INDIGENOUS JUSTICE

NEW TOOLS, APPROACHES, AND SPACES

Edited by **Jennifer Hendry, Melissa L. Tatum, Miriam Jorgensen and Deirdre Howard-Wagner**

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Palgrave Socio-Legal Studies
ISBN 978-1-137-60644-0 ISBN 978-1-137-60645-7 (eBook)
https://doi.org/10.1057/978-1-137-60645-7

Library of Congress Control Number: 2017964616

Cover illustration: Danita Delimont/Alamy Stock Photo

Printed on acid-free paper

This Palgrave Macmillan imprint is published by the registered company Macmillan Publishers Ltd. part of Springer Nature.
The registered company address is: The Campus, 4 Crinan Street, London, N1 9XW, United Kingdom

Preface

Spaces of Indigenous Justice began life as a workshop concept and rapidly transformed into an interdisciplinary academic project involving faculty and graduate students from multiple universities on several continents. This volume is a direct result of the first two Spaces of Indigenous Justice workshops, and we want to acknowledge and thank the World Universities Network, the University of Leeds School of Law, and The University of Arizona James E. Rogers College of Law for the financial and logistical support that made those workshops possible. We also owe a tremendous debt of gratitude to Rosemary Taylor-Harding for her excellent work copyediting the entire volume. Her calm unflappability and efficient demeanour were critical to the completion of the book.

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A Note on Terminology

One of the primary benefits of a project like the Spaces of Indigenous Justice is the involvement of scholars from different countries and different academic backgrounds. That diversity, however, is also a complicating factor in attempting to develop standard terminology. Accordingly, rather than try to standardise on one term—Indigenous, Aboriginal, First Nation, Native—we have opted to keep intact the convention used by the author, which is influenced by a number of factors, including the author's home country and academic discipline.

J.H.
M.L.T.
M.J.
D.H-W.

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Stephen Cornell is a political and cultural sociologist at the University of Arizona, where he is Professor of Sociology, Faculty Chair of the Native Nations Institute, and Past Director of the Udall Center for Studies in Public Policy. He is a faculty affiliate with the university's James E. Rogers College of Law and its School of Government and Public Policy. He co-founded the Harvard Project on American Indian Economic Development, which he continues to codirect. He has written widely on Indigenous affairs, economic development, collective identity, and ethnic and race relations.

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Kirsty Gover is a member of the faculty at Melbourne Law School. Her research and publications address the law, policy, and political theory of Indigenous rights, institutions, and jurisdiction. She is interested in the role played by 'indigeneity' in the constitutionalism of settler societies, and in the importance of Indigenous concepts of law and politics in settler state political theory and international law. She is the author of *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (2010).

Jennifer Hendry is Associate Professor in Law and Social Justice at the University of Leeds School of Law. She researches in the fields of social and legal theory, socio-legal studies, and comparative legal studies. She is currently writing on issues of Indigenous justice, legal culture, and legal pluralism, and on theoretical and comparative perspectives on civil/criminal procedural hybrids. She is Director of the School of Law's Centre for Law and Social Justice, Vice-Chair of the Socio-Legal Studies Association Executive Committee, and a member of the Economic and Social Research Council Peer Review College.

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Miriam Jorgensen is a research director of the Native Nations Institute at the University of Arizona and a research director of its sister organisation, the Harvard Project on American Indian Economic Development. She holds additional appointments as a research scientist in the Udall Center for Studies in Public Policy at the University of Arizona and as Professor of Indigenous Governance in the Jumbunna Institute for Indigenous Education and Research at the University of Technology, Sydney. As an economist and public policy analyst, she has worked with Indigenous communities and organisations in the United States, Canada, and Australia. Her research examines the ways social, political, and cultural characteristics affect Indigenous communities' development.

Teresa Libesman is an associate professor at the University of Technology, Sydney. Her research focuses on the fields of children and law and Indigenous peoples and the

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Darren Modzelewski received a PhD in anthropology and a JD from the University of California, Berkeley, and an LLM in Indigenous Peoples Law and Policy from the University of Arizona. His research and advocacy focus on how federal Indian law, international human rights law, and the principles of the environmental justice movement and indigenous archaeology can be combined for protection, preservation, and promotion of Indigenous cultural heritage and property.

Amrita Mukherjee is a lecturer at the University of Leeds School of Law. She holds a PhD and LLM in International law from the University of Nottingham. Her primary research interests are in the areas of international law and international human rights law. She has written on the prohibition of torture, the UN human rights monitoring bodies, legal orientalism, and postcolonial perspectives of international law. She also serves as an associate editor for the *International Journal of Human Rights* and is the programme director for the LLM in international law.

Wantarri Steve Jampijimpa Patrick is a fully initiated Warlpiri man from the Northern Territory community of Lajamanu. His first language is Warlpiri. He is a community liaison officer and a teacher's assistant at the Lajamanu Community Education Centre where he has worked for many years. His passion is the reinvigoration of Warlpiri culture by finding traditional principles that are relevant to today's community life.

Renee Racette is a Cree and Metis lawyer from south-eastern Saskatchewan. She received an SJD in Indigenous Peoples Law and Policy from the University of Arizona. She enjoys a broad range of practice primarily serving Indigenous communities in matters such as Aboriginal rights and title, treaty negotiations, international human rights, community representation, and economic development.

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Melissa L. Tatum is a member of the Law Faculty at the University of Arizona, where she also holds affiliate faculty appointments with the American Indian Studies graduate programme, Gender and Women's Studies, and the Native Nations Institute. She specialises in tribal jurisdiction and tribal courts, as well as in issues relating to cultural property and sacred places. She was a contributing author to Felix Cohen's *Handbook of Federal Indian Law*, and has written extensively about both civil and criminal procedural issues, as well as about the relationship between tribal, state, and

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Introduction

Jennifer Hendry, Melissa L. Tatum, Miriam Jorgensen, and Deirdre Howard-Wagner

In December 2013, a small group of academics gathered at the University of Leeds for a working paper conference entitled Spaces of Indigenous Justice. According to the concept paper for the workshop,[1] the plan was to use the 'spatial turn' that occurred in the humanities as a foundation for exploring new conceptions of space and to facilitate dialogue across academic disciplines under the umbrella of socio-legal studies. The ultimate objective of this interdisciplinary and comparative project was to bring together scholars of law, legal theory, sociology, political philosophy, anthropology, geography, and public policy in order to consider 'spaces' of Indigenous justice and governance, as well as those of interaction, transfer, reciprocity, recognition, and hybridity between the Indigenous and non-Indigenous worlds.

By the end of the two-day workshop, it was clear that this concept had the potential to be more than a mere academic exercise. The approaches discussed and the examples explored during those two days contained genuine potential for developing into new and perhaps more successful approaches to pursuing justice for Indigenous people and communities across the globe. By the end

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_1

of the workshop, a second one was planned for the following year, to be hosted by the University of Arizona. This University of Arizona workshop served to reinforce the usefulness of this new approach and helped to further define and articulate the approach and the foundation upon which it rests. The Spaces of Indigenous Justice Project is built on five foundational pillars:

(1) Litigation is not always the answer and it should not be the automatic first response to an injustice.
(2) Leveraging additional human rights at either the domestic or international level has the effect of funnelling claims into adversarial legal forums.
(3) The best and most effective strategies for achieving justice are interdisciplinary and multimethodological.
(4) Legal philosophical and sociological theories offer vital critical insights and perspectives on issues of Indigenous justice.
(5) In developing a strategy, Indigenous people and communities should be at the table as equal partners; they cannot and should not be the subject of academic experimentation.

A core purpose of these pillars is to draw attention to the range of alternative approaches and tools available for the construction of customised solutions for specific problems encountered by specific communities. This holistic approach is in contrast to the standard one, which begins (and often ends) in the laws governing Indigenous communities and their relationship to nation state governments. Considering that the majority of these laws were promulgated by regimes intended to subjugate and assimilate Indigenous peoples, it is no surprise that they have been unsuccessful both in fostering self-determination or protecting Indigenous identities and cultures, neither of these ever really being an honest objective.

In its inherent interdisciplinarity and employment of multiple methods, the multidimensional spaces approach transcends the disciplinary limitations of Indigenous peoples' *law* and makes its focus Indigenous *justice*. Moreover, in its consideration of legal normative ordering within society it adopts a fundamentally legally pluralist position, recognising within justice claims the importance of local and contextual issues. This is a fertile approach, and one with significant potential not only within the sphere of Indigenous justice but also beyond; while the main concern of this volume is Indigenous justice, the innovative socio-legal work undertaken here is also of relevance to the situations of minority groups and peripheral communities, which lack the political status of Indigenous nations, but which may separate themselves in some respects from the dominant culture.

