be in the electoral roll, particularly for Sámi traditionally engaged in reindeer husbandry.¹² Finland has a specific situation though, that differs in one major aspect from the Norwegian and Swedish situation. Reindeer husbandry is not an industry exclusive to the Sami, where Finnish settlers and farmers began quite early to herd reindeer. As a result, anyone permanently living within the Finnish reindeer herding area, and who is a citizen of a country within the European Economic Area, has the right to own and herd reindeer. The Finnish reindeer herding legislation does neither explicitly acknowledge a specific Sámi reindeer-herding right,¹³ but this right belongs to all that herd reindeers.

The formation of the nation-states, the establishment of the national borders as well as various assimilation policies has had major impacts on the Sámi societies. In the north there were unclear jurisdiction and thus unclear borders, resulting in, for instance, that Sámi in periods had to pay tax to more than one country (Sweden/Finland and Denmark/Norway, and sometimes to the Russian Empire). The Nordic Kings tried with various means to gain authority and sovereignty over this vast northern area, especially during the 1600s.

The forming of the national borders and the closure of free movement of the Sámi across these borders has had profound effects on the Sámi. In short, the establishment of the Norwegian-Swedish border in the far north in 1751, which through the so called Lapp Codicil recognized the free and customary movements across this border, was put to an end for the Finnish Sámi in 1852 and 1889 when the Finnish-Norwegian respectively the Finnish-Swedish borders were closed. The Finnish Sámi could no

¹¹ This right is based on written or unwritten proprietary concepts in national real estate law. See further in Allard, *The Nordic countries' law on Sámi territorial rights* (Arctic Review on Law and Politics, 2/2011, pp. 159-183). For a comparison with indigenous territorial rights in Canada and New Zealand see Allard, *Two sides of the coin - rights and duties. The interface between environmental law and Saami law based on a comparison with Aotearoa/New Zealand and Canada* (Luleå University of Technology, Luleå 2006) available online at <https://pure.ltu.se/ws/files/175649/LTU-DT-0632-SE.pdf> (accessed March 13, 2014).

¹² On the definition see further below under “The Sámi parliaments”.

¹³ Preparatory works to the former reindeer herding acts do however recognize the protracted use of the Sámi reindeer herders. See Allard, 2011.

longer make their seasonal movements for reindeer herding and fishing to northern Norway, nor could they use pasture on the Swedish side of the border.

This caused domino effects throughout the Sámi community; one result being forced relocation of Sámi from the north to southern parts of the reindeer herding area due to shortage of pasture land and overgrazing. It also caused a rapid change of the reindeer herding traditions in the 1920s/1930s, from an 'intensive' reindeer herding with smaller herds to larger herds that were allowed to move more freely over larger areas (as the northern Sámi were used to), and today, especially in Sweden, these relocations still creates problems within reindeer herding communities. As a result, only the Swedish-Norwegian border is open, but the customary movements are governed by negotiated bi-lateral treaties.¹⁴

Historically, there are records of disputes over Sámi rights to land and natural resources that were addressed in local courts and such rights were often recognized and shielded by the court, as proved by historical case law.¹⁵ One could generally say that the rights of the Sámi were strong till around the beginning of the 1800s when we start to see a deterioration of Sámi territorial rights. We have to wait until the end of the 1960s in Norway and the beginning of 1980s in Sweden when new case law in the Supreme Courts again begun to recognize Sámi customary rights and the right to be compensated for infringements,¹⁶ but the Sámi has lost several cases on reindeer-herding rights both before and after this new era.

One reason behind the relatively strong historical rights is probably because the Sámi as laymen in the court previously was in majority and rules were applied according to local and Sámi customs. Otherwise the history proves a complex pattern where kings sometimes supported the Sámi and their traditional livelihoods, and at the same time promoted new settlements in the north, with the decoy of promised exemption from taxes and military services. Already the Swedish kings in the mid-1500s aspired to colonize the north, but not until the 1800s the settlements grew in numbers due to the general population growth. An important policy then was the so called 'parallel theory' in Sweden, meaning that the different livelihoods could coexist because they were too different. This proved not to be true, instead causing many disputes between Sámi and settlers.

From especially the mid-1800s and onwards the states used various assimilation policies towards the Sámi, ranging from the establishment of a Sámi school system, legislation that stipulated a language criterion (Norwegian) for the right to acquire land in Finnmark and relocation of reindeer herding families to southern parts of the reindeer herding area. Moreover, it was not socially accepted to speak Sámi with the result of many Sámi turning their back on their Sámi language and heritage. A quote from the legislative process in Sweden concerning the first reindeer herding legislation (the Act is from 1886) illustrates common opinions about the Sámi:

The populations, that do not wish to leave the nomadic life, must necessarily remain on a lower cultural stage, and give in for the more civilized and permanent residing population, and finally

¹⁴ See further e.g. Broderstad, *Cross-border reindeer husbandry: Between ancient usage rights and state sovereignty* (in: Bankes and Koivurova (eds.) 'The Proposed Nordic Saami Convention: National and international dimensions of indigenous property rights', Oxford 2013).