The 14 essays selected for inclusion in this volume were drawn from both the Leeds and Arizona workshops, and represent approaches, tools, and solutions that are at the core of the Spaces of Indigenous Justice Project. First, each works on multiple levels, from being an individual case study or an exploration of one potential tool to illustrating a larger point stretching across multiple systems. In addition, this approach has the benefit of avoiding—or at least minimising—the 'pan-Indigenous' problem of homogenising and essentialising Indigenous groups.

Second, the essays and contributors come from a variety of academic disciplines, including law, sociology, public policy, economics, socio-legal studies, anthropology, and American Indian studies. The volume also makes a concerted effort to include the voices of early career scholars. The Spaces of Indigenous Justice Project is designed to foster new and creative approaches that reach across traditional boundaries. By infusing the work of the emerging generation of scholars, this collection both provides a platform for new voices and helps to encourage a new generation of academics to think outside traditional academic disciplines and silos. Of the 18 authors involved in this volume, a third were in the late stages of a doctoral programme when they received the invitation to participate.

Finally, this volume makes a deliberate effort to include the voices of Indigenous scholars and those scholars who have extensive experience working with Indigenous communities. If one of the goals of the project is to include Indigenous people and communities as equal partners at the decision-making table, they should also be equal partners in developing the theories and approaches that will guide that decision-making. Three-quarters of the contributors to this volume are either Indigenous or have substantial experience working cooperatively with Indigenous communities. There is representation from all four CANZUS (Canada, Australia, New Zealand, and the United States) countries, in addition to India and the United Kingdom.

To date, the most common approach to accommodating Indigenous justice claims has been the inclusion of Indigenous law and legal practices within those of the dominant legal order. Experience with this approach leads us to identify two categories of problems that arise repeatedly and which provide a useful framing for the examples contained within this collection. We have styled these categories as issues of *conceptualisation* and *implementation*.

Conceptualisation problems, we submit, arise at the stage of determining how, where, and in relation to what the respective legal orders should interact. We outline four requirements for best practice. First, it is vital that any transplanted legal feature[2] be more than simply the functional equivalent to any non-Indigenous counterpart. If it were a mere substitution, there would be no reason beyond symbolism for borrowing the feature. The transplanted feature

must bring with it something special or different. The reasons for its transplantation thus pertain to its unique contribution, and maintaining the full nature of the contribution necessarily requires an understanding of context, of the true role played by the legal feature. Further to this, caution should be exercised in terms of generalising across disparate Indigenous groups—a solution appropriate for one context may not be suitable for another, and it is important that there is no homogenisation of Indigenous communities, deliberate or otherwise. The third conceptual consideration is a temporal one. Legal cultures evolve and adapt over time, whether by accident or design, meaning that it would be a mistake to 'freeze-frame' how these are at a particular moment in time. While this observation holds true for both the dominant and Indigenous legal cultures, the danger is that it is the Indigenous legal culture that is erroneously bounded and concretised. Finally, interactions ought to be genuine, which is to say that engagement with tribal law should be respectful and not merely lip service. For example, the opportunity for an Indigenous community to provide testimony about its child-rearing practices is empty unless there is also an effective mechanism for its consideration, while obligations to consult mean little if they are not undertaken in good faith by both parties. Bearing these four requirements in mind can be useful in avoiding many of the pitfalls that can arise in each of the approaches.

Implementation challenges arise subsequent to conceptualisation issues, and concern the codification, application, and amendment of Indigenous legal features. Codification challenges concern the legal means by which a 'new' Indigenous legal feature is introduced into the overarching legal order. Common law or statutory provision, regulation or policy choice—the selection of the mechanisms and procedures through which such a legal feature is included is often indicative of the degree of import placed upon it. Targeted scrutiny of this, therefore, can be revealing. Application challenges, by contrast, encompass decision-making issues in terms of when and under what circumstances the legal feature should be brought to bear. Perhaps the most important consideration here is the issue of ensuring that those charged with application have the necessary information and understanding to be able to properly do so. Amendment challenges involve a related query, that is, in the event that the new legal feature requires alteration, who is empowered to do so? Does the authority to take this decision rest with the Indigenous legal order of its origin or with the principal legal order of which it is now a component part? Comparative legal studies has engaged with some of these issues in the context of nation state constitutional borrowing and legal transfer,[3] for example, but such theoretical inquiry in terms of Indigenous legal orders is still limited. This volume is intended as a contribution to this debate.

This collection opens with four essays that set the stage by examining current approaches. The chapters in Part I each explore an aspect of the issues that prompted the Spaces of Indigenous Justice Project. Stephen Cornell leads off by identifying two different aspects of justice and discussing what these mean for Indigenous communities. His primary focus is on the Nisga'a Nation, one of the First Nations located in what is now Canada, and he explores the issues confronting them as they move from fighting for the right to govern themselves to, on winning that right, suddenly realising that they had to figure out *how* to govern themselves. Kirsty Gover follows with a case study that explores why litigation that relies on existing laws governing relations with Aboriginal and Torres Strait Islander peoples is almost certainly destined for failure. She uses the case of *Maloney v The Queen* to illustrate how 'anti-discrimination law has not only failed to support an obligation to consult Australian Indigenous peoples, it has also disempowered Indigenous communities in their dealings with Australian governments and undermined their efforts to self-govern'. Darren Modzelewski's chapter uses the water rights claims of the Pueblos in the southwestern United States to demonstrate that Gover's critique is not Australia-specific, but rather is equally applicable to the United States, and arguably also to other countries. Concluding this part, Terri Libesman examines how the involvement of western-based human rights as interpreted through the lens of neoliberalism into Aboriginal and Torres Strait Islander child welfare cases has been counterproductive, and ultimately served to perpetuate the cycle of unjust removals rather than helping to break it.

Part II focuses on efforts to secure the recognition of Indigenous customs and traditions by the dominant legal order. Renee Racette begins this part with a chapter illustrating how the process of incorporating First Nations' law unfolded through Aboriginal Title cases in Canada. As the chapters in this part illustrate, this approach is perhaps the most dangerous one because it is the most difficult to do correctly—outsiders are making decisions about a legal culture not their own, often with little to no formal training or understanding. Amrita Mukherjee's chapter uses the case study of Jharkhand to provide an illustrative example of the problems that can occur when law from one legal system is imported into a different system. The two chapters by Sarah Ciftci and Deirdre Howard-Wagner both reinforce this point, arguing that merely importing the law of the Indigenous group may not in itself be sufficient, and that to ensure that the law is used correctly it is important to involve people knowledgeable about the law in its original context. These arguments recognise the importance of effective communication across the relevant cultures in leading to genuine understanding. Mary Spiers-Williams

and Steve Patrick conclude with a chapter that demonstrates both the difficulties with and potential rewards of cross-cultural understanding and cooperation.

Part III then turns to an examination of new tools and approaches and what they can bring to the table. Hendry and Tatum lead off this part with a chapter that not only employs the concept of interactive legal culture to argue in favour of reciprocity, but also makes the case that theoretical insights can contribute usefully to providing practical solutions. Gina Stuart-Richard then looks at new mapping tools and the promise they hold for Indigenous groups seeking to protect both physical and cultural boundaries. Colombi, Thom, and Degai describe a project involving academics and Indigenous communities on the Kamchatka Peninsula that illustrates the usefulness of these mapping tools, as well as the concept of academia partnering with Indigenous communities. This part then concludes with two chapters exploring how Indigenous groups are drawing on their own traditions and customs to develop methods of governing and interacting with the dominant legal system, and how those methods can be used to help pursue justice. Sharon Toi explores some of the pitfalls inherent in drawing on traditional practices, in particular, the need to update those practices to fit current circumstances while at the same time avoiding interpreting past practices through a lens distorted by colonialism and its influences. Miriam Jorgensen examines how two Mohawk communities in eastern Canada have drawn on their own traditions to reclaim the process of lawmaking, creating space for greater self-determination and self-governance.

The essays in this volume clearly establish that there is no one-size-fits-all solution to the myriad issues of Indigenous justice. As a result there is no attempt to provide such a solution, but rather a call to look for contextually appropriate approaches to addressing specific problems. Relative to this endeavour, these chapters provide timely and useful guidance by drawing attention to potential obstacles that may occur at either the conceptual or implementation stage; it is our contention that awareness and greater understanding of these obstacles can be of assistance to those seeking to use a particular approach.

Notes

1. J. Hendry (2013) ‘Spaces of Indigenous Justice: Concept and Aims’, http://www.law.leeds.ac.uk/assets/files/research/events/1300918-indig-workshop-concept.pdf.

2. See, for example, G. Frankenberg, 'Constitutional transfer: The IKEA theory revisited', International Journal of Constitutional Law (2010) 8 (3) 563–579.
3. See, for example, V. Perju (2013) 'Constitutional Transplants, Borrowing, and Migrations' in M. Rosenfeld & A. Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP: Oxford); G. Frankenberg (2013, ed) *Order From Transfer: Comparative Constitutional Design and Legal Culture,* ed. (Edward Elgar: Cheltenham); W. Osiatynski (2003) 'Paradoxes of Constitutional Borrowing', *International Journal of Constitutional Law* 1 (2) 244–268; S. Farran, J. Gallen, J. Hendry & C. Rautenbach (2015) *The Diffusion of Law: The Movement of Laws & Norms Around the World,* eds (Ashgate: Surrey).

Part I

A Look at the Existing System

2

Justice as Position, Justice as Practice: Indigenous Governance at the Boundary

Stephen Cornell

I begin with a story. The Nisga'a Nation is an Indigenous nation in the Canadian province of British Columbia. In 1999, after more than two decades of negotiations and more than a century of Nisga'a effort to prosecute their claims, the Nisga'a Nation, Canada, and British Columbia signed a treaty that restored to the Nisga'a people a portion of their traditional lands and certain Nisga'a rights of self-government, among them the rights to make law, to resolve disputes, and to control much of what happens on their lands. In 2000, after passage by the Canadian Senate and the provision of Royal Assent, the Nisga'a Final Agreement went into effect.[1]

A few years later, the Native Nations Institute at the University of Arizona hosted some Indigenous Australians who came to North America to look at some examples of Indigenous governments in action. We took them to several nations in the United States and then to British Columbia, where we visited the Nisga'a. The Nisga'a graciously received them, and one of the Nisga'a leaders, an architect of the new treaty, told them the story of the Nisga'a fight to restore their lands and self-governing power. That long battle, he said, took all their energy, skill, and perseverance. On the day the treaty finally went into

My thanks to Jen Hendry, Melissa L. Tatum, and Deirdre Howard-Wagner for including me in the workshops that stimulated this volume, to the workshop participants for stimulating discussions, to Miriam Jorgensen for suggestions and comments during the drafting of this paper, and to Rob Williams for helpful information and insight.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_2

effect, the Nisga'a leaders looked at each other and said, more or less, 'Uh-oh. Now we have to *govern*'.

In short, the world had suddenly changed. For more than a century, they had been denied the right to do what they had done for many prior generations: govern their lands and themselves. Now they had restored much of that right. More than a century of struggle for rights and recognition had morphed, overnight, into the challenge of governance. Subsequent years, said the Nisga'a leader, had been a learning process as the Nation took up once again the task of governing and began to figure out what it would require of them in contemporary times.

What does this story have to do with justice?

A Matter of Difference

In much of the world today, and certainly in the so-called CANZUS countries—Canada, Australia, Aotearoa New Zealand, and the United States—Indigenous peoples, such as the Nisga'a, are engaged in an extraordinary effort to restore self-government as an Indigenous right and practice. The issue of justice infuses that effort, as an aspect of both the colonial experience and the Indigenous agenda, and I want to pay attention here to both aspects. But before talking about justice, let us consider the character of this Indigenous movement for self-governing power.

The disciplines that I interact with the most—sociology and public policy—tend to focus on groups but measure change in individuals. Sure, we aggregate our measures of change by various social descriptors so that we can tell what is happening to specific population categories—but the fundamental metric, the key unit, is the individual, measured against the average mainstream individual or some other reference population. In doing this, we slip rather easily, although perhaps unconsciously, into the assumption that individuals generally have similar priorities—everyone wants better access to the benefits and opportunities society has to offer—and that group agendas are aggregations of those desires. Thus, we assume, for example, that justice is served when employment, income, health, and other socioeconomic indicators for American Indian populations more closely resemble those for the US population as a whole. It is the gaps that matter, and the gaps typically are measured by means, so that we look for disparities in what the 'average' individual experiences in each population.

What is often left out of this calculus is collective aspiration, an objective that has particular relevance for Indigenous populations. The famous White

Paper that the Trudeau government in Canada issued in 1969 made the assumption that First Nation peoples simply wanted what other Canadians had—education, jobs, health care, housing, prosperity. The White Paper's sentiment was 'We're all Canadians', and we need to break down the barriers that lead to differential outcomes among us.

Nearly 40 years later, John Howard, not long after stepping down as prime minister of Australia, expressed a view that had shaped his administration's approach to Indigenous issues: 'The only way the indigenous people of Australia can get what we call a fair go is for them to become part of the mainstream of the community and get the benefits and opportunities available from mainstream Australian society . . .' (quoted in Davies 2008, p. 1). In other words, 'we're all Australians'. This view was widely shared. A friend of mine in the mid-2000s held a senior position in an Australian NGO dedicated to addressing the needs of Indigenous Australians and repairing relations between them and the mainstream. Her chosen measure of success was life expectancy. She felt they would have succeeded when the life expectancy of an Aboriginal child was the same as that of a non-Aboriginal child. This is a necessary goal and one worth pursuing, but it occurred to me at the time that while she was no fan of John Howard, and her methods would have differed from his, her take on the Aboriginal situation was in many ways similar.

The same approach has been evident in Aotearoa New Zealand as well. In the early 2000s, the policy of the New Zealand government towards Maori was called 'closing the gaps' in schooling, health, employment, and so forth. The assumption was that closing socioeconomic gaps was both the primary issue in Maori-Pakeha (European-descent people) relations and a primary Maori aspiration.

It all reminds me of a Mohawk friend who told me of a conversation he had with a senior official in the Canadian government a decade or more ago. They were talking about that government's policy towards Aboriginal peoples and the sense among First Nations that the Canadian government was unwilling to engage their concerns. The official said to my friend, 'You have to understand: this government is willing to sit down and talk about equality, but we will not talk about difference'. In other words, we'll address gaps, but only certain kinds.

But difference is what many Indigenous communities want to sustain: they want the freedom to be themselves. What we risk losing here is the aspirations of peoples, communities, and nations. It is not that equality or socioeconomic disparities do not matter to Indigenous peoples. They do, and often urgently. But I have encountered numerous tribal communities in North America and

Australia that are quite willing to forego certain economic benefits if the cost is the loss of distinctive cultural practices and relationships because for them, community vitality and the continuity of a distinctive place, culture, and peoplehood matter more than individual prosperity does. The metrics are different.

Indeed, Indigenous politics—at least the politics that I most often encounter—is not a *distributional* politics, organised around obtaining equal access to socioeconomic opportunities and benefits. It is, first of all, a *positional* politics that has to do with the position of collectives—peoples, nations, communities—within the encompassing political system and, secondarily, within the encompassing economy. It is not a politics about Indigenous people and their access, as individuals, to opportunities and benefits; it is instead a politics about Indigenous *peoples* and their access to the freedom and power to shape their own futures according to their own designs.

I first became aware of this back in the 1970s when, as a graduate student, I was talking with some American Indian political activists about why so many politically engaged Indians had been reluctant to join the Poor People's Campaign, organised by Martin Luther King, that led in 1968 to a massive march on Washington, DC, a march for economic justice. They pointed out to me that while they wished to support the critical goals of that campaign—jobs, housing, an end to discrimination in voting, in the courts, in the workplace—these were not their primary concerns. Their primary concerns were treaty rights, sovereignty, the restoration of lost lands, and the freedom to be themselves as collectives, as nations within a nation. The Poor People's Campaign was distributional politics—the classic politics of disadvantaged and often immigrant populations. Their politics, on the other hand, was positional, the classic politics of Indigenous nations.

But there is a catch in positional politics. If you are successful, if you are able to affirm, for example, rights to self-government as a people or a nation, you are then confronted with the question of what to do with those rights. At that point, the distributional issues to some degree reassert themselves, only now you are the ones in control of at least part of the system; you are the ones deciding how things get distributed among persons. As the Nisga'a storyteller said, 'Now we have to govern'.

So again: what's the relevance of this to justice?

Two Dimensions of Indigenous Justice

I propose that there are two very different moments or dimensions of Indigenous justice. I am going to call these justice as position and justice as practice.