¹⁵ See e.g. legal historical research (only in Swedish) by Päiviö, *Från skattemannarätt till nyttjanderätt. En rättshistorisk studie av utvecklingen av samernas rättigheter från slutet av 1500-talet till 1886 års renbeteslag* (Uppsala Universitet, Uppsala 2011) and Korpjaakko-Labba, *Om samernas rättsliga ställning i Sverige-Finland* (Juristförbundets förlag, Helsingfors 1994).

¹⁶ The Altevann case (Rt. 1968 s. 429) from 1968 in Norway and the Taxed Mountain case (NJA 1981 s. 1) from 1981 in Sweden.

weaken and perish. The state, whose interest it must be to support a higher civilization, can do nothing but rightly promote agriculture.¹⁷

Many politicians and lawyers genuinely believed that the Sámi would disappear or that some Sámi would learn the life of the higher civilization. In other words, prejudices about the Sámi were flourishing at the time. Such ideas were however evident in the other Nordic countries as well, even if the situation in Finland was somewhat different.¹⁸

Sweden became also the world's first country in 1922 with the establishment of the Institute for Racial Biology, a Swedish governmental research institute supported by all major political parties, which forms a dark legacy of Swedish history. An official assignment of the Swedish institute was to study the inhabitants of the country from a racial perspective, which led to the gathering of statistics (measurements) and photographs to quantify the racial make-up, in part to prove supremacy of the Nordic race. The Sámi were of course attributed with low mental ability among other things. Notions of racial hygiene, that the population could somehow be improved as a result of such studies, were strong in the 1920s and early 1930s but after the Second World War this type of study was not considered politically correct.

When moving to modern times, the Nordic countries have internationally a good reputation on performance concerning human rights, and it may come as a surprise that this reputation is not well-deserved regarding the treatment of the Sámi. All three states have received repeated critique during recent years from various United Nations human rights monitoring bodies for not doing enough and for prolonging already longstanding issues, above all related to Sámi claims to land and natural resources.¹⁹

As renowned welfare states, Sweden, Norway and Finland have put much emphasis on social and economic stability, and in particular on equality issues, not at the least gender equality, by which the countries are regarded among the world's leading when it comes to women rights and participation in society. Focus has, however, for the most part been on formal equality between persons, groups, and associations, leaving the emphasis for special rights for various groups, such as the Sámi, aside. In the same vein, there has generally been difficulty for the three states to acknowledge their legacy of colonization over traditional Sámi areas, although Norway by ratifying the ILO Convention No. 169 in 1990 has taken promising steps forward in reassessing its relationship with the Sámi as a people. The State churches, first in Norway and now in Sweden, are also engaged in a reconciliation process with the Sámi to apologize and rethink its relationship.

After this condensed introduction and background we will now move forward to a few areas of law that have importance for the topic of this paper: issues of legal pluralism in the three legal systems.

¹⁷ This is a quote from one of the Supreme Courts judges, called to make a statement on the government's proposal to the first reindeer herding act. See the bill 1886:2 p. 7 in the minutes (Utdrag af protokollet öfver lagärenden, hållet uti Kongl. Maj:ts Högsta Domstol Fredagen den 21 November 1884). Author's translation.

¹⁸ Finland belonged at the time under the Russian Empire, and both Finns and Sámi had a common enemy in Russia. After the wars they were occupied with the rebuilding of the country, and equal treatment of Finns and Sámi were assumed, and therefore we have a situation more of a non-recognition of the "Sáminess", evident even today.

¹⁹ See e.g. the Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya from 2011: *The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*, A/HRC/18/35/Add.2.

The constitutional framework and the protection of Sámi culture

There still exist a notion of a common Nordic law, and in some comparative law taxonomy and encyclopedias a specific Nordic legal family is observed, placed as a sub-group under the civil law tradition.²⁰ For instance, there is a lack of big civil law codifications, the preparatory works are an important source of law and the law is quite pragmatically oriented with short statutes and simple wordings. This general likeness is true at least on a basic level, but with a closer comparative analysis rather substantial differences do emerge.

Some Nordic scholars argue that the closeness of the Nordic countries is due to a community of values, a specific shared social ethos, rather than uniformity of political structure, history, language, etc., which clearly is diverse.²¹ With my own experience of comparative analysis of the law in three states, I agree. In particular the distinction between a West-Nordic and an East-Nordic legal tradition is valuable for the understanding of basic differences and their origin. Sweden/Finland forms the East-Nordic culture and Denmark/Norway, along with Island, belongs to the former.

This division can partly be explained due to long and shared historical roots because of wars and alliances between these countries over the years. Finland was for over 600 years a part of the Swedish Kingdom, but was lost in 1809 to the Russian Empire. Even after that Finland used much of the former Swedish legal system and laws, which was also the case after Finland gained independence in 1917. Norway, on the other hand, belonged to the Kingdom of Denmark from around the 1400s till 1814. In less than hundred years Norway was also in union with Sweden between 1814 and 1905, but retained its own legal structure and laws during this period. Norway became fully independent in 1905.

This explains briefly the closer resemblance between the Swedish and Finnish legal systems than the Norwegian, which is echoed also in the present constitutions. Norway has the oldest constitution, which dates back to 1814, while the Swedish and Finnish constitutions are from a later date, 1974 and 1996 respectively. The Norwegian constitution is based on a more classic division of powers, whereas the Swedish and Finnish draw on the principle of public sovereignty (*folksuveränitetsprincipen*), with the idea that the power and law-making functions solely proceeds from the people, or rather the Parliament with its elected members. This means for instance that the Norwegian courts, with the Supreme Court at the apex, are comparatively more autonomous and have law-making functions, also in their ability to interpret the Constitution and review the conformity of Parliamentary and Governmental enactments. In Sweden and Finland courts are merely positioned to interpret the law and give guidance for the legal application, and their authority to review statutes are more restrained.

A common feature is, however, that the constitutions traditionally have been, and still are, rather weak – especially compared with many common law countries. Provisions are seldom evoked before courts and play therefore a minor role in specific disputes and in legal application in general. Instead provisions in statutes are relied on. The supreme law in the three countries is positive law, but there is some room for customary law, especially in Norwegian law related to real property and Sámi claims. The fact that Sweden, Norway and Finland are unitary states and adheres strongly to legal positivism makes arrangement for legal pluralism challenging. Sweden and Finland is even more 'positivistic' and to pay due regard to unwritten Sámi customs in the legal application is even more difficult within these two legal systems.

As implied in the introduction, there exist no arrangements in either constitutions for power-sharing or self-determination explicitly with respect to the Sámi as a people, and the Sámi parliaments are all

²⁰ See e.g. Zweigert and Kötz, *Introduction to comparative law* (Clarendon Press, Oxford 1998).

²¹ See e.g. Husa, et al, *Nordic law - Between tradition and dynamism* (Intersentia, Antwerp 2007).

established by statutes and are lacking any real law-making functions. However, since 1996, the Sámi in Finland have some constitutional self-governance in the so called Sámi homeland area in the very north with respect to language and culture. See further below.

All three constitutions protect Sámi culture to some extent, even if the Norwegian and Finnish Constitutions protect Sámi culture and language better because of the wordings or the position amongst other provisions. In 1988 a new section in the Norwegian Constitution was added, intended to securing the Sámi culture and way of life. One of the main purposes behind this amendment was in fact to leave past grievances and assimilation policies behind.²² The so called Sámi clause protects the Sámi culture broadly speaking:

It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.²³

The language of the provision itself suggests that the real addressee is the State, forming it as a State responsibility. The wordings are not arranged as a 'rights-provision' and therefore it is not directly evocable in courts by individual Sámi or groups of Sámi as their *only* basis. The provision has nevertheless an important function as a basis for interpreting other provisions,²⁴ something not seen with the Swedish constitutional provision.

The Finnish Constitution section 17, paragraph 3, which is built as more classic 'rights-provision', states that:

The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. (...) ²⁵

In section 121, paragraph 3, of the Finnish Constitution some linguistic and cultural self-government are acknowledged related to the so called Sámi homeland area – in the text below translated as “their native region” – which is a legally demarked area in the very north. The provisions reads:

Provisions on self-government in administrative areas larger than a municipality are laid down by an Act. In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.²⁶

The Swedish Constitution, in the Instrument of Government chapter 1 section 2, mentions the Sámi as a people since the overhaul of the Act in 2010. Before that the Sámi was mentioned only as an ethnic minority. The provision creates goals for the public and cannot be evoked by persons before courts. It states:

The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.²⁷

²² NOU 1984:18 p. 432. NOU refers to a report by a Government Commission, and forms part of the preparatory works, an important source of law among the Nordic countries.

²³ Constitution Act s. 110 a. See the English version of the Act at <http://www.stortinget.no/In-English/About-the-Storting/The-Constitution/The-Constitution/> (accessed March 13, 2014).