Justice as position refers to the position that Indigenous peoples—communities, nations, tribes, iwi, societies, and so on—occupy within encompassing states or political systems. The key issues in justice as position are recognition (are Indigenous peoples recognised as formal political actors—governments—with whom central government should interact on a government-to-government basis?), jurisdiction (what is the nature and scope of Indigenous jurisdiction over space, persons, relationships, and activities?), power (regardless of the *de jure* nature of jurisdiction, what is its *de facto* nature?), and organisational freedom (to what extent are those nations free to organise as they see fit in pursuit of collectively determined goals, including the freedom not only to determine how they will govern but to decide who they are—to define the nation, community, tribe, or other collective entity in their own terms?).

In my experience, justice as position increases to the extent that recognition, jurisdiction, power, and organisational freedom increase. Colonialism is unjust not only because it leads to the expropriation of land, labour, natural resources, intellectual property, and so forth—but also because of its denial of justice as position. It expropriates as well the political standing of Indigenous collectives. This indeed is one of its worst effects, for as justice as position deteriorates, the ability of Indigenous peoples to address the other legacies of colonialism deteriorates as well (see Cornell and Kalt 1992, 1998, 2000; Wakeling et al. 2001).

As the Nisga'a story suggests, however, increases in justice as position lead eventually to a new challenge: justice as practice. The empowerment of Indigenous peoples changes their relationship to justice. With recognition, jurisdiction, power, and organisational choice, outcomes such as fairness, accountability, justice, and even community wellbeing and sustainable development become an Indigenous nation's own responsibility.

Justice as practice refers to the exercise of this responsibility. Here the key issues are effectiveness and legitimacy or resonance. Do Indigenous peoples have the capability to govern effectively? Can they provide justice to their own people and to outsiders? Can they do so in ways that match their own political cultures and that their people, therefore, will support (Cornell and Kalt 2000; Cornell et al. 2011)? In other words, justice as practice has to do not only with

courts or other forms of dispute resolution but also more generally with whether modes of self-government are perceived by the governed as appropriately serving the collective interest, as representing a *just* mode of governance.

Thus Indigenous nations face two major tasks in the justice realm, but those tasks focus on two different targets. Justice as position focuses outward on 'them', the colonial power. It is their assumptions and behaviours and practices that are at issue; the task is to obtain justice through the restoration of self-governing power. Justice as practice focuses inward on Indigenous peoples themselves; the task is to resuscitate, develop, borrow, or invent practices that provide effective justice to their own peoples and others, on the ground.

While it is not explicitly a justice story, I think the Nisga'a story illustrates—on a more comprehensive canvas—both the difference and the relationship between these two. It is the story of a people fighting for position—the right of self-government—only to confront, position achieved, the matter of practice—they have to govern. It is a story of a transition from powerlessness, dependence, and external control to a position of limited but significant power and to the responsibility that comes with that position. I subtitled this chapter 'governance at the boundary', and this boundary between position and practice is the first boundary I want to highlight.

Moving from Justice as Position to Justice as Practice

This transition from position to practice can be difficult. While the battle for rights, recognition, and freedom—for position—is enormously difficult and demanding, the challenge of governance has its own demands. Indeed, that may be where the most difficult work lies. As one Nisga'a citizen said to our group, in jest but with a cautionary tone, 'Be careful what you wish for'.

I do not mean to imply here that the positional battle is over, for the Nisga'a or for anyone else. In the United States, where the rights of Indigenous peoples in many ways have been more advanced than in the other CANZUS countries, those rights are under attack. Recent Supreme Court decisions have undermined those rights, and Congressional support for Indigenous self-determination has been falling (Williams 2005; Cornell and Kalt 2010; Duthu 2013). Indigenous rights are by no means secure in Canada, despite major advances in the courts, and genuine Indigenous self-government has a long way to go in Aotearoa New Zealand and, especially, in Australia. But

more and more Indigenous nations in all four countries are thinking about what self-government means and how to do it well. They are paying growing attention to practice.

This includes the practice of justice, for part of the challenge of governance is to deliver justice to your own people and to others who come under your jurisdiction. I do not assume here any particular conception of justice. The challenge is to deliver justice that is perceived as such by the people you govern. The Ngarrindjeri people in Australia may conceive justice differently from its conception by Lakota peoples in the United States, and while the difference between Ngarrindjeri justice and Lakota justice may be interesting, the core issue is whether both the Ngarrindjeri and the Lakota have achieved positions that allow them to organise the provision of justice in their own ways and, if so, whether they have the ability then to deliver it, to make their conceptions of justice operative in the lives of their peoples.

As Indigenous nations confront the justice-as-practice challenge, one result is diversity. Justice as practice is taking a variety of forms in the CANZUS countries. This is certainly the case in North America where Indigenous justice systems range from formally organised and sometimes elaborate court systems to circles of elders who can help resolve disputes, to the maintenance of ancient designations of individuals who are trusted to produce solutions to conflicts or to correct the behaviour of others so as to maintain the peace and safety of the community.[2]

But justice as practice is not easy. What makes it so difficult? One could compose a long list of factors, but in the cases with which I am familiar, several things are involved.

Capacity

Many Indigenous nations are small. Many are isolated. Many have limited human capital. As an attorney in Canada once said to me, what does self-governance mean in a nation of 200 people, only half of whom are adults, and half of them are dysfunctional because of alcohol or other factors? Can you create a government under such conditions? How do you deliver justice in such situations without relying on the colonial state to do it for you?

One of the solutions we are seeing is institution sharing. This has been accomplished in some cases, particularly in Canada, through a reconstitution of the Indigenous nation itself. Thus, for example, the revitalised Ktunaxa Nation in British Columbia is an amalgamation of four First Nations that share culture, language, and much of their history. They have come together

to create a shared government that vests certain powers in centralised institutions and others in the hands of the component First Nations. In the Northwest Territories, four First Nations, whose Tlicho people were known formerly as Dogrib Indians, have jointly formed the Tlicho Government. In Quebec, the threat of massive hydro development in the 1970s led to the founding of the Grand Council of the Crees, linking nine Cree communities with no previous history of joint political structure or action (see on these cases Cornell 2013). This sort of reconstituting makes a good deal of sense in parts of Canada where nineteenth-century policy and treaty-making took little notice of peoplehood, and the shredding of nations was effectively national policy, imposing separate administrative structures—each called a First Nation—on dispersed fragments of peoples. Now some of those peoples are restoring, in formal terms, the group boundaries that make sense not to Canada but to them.

We are seeing some similar things in Australia. Examples, some of them short-lived for various reasons, include the West Central Arnhem Regional Authority, the Noongar Nation, and the Thamarrurr Council, where cultural ties, political necessity, or geographical convergence have promoted the emergence of new, shared structures of governance (see Cornell 2013; Smith 2008). Each involves either disparate peoples or fragments of peoples coming together to govern. In Australia, this does not yet include the formal provision of justice, but it is a means of addressing some of the capacity issues that make the Indigenous provision of justice more difficult.

In the United States, the process of joining hands often has a clear justice component. Numerous tribes have worked together to form intertribal courts including, for example, the Northwest Intertribal Court System and the Southwest Intertribal Court of Appeals, both of which either accept or assist with cases from individual nations.

These Canadian, Australian, and US examples illustrate the crossing of another set of boundaries: the administrative boundaries set up by colonial governments in the processes of subordination, boundaries that typically reflect the convenience and control imperatives of colonial powers, not the conceptions of Indigenous peoples themselves.

Politics

While one factor in the development of intertribal courts in the United States is the difficulty very small nations face in developing their own justice systems, another factor is politics. A major part of the governance challenge, for

any nation, is controlling piracy: the tendency of those in positions of power to use their positions to enrich themselves and their families and friends.[3] This is a common human problem to which Indigenous peoples are hardly immune. Particularly in small nations, all relations tend to be personal. This complicates things like dispute resolution, where obligations to family and obligations to the family of families that constitutes the nation can come into conflict with each other.

Some nations have solved this in the structuring of their own court systems by establishing and enforcing rules that protect those courts from political interference; others look to intertribal courts as a way to remove dispute resolution from the reach of a nation's politicians or kinship ties. Both approaches send a message to the citizens of the nation that they will be treated fairly regardless of who they voted for or who their relatives are. This perception of fairness, of adherence to a set of rules that prevent favouritism, turns out to be critical to the delivery of justice—and to the more general success of Indigenous communities (Cornell and Kalt 1992).

Cultural Discontinuities

A major part of the self-governance movement across the CANZUS countries has to do with culture and, in particular, with the commitment to sustain Indigenous cultures and culturally distinctive communities and to avoid the collective oblivion of assimilation. For example, many Indigenous nations are looking for ways to introduce or restore their own values, practices, and conceptions into the governing institutions that they are trying to create.

Justice systems are a natural site for the animation of those values and practices.[4] In a colloquial sense, justice systems are conclusive. They lay down the law. Many of their decisions are expressions of the normative order: this is how things should be. They are in a position to validate values and practices or directly to facilitate their validation by the community.

At the same time, they also can be the source of the invalidation of those values and practices. If one looked only at the structure of some emerging justice systems in Indigenous nations, one might conclude that they are among the prime instruments of assimilation, and some analysts have argued as much. Are not some of these courts, which often look similar to their western counterparts, literally forcing all those who participate in them—from defendants and victims to court staff and judges—to leave their indigeneity at the door (see Newton 1998; Richland 2008, ch. 1)?

This is the challenge to justice as practice generated by cultural discontinuities: the difficulty of integrating values and practices that come from one set of cultural understandings into organisational models that may come from a different set. Must the Indigenous delivery of justice, which often uses western organisational models, be part of the assimilationist process, or can it serve as a tool for the sustainability and revitalisation of Indigenous normativity and culture?

At least some evidence says it can. James Zion points to two things that are happening in the United States, where the tribal court phenomenon is furthest advanced (Zion 2009; also Tatum 2007; Austin 2011; Riley 2016). First, regardless of the organisational structure of their justice systems, a growing number of tribes are placing customary law at the heart of court processes and decisions. This is happening particularly in areas such as property law, the individual use of tribal rights such as hunting or fishing, and interpersonal disputes.[5] Second, a growing number of these court systems are turning towards restorative justice and away from the adversarial approaches to dispute resolution that dominate the western judicial process. The best-known and most-studied example is the peacemaking court of the Navajo Nation, but there are similar developments in a number of other tribes, among them the Mississippi Band of Choctaw Indians, the Little Traverse Bay Bands of Odawa, the Grand Traverse Band of Ottawa and Chippewa Indians, the Organized Village of Kake in Alaska, and the Tsuu T'ina First Nation in Alberta.[6]

Both of these strategies—customary law and restorative justice—depart from western assumptions about judicial practice, opening up space in the justice system for Indigenous cultural values and norms.[7] Here we see Indigenous justice systems negotiating a third boundary, that between Indigenous and non-Indigenous bodies of law and conceptions of justice.

The Perceptions of Others

Cultural discontinuities raise a challenge of their own for justice as practice. The turn to customary law, the turn to restorative justice, and other ways that Indigenous nations are trying to reintroduce their own ways of being and thinking into the practice of justice may help their justice systems—and their governing systems—maintain legitimacy with their own people. But what about the outside world?

These are nations within a nation. Reality says Indigenous nations cannot entirely ignore the power that surrounds them. The challenge is to maintain

legitimacy with two very different audiences: their own people and the world beyond. That world beyond typically has the power, should it become too concerned about Indigenous justice-as-practice, to step in and undercut Indigenous justice-as-position (see, among others, Porter 1997; Newton 1998; Barsh 1999; and Tatum 2007).

Some of the nations creating justice systems today have addressed this problem.[8] For example, the Mohawk Council of Akwesasne has been aggressive in building up its own justice system: making law, developing its own enforcement arm, and building up a capable court. Mike Mitchell, former Grand Chief at Akwesasne, once pointed out that when you enter the Akwesasne court, what you see is a standard courtroom: the judge sits here on a kind of raised platform, the attorneys sit there, there is a flag on the wall, and so on. That makes non-Natives feel better. But what you will encounter there, says Chief Mitchell, is *Mohawk law*. The structure is like a stage set from a Hollywood courtroom drama, but the script is Mohawk (cf. Richland 2008, on the Hopi Tribal Court).

Concluding Thoughts

I began this chapter with the Nisga'a story, a story suggesting that you move from the battle for rights—in the present argument, from justice as position—to the challenge of governance—to justice as practice. Certainly that is the way things look in North America today. But in North America the self-governance rights of Indigenous peoples, while fragile and under attack, still may be more robust than those in most other countries. What about those other places, where justice as position has yet to be achieved? Is it possible to reverse the pattern? Can some Native nations begin with practice and move towards position?

I believe they can. In Australia and Aotearoa New Zealand and in the less developed rights domains of North America, some nations are taking what might be called the Nike approach to governance, after the company's advertising slogan: 'Just do it'. Carefully, deliberately, sometimes stealthily, some Indigenous communities are searching out the interstices in the various legal and political constraint regimes they face, inserting themselves into those spaces, making decisions, pushing the envelope, and creating track records of capable governance.

As my colleague Miriam Jorgensen has pointed out, this strategy has relevance to the area of justice. A nation could begin to deliver justice as practice by addressing the kinds of modest disputes that we find in every community

but that often happen below the radar of outsiders or the formal legal system and, building from there, establish a track record of success (Jorgensen 2009). If this is done well, one possible result is what Paul Chartrand, an Aboriginal attorney in Canada, refers to as practices crystallising into rights (Chartrand 1999). It doesn't always work, and the scope may be limited at first, but there is at least some evidence that as Indigenous nations assume governmental functions *and govern well*, outsiders may grant them a tacit right to govern.[9] In short, while justice as position opens the door to justice as practice, justice as practice becomes both exercise *and defence* of justice as position. The relationship goes both ways.

That relationship also can teach us something about a subject touched on early in this chapter: the closing of gaps. Evidence from the United States argues strongly that as Indigenous nations assume self-governing powers and exercise those powers effectively, they dramatically increase their ability to address the same social and economic problems—poverty, ill health, and the like—that both dominate and confound the Indigenous policies of central governments (Cornell 2005). The apparent lesson: those governments that focus on closing gaps with Indigenous populations by directly addressing the gaps themselves are unlikely to achieve sustainable success. A more likely and productive strategy is to empower Indigenous nations—to assist them in achieving justice as position and in the exercise of real self-governing power—so that they in turn can develop their own solutions to the challenges they face.

Notes

1. For accounts of Nisga'a treaty negotiations, the treaty itself, and some of the issues and controversy surrounding it, see Rose (2000), Molloy (2000), Sanders (1999), and the thematic issue of *BC Studies* (1998/99).
2. The sources on contemporary North American Indigenous justice systems are numerous. See, for example, Melton (1995), Vicenti (1995), Newton (1998), Perry (2005), Flies-Away et al. (2007), Harvard Project on American Indian Economic Development (2008, pp. 44–50), Zion (2009), and Champagne and Goldberg (2012, ch.4). For examples of some specific tribal court or other justice systems, see Harvard Project on American Indian Economic Development (1999, 2003, 2005, 2010), Nielsen and Zion (2005), Brimley et al. (2007), Nesper (2007), Richland (2008), Austin (2009).
3. In my use of the term piracy, I am echoing conversations with Joe Kalt.
4. Carey N. Vicenti, former Chief Judge of the Jicarilla Apache Tribal Court, has written (1995, p. 137), 'It is in the tribal court that the competing concepts

regarding social order, and the place of the individual within the family, the clan, the band, and the tribe, will be decided.' Writes Flies-Away et al. (2007, p. 117), 'When a Native nation develops its own laws, interprets them according to culturally distinct traditions and customs, and uses tribally determined practices and institutions to mediate this process, it advances *its own* agenda for the future.'

5. Some key texts exploring this in depth include Austin (2009) on Navajo courts and Navajo common law, Nesper (2007) on a set of court cases at Lac du Flambeau, and Richland's (2008) ethnographic examination of operations of the Hopi tribal court.
6. Nielsen and Zion (2009), Austin (2011), Harvard Project on American Indian Economic Development (1999, 2003, 2005), Costello (1999), http://www.ltbbodawa-nsn.gov/Tribal%20Court/Peacemaking/Orientation%20Manual%20Jun72007.pdf, http://www.kakefirstnationorg/OVKTribalCourts/TribalCourts.html, http://www.tsuutina.ca/Governance/Office-of-the-Peacemaker, and the discussion at http://www.restorativejustice.org/editions/2004/August/peacemaking, date accessed 22 December 2013.
7. One could see this as an example of what the eminent Maori leader Sir Tipene O'Regan calls 'reverse colonisation', in which the Indigenous people use dominant-society models but infuse them with Indigenous values and protocols (O'Regan 2014, p. 1). See also Sahlins (2000, p. 519) on 'the resistance of culture' and 'the assimilation of the foreign in the logics of the familiar'.
8. See Nesper's (2007) discussion of the Lac du Flambeau case. Yazzie (2008) discusses the integration of Indigenous and western systems in the Navajo Nation Court.
9. For some intriguing evidence along these lines from Mexico and Australia, see Sierra (2005), Hemming et al. (2011).