²⁴ See further in NOU 2007:13 pp. 190-191.

²⁵ The Constitution of Finland, 1999. Unofficial translation by the Ministry of Justice.

²⁶ Ibid.

Despite the constitutional protection of Sámi culture and way of life, there exist no specific Sámi courts, nor are there specific procedures laid down related to Sámi matters. In Norway, however, the establishment of the Inner Finnmark Local Court in 2004 meant a change in some respects. It is a normal local court and its decisions are appealed in usual manner, but it is bi-lingual (Norwegian and Sámi). The court has a special responsibility to investigate and document the existence of Sámi customs and perceptions of justice. One problem has been that many cases appealed from the Inner Finnmark Local Court later has been altered by the appellate court or the Supreme Court who commonly adheres to Norwegian legislation. The realisation of Sámi customs within the Norwegian legal system is thus complicated.²⁸

Here, in particular Article 8.1 of the ILO Convention No. 169 is relevant, since it states that when applying national law “due regard shall be had to their customs and customary laws”. Article 8 speaks about the importance of acknowledging norms, system of norms and traditions that lies within indigenous societies. In recent years there has been a growing awareness and discussion of the need of genuine knowledge of the Sámi, their culture and cultural expressions in the Norwegian court system, something referred to as cultural competence. In these matters the independence of judges and the rights of the Sámi as an indigenous people are intertwined. An expert working group published a report to the National Court’s Association (*Domstolsadministrasjonen*) in 2011, “The Sámi dimension within the judiciary”, but it has so far not meant any amendments for the cultural knowledge required of the judges when dealing with Sámi legal matters.²⁹

Matters related to cultural competence of the judges in the Swedish or Finnish court system have, to my knowledge, not been discussed yet in relation to Sámi rights and Sámi customs. A complicating factor here may also be that Sweden and Finland has both civil (general) and administrative courts that interpret Sámi issues, including special courts for certain areas of law, such as environmental courts in Sweden that addresses exploitation of land and natural resources, among other matters. Moreover, much legislation that affects the Sámi includes both private and public law provisions and decisions based on such rules are normally appealed to the administrative courts, which mean that certain disputes, such the extent or content, of Sámi rights remains unsolved unless taken separately to the civil courts (which rarely is done).

The Sámi parliaments

The three Sámi parliaments are established by statute. The mandates of the parliaments are laid down in Acts, and basically secure a substantial influence in cultural and linguistic matters, but include no law-making functions. There is also a problem with sufficient state-funding for performing their functions and duties which relates to all three parliaments, but this is especially pronounced for the Finnish Sámi parliament.

All Sámi who are listed in the electoral register of the respective Sámi parliament are entitled to vote in the Sámi parliament elections. For the Swedish and Norwegian elections there are several political

²⁷ Instrument of Government, 1974, ch. 1 s. 2 para. 5. See an English version of the Act at <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Instrument-of-Government/> (accessed March 13, 2014).

²⁸ See further e.g. Ravna, *Sámi legal culture - and its place in Norwegian law* (in: Øyrehagen Sunde and Skodvin (eds.), ‘Rendezvous of European legal cultures’, Fagbokforlaget, Bergen 2010: pp. 149-165).

²⁹ See Funderud Skogvang, *Judicial independence and the rights of indigenous peoples* (forthcoming article). Abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387472 (accessed March 16, 2014).

parties to vote for, whereas the Finnish elections are based more on individual Sámi candidates. The right to vote is constructed on a Sámi definition relating to self-identification and home language, either by a parent or grandparent (or great grandparent in Norway) with Sámi as his or her home language. There are also a few nation specific criteria which I will not go into here. Especially in Finland, the definition of who is regarded as Sámi is a highly controversial and sensitive issue. The Sámi definition was also one of the trickiest questions dealt with within the appointed expert group drafting the text to the Nordic Sámi Convention.³⁰ Nevertheless, in Norway there are some 13 000 Sámi listed in the electoral roll, some 8000 in Sweden and in Finland slightly over 9000. This should be compared with the figures of the official numbers of Sámi for each country offered above (50-65 000 in Norway, 20 000 in Sweden and 9 000 in Finland).

Norway was the first country to establish a Sámi parliament, by the Sámi Act of 1987. The parliament was officially opened in 1989 in Karasjok in Finnmark. This parliament is state-funded, as are the other parliaments, and consists of 39 elected members that sits for a four-year period. According to legislation the purpose is to enable the Sami people in Norway to safeguard and develop their language, culture and way of life. It has authority in all matters that, according to the Sámi parliament, affects the Sámi people. Other public bodies should also give the Sámi parliament an opportunity to express an opinion before they make decisions on matters within the scope of the parliament.