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3

Indigenous-State Relationships and the Paradoxical Effects of Antidiscrimination Law: Lessons from the Australian High Court in *Maloney v The Queen*

Kirsty Gover

In this chapter, I consider the precariousness of Indigenous rights to self-governance when advanced or defended as nondiscrimination claims. In the absence of settled concepts of Indigenous rights in domestic law, any differential treatment of Indigenous peoples is susceptible to characterisation as a 'special measure', designed to ensure substantive equality by addressing Indigenous disadvantage. The special measures justification allows settler governments to defend benefits conferred on Indigenous peoples when these are challenged as forms of preferential treatment, consistently with the understanding that special measures and affirmative action are interchangeable concepts (Committee on the Elimination of Racial Discrimination (CERD) 2009). The same logic, however, enables governments to defend coercive measures imposed on Indigenous peoples against challenges brought by members of the burdened group. The special measures exception, designed to protect the interests of disadvantaged groups, paradoxically can make it harder for Indigenous peoples to challenge settler state unilateralism and paternalism. In

Many thanks to participants at the 'Spaces of Indigenous Justice Workshop II' (13–14 April 2015, James E. Rogers College of Law, University of Arizona), and to participants at the 'Making Sense of Maloney: The Significance and Consequences of *Maloney v The Queen*' Roundtable (31 October 2014, Melbourne Law School, University of Melbourne). Thanks also to the MLS Academic Research Service and to Cate Read in particular. All errors and opinions are mine.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_3

this chapter, I address the particular shortcomings of the special measures exception in situations where Indigenous peoples are seeking to enforce the relational responsibilities of settler governments. These responsibilities have variously been expressed in settler law as trust obligations, fiduciary duties, government-to-government relationships, and significantly, as duties to consult Indigenous peoples about proposed measures affecting their established or claimed rights.

I take as a case in point the Australian High Court decision of *Maloney v The Queen*, decided in 2013 (Maloney v The Queen 2013). Joan Maloney, an Indigenous woman, argued that regulations criminalising alcohol possession in her community could not qualify as special measures in the terms of the Racial Discrimination Act 1975 (Cth) (RDA) because they were imposed on the community in the absence of adequate consultation. The Court unanimously rejected her appeal. The precedent now stands that when taking measures for the purpose of 'securing the adequate advancement' of Indigenous peoples, Australian governments need not consult those peoples, even where the measure in question imposes significant burdens on group members. Further, the Court has confirmed that complying with the special measures exception is now the only way to exempt acts that would otherwise constitute racial discrimination in the terms of the RDA. The precedent established by *Maloney v The Queen* thus enables coercive laws targeting Indigenous communities to be characterised as 'special measures' and relieves Australian governments of the obligation to consult the communities affected by such impositions, including, for example, the acts mandated by the Commonwealth's notorious Northern Territory National Emergency Response legislation.[1] In this way, antidiscrimination law has not only failed to support an obligation to consult Australian Indigenous peoples, it has also disempowered those peoples in their dealings with Australian governments and undermined their efforts to self-govern. *Maloney v The Queen* is thus illustrative of the broader claim advanced in this chapter—that antidiscrimination concepts and methods typically give at best only circumscribed and temporary recognition to distinctive Indigenous rights, and in the worst case scenario, they facilitate settler state unilateralism and undermine the efforts of Indigenous communities to govern themselves.

The Settler State Dilemma

Indigenous rights are not claims to an equitable share of primary goods on terms equal to those of other individuals, but to particular property and powers that were held by the predecessors of Indigenous communities and have been or should have been inherited by their descendants. These entitlements are not necessarily, or as a matter of principle, capped by concepts of equality, nondiscrimination, and distributive justice. They depend for their justification on the existence of Indigenous arrangements of power, property, and law that precede the establishment of the settler state. In other words, what is sought is the distribution of primary goods in accordance with a hypothetically just, consensual agreement between Indigenous and settler peoples, and between their respective governments. Certain Indigenous rights then, have a justificatory base that is premised on the principle of continuity rather than on concepts of equality. This makes it difficult to shoehorn them into prospective liberal human rights frameworks.

The settler state dilemma is a genuine one. States are obliged to grapple with and try to reconcile two expressions of democratic liberalism. The first is classical liberalism, which is largely forward-looking, and directed to the maintenance of equality and nondiscrimination norms, the rule of law, and the just allocation of resources and primary goods amongst members of the society. The second form of liberalism has a more reparative and constitutive aspect, looking back to the establishment of the state to address the liberal concept of 'consent', the idea of the social contract that is thought in some accounts to underpin legitimate governance, and the identity of 'the people' in whom popular sovereignty vests. The historic and persistent lack of Indigenous consent to settler governance, and to inclusion in the settler body politic, undermines the premises of the settler state's claim to be a liberal democratic polity comprised of a single sovereign people governed by a legitimate government.[2] As Duncan Ivison has argued, a political theory for liberal democratic *settler* states should

> conceptualize [those] states very differently. They should be seen as being composed of constellations of normative orders that overlap and intersect in complex ways both above and below the state, as opposed to a singular people or sovereign. And it should take seriously the historical and political legacies of the way those normative orders came into being and the interactions between them over time. (Ivison 2016, p. 15)

The restoration of Indigenous property and governance authority offers a way for settler states to negotiate certain limited forms of Indigenous consent. However, these bargains entail the redistribution of primary goods in a way that can appear, within a human rights framework, to discriminate against non-Indigenous individuals and communities, and against Indigenous persons denied access to those goods. From time to time, then, the efforts of settler government to differentiate between Indigenous and non-Indigenous citizens have been challenged as racially discriminatory measures (R v Kapp 2008; Amaltal Fishing Co Ltd v Nelson Polytechnic 1996; Gerhardy v Brown 1985; Morton v Mancari 1974). In Australia, the special measures exception encoded in Section 8 of the RDA has been used to defend state laws for Indigenous communities from challenges brought by non-Indigenous applicants (Bruch v Commonwealth 2002), by Indigenous nonbeneficiaries (Gerhardy v Brown 1985), and most controversially, by Indigenous 'beneficiaries' themselves, such as Joan Maloney (Bropho v Western Australia 2008; Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury 2012; Maloney v The Queen 2013). In other words, in order to show that an act or measure undertaken by a settler government with respect to an Indigenous community discriminates against that community, the claimant group or member must also be able to show that the act is not a 'special measure'. As will be discussed, the Australian High Court has shown a very high degree of deference to decisions made by the political branches of government when evaluating the necessity of special measures and the form those measures should take.

Even where the community has sought the measure in question, and where the measure undeniably confers a benefit on that community, the designation of certain Indigenous rights as special measures is conceptually problematic. Special measures must be premised on disadvantage and must be temporary, because they 'should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved' (CERD General Recommendation No. 32, 2009, para. 12, paraphrasing ICERD art. 1(4)), and 'shall not lead to the maintenance of separate rights for different racial groups' (International Convention on the Elimination of All Forms of Racial Discrimination (1966), art. 1(4)). (Note however that the Australian High Court has affirmed that special measures need not be temporally limited on their face: Gerhardy v Brown 1985, pp. 88–9, 106, 108, 113, 140, 154, 161.) They are therefore an inadequate vehicle for the protection of permanent Indigenous rights to property and self-governance, and as will be seen, do not easily support consultative obligations premised on these underlying

entitlements. It is partly because of this tension that the legal systems of the western settler states contain adaptations that effectively insulate the logics of human and Indigenous rights from one another. These include special Indigenous rights provisions (such as Section 35 of the Canadian Constitution Act, placed outside of the Charter of Human Rights and Freedoms and given priority over those rights in the event of conflict (Canada Act 1982 (UK) c.11, sch. B pt.1 (Canadian Charter of Rights and Freedoms) s.25)), and state-Indigenous agreements (historic and contemporary treaties, land-use agreements, self-governance agreements, and deeds of settlement) (R v Kapp 2008). With the exception of Australia, the legal systems of the western settler states include special property and treaty-based common law doctrines to guide state-Indigenous relationships. These include the US federal trust doctrine, fiduciary duty doctrines, and the constitutional principle of the 'honour of the Crown' that has emerged in Canada and New Zealand (see Guerin v The Queen 1984; Tsilhqot'in Nation v British Columbia 2014; New Zealand Maori Council v Attorney-General 1987; Proprietors of Wakatū & Rore Stafford v Attorney-General 2017). These common law doctrines condition the exercise of governmental power in dealings with Indigenous peoples and their property. Importantly, they support settler government obligations to make informed decisions and to consult with Indigenous peoples about proposed laws or policies affecting their interests. In the United States, Executive Order 13175 provides an illustrative example. The Order requires federal agencies to consult with tribes on matters affecting their interests, in furtherance of the federal government's common law trust obligations and its 'government-to-government' relationship with recognised tribes.

Notably, Australian common law has not produced such a doctrine alongside its recognition of native title rights, nor does Australia have a history of treaty-making with Indigenous peoples, (although a proposal to conclude a treaty between Victorian Aboriginal peoples and the state of Victoria is currently under discussion (see Hutchins 2016)). In this respect, then, Australian law presents a particular challenge for Indigenous claimants. The RDA has become the primary vehicle for the advancement or defence of Indigenous rights claims and protections in Australia, including by providing justification for the Native Title Act as a 'special measure' (Native Title Act (1993) (Cth)). The absence of a treaty, or a constitutional or federal legislative bill of rights (which might, for example, provide protection for the rights of members of minorities) and the lack of general common law fiduciary or trust obligations that could condition

state-Indigenous dealings, forces Indigenous claims into the very narrow and inhospitable avenues provided by antidiscrimination legislation. The necessity of relying on the RDA explains in part the emphasis on race and racial difference in Australian judicial evaluations of measures that target Indigenous peoples.

The first step in a discrimination claim is to establish that the measure engages a prohibited ground of differentiation. A small body of comparative jurisprudence from courts in the western settler states addresses the correlation between race, indigeneity, and tribal membership. In the United States, differentiation between Indian tribal members and non-Indians is not legally a distinction based on race. In *Morton v Mancari* the US Supreme Court found that a hiring preference for persons with Indian blood who were members of federally recognised tribes was not racially discriminatory because it did not benefit Indians 'as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion' (Morton v Mancari 1974). This principle serves to protect benefits extended to members of federally recognised tribes, but the extent to which it supports legislative measures benefitting Indians more generally, and whether tribal membership will continue to suffice to neutralise the potentially discriminatory aspects of federal Indian 'blood quantum' criteria remains a point of considerable controversy. One need look no further than the US Supreme Court's decision in *Adoptive Couple v Baby Girl* (2013) (and the justices' comments during oral argument) to see the depth of that controversy. In Canada, distinctions made between members of First Nations and nonmembers have been found by the Canadian Supreme Court to differentiate on the grounds of race. In *R v Kapp*, a one-day communal fishing licence was granted to named First Nations and was challenged by non-Indigenous fishers. The Canadian Supreme Court found that the differentiation was nondiscriminatory because it had 'as its object the amelioration of conditions of disadvantaged individuals or groups', in the terms of the 'special measures' provision of the Canadian Charter of Human Rights and Freedoms (R v Kapp 2008; Canadian Charter of Human Rights and Freedoms, s.15(2)). In the only New Zealand case discussing the correlation between indigeneity and race, a distinction made between persons of 'Maori or Pacific Island descent' and persons not having Maori or Pacific Island descent was held by the Human Rights Review Tribunal to be a distinction made by 'reason of' race (Amaltal Fishing Co Ltd v Nelson Polytechnic 1996). The New Zealand Crown Law Office has elsewhere advised that legislation directed to the settlement of tribe-specific historic claims does not implicate

the prohibited grounds of 'race' and 'ethnic or national origins' contained in the New Zealand Bill of Rights Act,[3] although the office has conceded that legislation securing the entitlements of 'Maori' may constitute a such a prohibited distinction.

In Australia, the concept of race has been drawn in very wide terms, encompassing distinctions made between traditional land owners and persons who are not traditional land owners (Gerhardy v Brown 1985); between holders of native title and holders of other types of property (Mabo v Queensland [No. 1], 1988; Western Australia v Ward 2002, para.117; Western Australia v Commonwealth (Native Title Act Case) 1995, para.438); and between Aboriginal and non-Aboriginal persons (Carr v Boree Aboriginal Corporation 2003, para.9). Accordingly, in Australia non-Aboriginality has been held to be a marker of 'race', and the collective of all persons who are not traditional owners, including Indigenous persons, has been deemed to be a 'particular race' (Gerhardy v Brown 1985, para.84 (Gibbs CJ), paras.100–1 (Mason J), and para.118 (Brennan J)). The Australian federal court has also held that different ethnic groups can be grouped together as members of a single 'race':

> In popular usage, the terms are often used interchangeably. Attempts to draw a meaningful distinction between 'race' and 'ethnic origin' are likely to be illusive, although 'race' can be used to identify a category of people made up of many ethnic origins (for instance the Caucasian race).
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> In my view, Australian Aboriginal people are a race and have common ethnic origin. They are a group of people who regard themselves and are regarded by others as having the two essential distinguishing conditions referred to by Lord Fraser in Mandala – a long shared history and a culture distinctly of their own. An act done because a person or a group of people are Aboriginal people is, in the terms of s 18C(1)(b), done because of the race or ethnic origin of the person or group. (Eatock v Bolt [No. *1*] 2011, para.313–4)

In Australian jurisprudence then, attributes associated with indigeneity, including most prominently, being a holder of Indigenous property rights, are readily described as racial attributes. Given the symmetry of discrimination law, the effect is to identify nonmembers of a specified Indigenous group collectively as members of a 'particular race' whether or not those persons are also Indigenous. This feature renders it more likely that a court will characterise measures directed to communities comprised predominantly of Indigenous persons as measures that also deny rights to nonmembers on the basis of their race, thereby necessitating recourse to the special measures an exception.

The perception that all nonmembers of a racial group are members of a 'particular race' also contributes to the idea that geographically distinct Indigenous communities are constituted as racial groups, rather than as *de jure* polities in their own right, even where those communities are also traditional owner communities resident on their traditional territory (see Gerhardy v Brown 1985). The problem is even more acute for peoples like the Palm Island Bwgcolman community to which Joan Maloney belongs, because these are comprised of Indigenous families whose predecessors were forcibly relocated to Aboriginal reserves, and who accordingly have different lines of descent, different traditional languages, and different laws and customs. Historic communities residing on lands that were once reserve lands are so readily characterised as racial communities that courts have repeatedly accepted the proposition without discussing the concept of 'race' itself, let alone the extent to which it is or should be coextensive with indigeneity or community membership (Wotton v State of Queensland [No. 5] 2016, para.549). For the time being then, in Australian law, an emphasis on racial discrimination denotes the class of nonmembers as the relevant comparator group for an Indigenous community and requires the equal enjoyment of human rights and fundamental freedoms by members and nonmembers, thus downplaying the unique experiences and attributes of Indigenous communities as historic self-governing peoples. The effect is to ensure that measures designed specifically for Indigenous communities can only be justified if they are special measures within the terms of the RDA, rather than, for example, measures designed to support distinctive forms of Indigenous property ownership, to remedy historic injustice, to enable Indigenous self-governance and law-making, or to facilitate a distinctive state-Indigenous relationship. In other words, an insistence on racial difference as the most legally salient attribute of Australian Indigenous community membership operates to deflect discussion about the appropriate relational aspects of the state-Indigenous relationship, including settler state obligations to consult. Because there is no other legal framework available, the central question becomes inevitably whether the measure racially discriminates against nonmembers.

The conflation of Indigenous membership and race underpins the approach taken by the High Court in *Maloney v The Queen*. Of the six judges presiding in that case, only three even considered whether the differential treatment in question was properly described as a distinction based on race, rather than one based on other characteristics of the community (such as co-residence), and all three gave the question rather short shrift. None discussed the concept of 'race' itself, and none referred to comparative law on this point (Wotton v State of Queensland [No. 5] 2016, para.549). Gageler J simply noted that the

measure was 'inserted and tailored specifically to address conditions and behaviours perceived to exist within the Indigenous community on Palm Island. Geography was used as a proxy for race' (Maloney v The Queen 2013, para.362 (Gageler J)). Likewise, Bell J observed that '[t]he overwhelming majority of persons resident on Palm Island are Aboriginal persons. . . . the enjoyment of the right by Aboriginal persons on Palm Island is limited in comparison with the enjoyment of the right by persons elsewhere in Queensland, the vast majority of whom are non-Aboriginal' (Maloney v The Queen 2013, para.202 (Bell J)).[4] In the section that follows I take a closer look at other important features of the High Court's reasoning in *Maloney v The Queen*. My aims are to draw attention to the self-governance aspects of Maloney's claim, noting that these are disguised by the logics of race and non-discrimination, and to outline the distinctive and very uniquely Australian view of special measures that is revealed by this case.