The Consultation Agreement, signed between the Norwegian Government and the Sámi Parliament in 2005, has meant a substantial influence in, for instance, the drafting of new legislation directly affecting the Sámi.³¹ Although it gives no veto rights for the Sámi, the Government has tried to accommodate the views and opinions of the Sámi. If local Sámi is affected directly, the state is likewise obliged to consult directly with local Sámi interests groups, including reindeer herding districts. This agreement is now becoming an act of parliament. This Consultation Agreement has been made possible because of the official Sámi politics in Norway which holds that "The State of Norway is founded on the territory of two peoples – the Sámi and Norwegians", emphasizing the countries colonial past and the status of the Sámi as an independent, indigenous people. There has also been a public excuse by the Government and the King for past injustices and wrongdoings.

In Sweden the Sámi Parliament Act of 1992 founded the parliament in Kiruna, that opened in 1993 with its 31 elected members. They also sit for a four-year period. The Swedish Sámi parliament is a specific public authority under the Government, with aim to safeguard issues related to Sámi. This means that as an authority it has to follow all the general public administration legislation in all their decision-making not related to the elected assembly. According to legislation the Sámi parliament shall strive for a viable Sámi culture and take initiative to activities and suggest measures that promote this culture, such as to decide on the distribution of state funds and appoint members of the Sámi school board.

The Sámi parliament was in 2007 transferred public authority in relation to reindeer husbandry, which formerly lay on regional state authorities. Initially reluctant to exercise this power, much due to interpretation difficulties and no real amendments, the parliament eventually accepted this transfer of powers. As an authority, the Sámi parliament can make some by-laws (delegated power based on legislation). Because of the constitutional principle stating that all public power in Sweden proceeds from the people, the Sámi parliament when established had to be observed as a public authority,

³⁰ The expert group issued a report in 2005 with a draft text to a Nordic Sámi Convention, now under negotiation among the three states. See *Nordisk samekonvensjon: utkast fra finsk-norsk-svensk-samisk ekspertgruppe*.

³¹ The Sámi parliament has influenced the drafting of new legislation, such as the Finnmark Act, 2005, the Building and Planning Act, 2008, and the Nature Conservation Act, 2009.

proving again a problem due to the constitutional structure. It was simply not seen as constitutionally possible to have another elected body apart from the Swedish Parliament. As an adjoining effect there is no general agreement of legislation on consultation obligations of the state vis-à-vis the Sámi, and instead consultation takes place, for instance, in relation to exploitation activities where Sámi is regarded as one interest group among many others.

In Finland the Sámi parliament was established by the Act of Sámi Parliament of 1995. A year later it was opened in Inari. It consists of 21 elected members, who sit for a four-year period. As in Sweden, it is a public authority and answers to the Ministry of Justice, and the general public administration legislation apply. The parliament has only functions in matters related to Sámi language and culture and their status as an indigenous people, and shall also represent the Sámi in national and international situations. Moreover, the so called Skolt Sámi maintains their tradition of village administration, under the Skolt Act, within the area reserved for the Skolt Sámi in the Sámi homeland area.

According to the Act of Sámi Parliament section 9, public authorities must consult with the Finnish Sámi parliament on all important matters that directly may affect the Sámi as an indigenous people. A weakness is that this obligation only applies within the so called Sámi homeland area, leaving large areas outside mandatory consultation.³² Nevertheless consultation relates to physical planning, the management and transfer of state owned lands and protected areas as well as amendments in legislation or public policy related to Sámi culture and livelihoods, among a few other matters.

In the draft Nordic Sámi Convention, mentioned above, the role of the Sámi parliaments are strengthened. It regards above all consultation obligations for the governments and even a veto right for the parliaments in relation to significant harm caused by, for instance, extractive industries. Whether the draft text will be amended through the negotiation process, or even whether the Convention will be agreed upon, remains to be seen. In any case, if ratified the Convention affords a minimum protection of Sámi rights and in the long run aims to harmonize the countries legislation, which currently is drifting more and more apart.

Compared to Canada and USA, the endorsement of legal pluralism is not that strong, not even in Norway which clearly holds a Nordic lead role. There seems to be a lack of common vision here – something that the Canadian legal scholar Jonnette Watson Hamilton also pointed out in her analysis of the draft Nordic Sámi Convention in the anthology devoted to an analysis of the Convention.³³

Concluding remarks

As proven by this overview there is not much to discuss when it comes to questions of *judicial* pluralism and the Sámi among the three Nordic countries. A little more can be said concerning *legal* pluralism, but surprisingly little considering the strong reputation and advocacy for international human rights that Sweden, Norway and Finland holds. Clearly all three states has homework to do when it comes to the reconciliation of their colonial past vis-à-vis the Sámi and securing Sámi rights and Sámi culture in a broad sense. Norway, especially during the recent couple of decades, has stated on this path. International monitoring bodies for human rights have become increasingly aware of the

³² There are 13 reindeer herding districts in the Sámi homeland area and about 85 percent of the reindeers are owned by Sámi.

³³ See Watson Hamilton, *Acknowledging and accommodating legal pluralism: An application to the draft Nordic Saami Convention* (in: Banks and Koivurova (eds.) 'The Proposed Nordic Saami Convention: National and international dimensions of indigenous property rights', Oxford 2013).

lack of performance concerning the Sámi and this 'naming and shaming' might put pressure on the more reluctant governments in Sweden and Finland.

Sámi claims and case law has, as indicated above, essentially been focused on land rights. Issues have regarded recognition of rights as well as sufficient protection for the reindeer-herding right against extractive industries and other competing interests, such as mining, windmills, infrastructural developments, predators and more general conservation interests. These questions are equally important today, not at least with the high metal prizes and the mining boom in Sweden and Finland. Well, to have land rights recognized and shielded is part of a reconciliation process and acknowledgement of the principle of non-discrimination, and relates to legal pluralism. The Norwegian Finnmark Act of 2005 should be understood in the same vein. It was endorsed behind the ILO Convention No. 169 and the land rights provisions.

With the establishment of the three Sámi parliaments through statutes, some room for self-governance was awarded with respect to Sámi culture and language. In Norway the Sámi parliament has larger autonomy and more state-funding to perform its functions which clearly includes all Sámi within Norway. The Finnish Sámi parliament is restrained because its self-government powers relates only to a small part of the traditional Sámi area in Finland and leaves many Sámi outside. The increased role as a public authority for the Swedish Sámi parliament confines its ability to perform as an elected body for the Sámi, as do the constitutional principle of public sovereignty. Conflicts within the Sámi community, between those with specific Sámi rights and those without,³⁴ also hampers an effective decision-making within the Sámi parliament today. One can conclude that none of the parliaments are autonomous and self-ruling parliaments, even if the Norwegian and Finish Sámi parliament's consultation rights are an important step forward.

As welfare states with their strong emphasis on formal equality the three states have generally speaking shown reluctance towards any special rights discourse related to the Sámi or other national minorities, something that in particular goes for Sweden and Finland. The constitutional framework as small, unitary states is furthermore based on the idea of one people governing themselves, although Norway has recognized that the country is founded on the territory of two peoples. A positivist approach may, furthermore, be particularly problematic in relation to a concept of a plurality of legal sources and legal orders, as forming part of a decolonizing process, since the supreme law is understood as the one issued by Parliament. In Sweden, Norway and Finland there is still a question to what counts as law, more than the written legislation. Sámi customs and customary law is increasingly referred to in courts, and sometimes applied. Proper cultural competence of judges with regard to the Sámi culture, livelihoods and legal perceptions, as discussed in the context of the Norwegian court system, is crucial.

Consequently, the unitary Nordic states with their tradition of legal positivism and realism still have difficulties acknowledging legal pluralism. There are simply few notions of a plurality of legal orders among the three countries today. Whether the lack of historical treaties between Sámi communities and the states may help to explain this fact or that the Sámi has been effectively assimilated into the dominant societies, can only be assumed. Sámi rights claims generally have been sought to be solved through government commissions, bills, but are also nowadays increasingly battled through national and international courts.

³⁴ The reindeer-herding right includes also fishing and hunting rights, which has resulted historically that the vast majority of the Sámi does not have specific hunting or fishing rights or other special rights based on protracted use.

**INDIGENOUS PEOPLES' SOVEREIGNTY AND THE LIMITS OF JUDICIAL AND LEGAL PLURALISM:
American tribes, Canadian first nations and Scandinavian Sami compared**

Trento, 25th October 2013

**JUDICIAL PLURALISM AND THE
SAMI: AN INDIGENOUS PEOPLE IN
EUROPE**

**TERRITORIAL BOUNDARIES AND CONCEPTUAL LIMITATIONS
VIS-À-VIS INDIGENOUS PEOPLE(S) IN EUROPE**

INSIGHTS FOR A DEBATE

Sara Memo

PhD, School of International

Studies University of Trento, Italy

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For a long time, the European legal perspective on indigenous people(s) has been constrained by territorial boundaries and conceptual limitations. The claim for international recognition of indigenous peoples and indigenous rights was traditionally perceived as something *beyond* European boundaries, especially beyond European marine boundaries.

In the wake of new legal order established after World War 2, the increasing recognition of the principle of self-determination was in fact progressively accompanying – together with legal thesis of *blue water* or *salt water* – a process of emancipation of indigenous peoples in “new” decolonized countries. In Europe, instead, this process started only lately and almost *incidentally* at the end of the 70s, thanks to the support of an environmental movement in Norway (1).

Undoubtedly, the very limited presence of indigenous communities in Europe did not possess the same “emancipation force” as in other continents such as America or Africa. The only indigenous group that is presently recognized in Europe (and that is perhaps still existing) are the in fact the Sami of Scandinavia.

In the overall history of “legal” discovery of the Sami as a European indigenous people, it is particularly interesting to consider the contribution that such a legal discovery brought to the European human rights discourse in general and to the debate on legal pluralism in particular.

When the European human rights regime developed at the end of World War 2 (2), it enshrined only a minimum momentum towards legal pluralism. European States generally accommodated national/ethnic

differences of social groups living within the same domestic jurisdiction mostly through the non-discrimination principle. Thus, “special

guarantees” were provided only sporadically and quasi-exclusively to kinship minorities, through international bilateral agreements under the international principle of reciprocity.

For decades, cultural and ethnic differences of social groups falling outside the territorial-kinship scheme remained almost invisible to the eyes of international and national legislators. Only at the beginning of the 90s, when European States reached a stronger degree of stability, the discourse on legal pluralism eventually reached a higher degree of maturity.

The promulgation of the two European paramount legal instruments on minority rights (the European Framework Convention on National Minorities and the European Charter on Minority and Regional languages) set the legal foundation for an international recognition both of individual and collective human difference. The way towards a European binding commitment in legal pluralistic perspective started to be paved.

Apparently, the two historical developments – the recognition of Sami as an “indigenous people” by Scandinavian States and the promulgation of two international treaties on minority rights by European States – followed two parallel tracks. In fact, legal theory has been generally approaching (at least in Europe) “indigenous peoples” and “minorities” as formally belonging to two separate spheres of human rights law (minority rights law and indigenous rights law).

Although the “*salt water boundary*” was formally overcome by European jurists once recognizing the Sami as an “indigenous people” of Scandinavia, the “conceptual limitations” formally attached to the doctrinal distinction between the two categories (indigenous peoples and minorities) did remain anchored for years in the European legal discourse.

Nonetheless, the recent legal practice has started to show that the two socio-legal categories – indigenous peoples and minorities – rather form “a subtle continuum” since the two social groups to which the two legal categories respectively refer, share the common feature of “autochthony” and of “historical tie” to a territory. Practically, this means that some provisions of the European Framework Convention for National Minorities, although devised for national minorities, may be enjoyed by indigenous peoples as well (3).

These recent developments are showing that in practice, the nature of the European human rights discourse is much more fluid than in doctrinal classification. In Europe, the spheres of minority rights law and of indigenous rights law – although formally belonging to two distinct branches of international law – do hold a fascinating osmotic relationship.

The question is, what is the degree of “legal pluralism” that might be envisaged in such a relationship? In other words, to which extent the “indigenous/minority rights *acquis*” promotes the coexistence of diversity in European societies? How such a diversity can be measured?

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While this question can be answered from different perspectives and diverse disciplines, in this occasion I am particularly interested in looking at the cultural-political perspective in the field of comparative constitutional law. According to Bruce Duthu,

“Having local governments of the people, for the people and by the people with equal protection for everyone and under the umbrella of the State and Federal Law is the answer” to respond to the social demand for legal pluralism (4).

As Christina Allard explained in her presentation, Scandinavian countries (Norway, Sweden and Finland) have already been provided such an answer to the Sami through the creation of the so-called "Sami Parliaments" in each of the three domestic jurisdictions. Although "Sami Parliaments" present inner institutional differences, they all represent an attempt to provide Sami with special channels of political influence on majority political agendas, in regard to issues

affecting their identity and interests. In fact, in light of their minority percentage *vis-à-vis* majority societies, the cultural-political representation of Sami would be theoretically impossible through "ordinary channels" of political influence (5).

For this reason, Sami Parliaments have often been regarded as a European "best legal practice" (at least *de jure*) not only by the scientific community working on indigenous rights, but also by the scientific community working on minority rights. The same Hungarian Minority Law No. 77 of 1993, (which is still considered one of the most promotional examples of minority rights legislation in Europe), was designed with the experience of Sami Parliaments in mind. Again the cross-pollination between the two legal spheres – indigenous law and minority law – has demonstrated to develop in Europe long before on the practical level than on the doctrinal one.

Back to our question, how can the Sami Parliaments experience can be analyzed to understand the contribution that it has brought to the European human rights discourse on legal pluralism?

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The key to the reading that I am going to propose to analyze this experience and its possible contribution to the European human discourse on legal pluralism comes from the legal doctrine on children's rights.

As a social minority, the joint consideration of the children's minority together with other minorities and indigenous groups might be taken in light of the inferior position (in terms of empowerment) that both groups hold *vis-à-vis* mainstream society.

Eugeen Verhellen described the evolution of children's rights as developing around the so-called 3P logic: protection, participation and provision (6). The "protection" logic develops from a "paternalistic" view which perceives the minor- minority group in question as a mere "object" of legal provisions and social policies. The "participation" logic perceives, instead, the minor-minority group in question as a "subject" both in the promulgation of legal provisions and implementation of social policies affecting its interests. Lastly, the "provision" logic builds on the participatory logic and considers the effective fulfillment of socio-economic needs on the substantial level.

In my view, the overall development of the experience on Sami Parliaments although limited and still improvable in its mechanisms of constitutional engineering, has by and large contributed to shift the overall approach towards indigenous-minority groups in Europe towards a more "participatory" perspective. While other experiences of cultural-political participation of minority groups have been existing in Europe before Sami Parliaments (7), I believe that the significance of Sami Parliament experience extends much beyond domestic (territorial) boundaries.

Recently, a progressive trans-national role for Sami Parliaments has in fact been envisaged by the 2005 Draft Sami Convention. According to this draft document, Sami are recognized together with Norwegians, Swedish and Finns as one of the four nations living in the territory of Scandinavia. This recognition has not just developed at the formal level but also at the substantial one. Although this international instrument is still in embryo, Sami's representatives have been actively participating in its *travaux préparatoires*. Moreover, according to this draft document, Sami Parliaments would be invested with a trans-national monitoring role on Sami social status in the

three States where Sami have been living. (8)

This experience of trans-national cultural-political participation of a group provides a remarkable contribution to the European human rights discourse on legal pluralism. It does in fact open new interesting scenarios for the cultural- political participation of other trans-national groups living in Europe, such as the Roma. At the same time, it does virtuously enhance the process of cross-pollination of minority-indigenous-human rights in Europe.

Even if highly promotional on the participatory perspective, the experience of Sami Parliament cannot however disregard the “protection” and “provision” perspectives. The conceptual limitation that still remain in the European

discourse on judicial pluralism regards the socio-economic participation of minority groups in majority societies. As long as these dimensions will not be comprehensively addressed as to fully complement the participatory one, the overall discourse on judicial pluralism in Europe will be circumscribed to a formal dimension, which although fascinating at the *de jure* level, it risks to remain a good project “on the books” without (full) actuation in practice.

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- (1) In particular the process of recognition of Sami occurred during the so-called “Alta conflict” of 1979-1982. The conflict, started after the decision to build a dam across the Alta-Kautokeino River which was draining a big part of the water system of the Finnmark plateau, one of the territorial area inhabited by Sami. Even if Sami lost the Alta case with the Norwegian State, the conflict represented a key event to strengthen the recognition of Sami cultural identity and Sami rights at the domestic level, in particular in Norway. See Minde, H. “Sami Land Rights in Norway: A Test Case for Indigenous Peoples” *International Journal of Minority and Group Rights* 8, no. 2 (2001): 107-25.
- (2) The so-called “European human rights regime” enshrines the *acquis* of human rights instruments promulgated by the three main European human rights organizations: the Organization for the Security and Cooperation in Europe, the Council of Europe and the European Union.
- (3) This is the case of Sami people living in Finland and in Russia as it emerges from the periodical reports under the Convention. Currently in Europe there is no legal tools specifically focused on the protection of indigenous peoples because, as it has already been discussed, up to now Europe has regarded to indigenous peoples as an “extra-European” issue.
- (4) B. Duthu, *Shadow Nations. Tribal Sovereignty and the limits of Judicial Pluralism*, Oxford: Oxford University Press, 2013, 8.
- (5) Josefsen, E. “The Saami and the National Parliaments: Channels for Political Influence.” *Promoting inclusive parliaments: The representation of minorities and indigenous peoples in Parliament* Geneva/New York: IPU/UNDP (2010).
- (6) Verhellen, E. *Monitoring Children’s Rights*, Dordrecht: Martinus Nijhoff, 1996.
- (7) See for instance the experience of cultural-political participation devised by Renner and Bauer between the end of the 19th century and the beginning 20th century. See Nimni, E. *National Cultural Autonomy and Its Contemporary Critics*. New York: Routledge, 2005.
- (8) Åhrén, M. “The Saami Convention” *Gáldu Čála – Journal of Indigenous Peoples Rights* 3 (2007): 8-39.