Maloney v The Queen: The Context and Backdrop

Palm Island, or Bwgcolman, lies off the coast of the state of Queensland in the north-east of Australia. Since 2002, the Queensland government has designated 19 Aboriginal communities, including Palm Island, as 'restricted areas'. (Indigenous Communities Liquor Licences Act (2002) (Qld)). These are to be governed by Alcohol Management Plans (AMPs)—regulatory measures that limit the quantity and type of alcohol allowed in the community and impose criminal sanctions for violation of their terms. All 'restricted areas' are Indigenous communities. As explained by one of the judges hearing Maloney's claim in the Court of Appeal, '[t]he relevant provisions do not apply to dysfunctional non-Indigenous communities with problems of alcohol-related violence' (R v Maloney 2013, para.28). The terms of AMPs vary between communities but all are intended to 'minimise harm caused by alcohol abuse and misuse, associated violence, and alcohol-related disturbances or public disorder in Indigenous communities' (Explanatory Notes, Liquor Amendment Regulation (No. 4) 2008 (Qld) p. 1), including by 'improv[ing] school attendance' (R v Maloney 2013, para.30) and 'reduc[ing] alcohol-related violence, particularly violence against women and children' (Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (2012) p. 1). The applicable legislation specifies that the responsible Minister may impose an AMP only if he or she has consulted with the community's Community Justice Group (CJG), a body comprised of local Indigenous persons appointed to advise and assist government in the implementation of criminal justice

measures (KPMG and Department of Justice and Attorney General (Qld) 2010, p. 7). Notably, however, the Minister is not similarly directed to consult Aboriginal Shire Councils, which are the statutory bodies serving as the main governance institution of each of the restricted areas, and whose members are elected by the Indigenous community they represent (Liquor Act (1992) (Qld) s.173I(2)). Paradoxically, the empowering statute also provides that failure to consult the CJG or to consider its recommendations 'does not affect the validity' of an AMP (Liquor Act (1992) (Qld) s.173I(2)). The operation of this provision is illustrated by the way that the introduction of the AMP was described by the Queensland government—'On 11 October 2005, the Palm Island Aboriginal Shire Council was informed that an Alcohol Management Plan would be introduced in early 2006' (Queensland Government 2005, Queensland Government Response to the Palm Island Select Committee, November, p. 39). Palm Island was the last of the 19 communities to have an AMP, due in large part to the Shire Council's opposition to proposals put forward by the Queensland government, and ongoing disagreements within the community about the content of the intended alcohol restrictions. After many delays and deadlocks, an AMP was finally implemented in 2006. In 2008 Joan Maloney was found in possession of a bottle of rum and a bottle of bourbon, both being types of alcohol not permissible in any quantity on the island, and was charged and convicted in the Magistrate's court. At the time of her arrest, Maloney was 55 and had no prior criminal record.

Maloney appealed against her conviction in the Supreme Court of Queensland, arguing that the AMP and its enabling legislative provisions (Liquor Act (1992) (Qld) s.168B) were inconsistent with Section 10 of the RDA and so invalid, because their effect was to limit her human rights and fundamental freedoms and to prevent her from enjoying those rights to the same extent as non-Aboriginal persons (see Maloney v The Queen 2013, para.227 (Bell J), citing Western Australia v Ward 2002, paras.107–8 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), citing Gerhardy v Brown 1985, paras.98–9 (Mason J)). Queensland countered that the measure was a special measure in the terms of Section 8 of the RDA, because it was enacted 'for the sole purpose of securing adequate advancement' of its beneficiaries. In response Maloney argued that in the absence of appropriate consultation with the Bwgcolman people, a purported special measure must be accompanied by a 'compelling justification' and subjected to a higher degree of judicial scrutiny (Maloney v The Queen 2013, para.117 (Crennan J)). A measure criminalising alcohol possession, she argued, could be a special measure only if 'the community through its representative institutions [was] consulted and involved in the drafting and implementing of any measure restricting the

supply or possession of alcohol' (Maloney v The Queen 2012, HCATrans 243 (Ronalds)). On this point the High Court judges unanimously disagreed with Maloney, holding that special measures need not be accompanied by consultation with the community that is to be the beneficiary of those measures (Maloney v The Queen 2013, paras.24 (French CJ), 91 (Hayne J), 128, and 131 (Crennan J), 186 (Kiefel J, 240 (Bell J), and 357 (Gageler J)).[5]

Much has been made of the Court's treatment of international law and jurisprudence in *Maloney v The Queen*. The RDA incorporates the text of the Convention on the Elimination of all forms of Racial Discrimination into Australian law. While neither the RDA nor the Convention texts make reference to consultation requirements, the CERD Committee has advised state parties that consultation is a required element of 'special measures'. Maloney relied on the Committee's advice to make her case about the necessity for adequate consultation, noting that the Committee had advised that states 'should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities' (CERD General Recommendation No. 32, 2009, para.18) and should 'ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent' (Committee on the Elimination of Racial Discrimination (CERD) (1997), annex V, para. 4(d); Maloney v The Queen 2013, para.121 (Crennan J)). All but one of the judges declined, for various reasons, to use the recommendations of the CERD Committee as extrinsic material in the interpretation of the RDA (Maloney v The Queen 2013, para.61 (Hayne J); paras.175–6 (Kiefel J), para.236 (Bell J), para.134 (Crennan J); see also paras.326–8 (Gageler J)). All judges likewise declined to consider the relevance of the United Nations Declaration on the Rights of Indigenous Peoples, including its provisions on 'free, prior and informed consent' (United Nations Declaration on the Rights of Indigenous Peoples (2007), art. 19).

For the purpose of this chapter, however, the more important aspect of the High Court's decision lies in its findings on the concept of 'advancement' in Australian nondiscrimination law and the implications of this reasoning for Indigenous self-governance claims. The High Court has affirmed that 'advancement' entails not just the type of benefits associated with 'affirmative action', but also burdens designed to correct behaviours thought not to be in the community's best interests, including measures that limit the rights of some group members in order to protect the rights of other members, whether or not the community had itself decided that such measures were necessary or desirable. Most significantly for the purposes of this chapter, the High Court failed to

accept the observations offered *in obiter* by one of the judges presiding in the High Court's 1985 decision in *Gerhardy v Brown* (the only other High Court case considering the special measures defence for acts affecting an Indigenous community). In this case, Brennan J (alone on this point) thought that the concept of advancement animating the special measures exception was intrinsically linked to 'the wishes of the beneficiaries' and to their agency and human dignity, which are supported by the opportunity to exercise choice, observing that

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. (Gerhardy v Brown 1985, para.135 (Brennan J))

Maloney v The Queen thus represents a missed opportunity. The High Court could have, consistently with its own precedent, and in response to the invitation left open by Brennan J, elaborated a consultative standard of the kind that Australia's common law has so far failed to produce. This could have been usefully deployed in the service of Indigenous self-governance to increase the probative and procedural burden borne by Australian governments in decision-making affecting Indigenous interests (see Mabo v Queensland [No. 2] 1992, paras.89–92 (Toohey J)). The Court's refusal to elaborate such a standard is of special import given the history of Palm Island and the Queensland government's treatment of its Indigenous inhabitants.

The History and Tragedy of Palm Island

Palm Island was established as an Aboriginal Reserve in 1916, and since then it has been a site marked by the violent oppression of Indigenous peoples and by episodes of Indigenous resistance and civil disobedience. In 2008, the year of Joan Maloney's arrest, the island had a resident population of approximately 2,000 people, a number which had increased to 2,600 by 2014 (Australian Bureau of Statistics 2017). An 'overwhelming majority' of

residents, probably in the realm of 97 per cent, are Indigenous (Maloney v The Queen 2012, HCATrans 243 (Ronalds); see also, Maloney v The Queen 2012, HCATrans 342 (French CJ); Maloney v The Queen 2012, HCATrans 342 (Ronalds)). Aboriginal and Torres Strait Islander People from all over Queensland were moved to Palm Island and confined there in accordance with the Aboriginals Protection and Restriction of the Sale of Opium Act (1897) (Qld) which remained in force until the 1970s (Wotton v State of Queensland [No. 5] 2016). By the 1920s Palm Island had become the most populous Aboriginal reserve in the state and was used as a 'penal settlement' in which to incarcerate Indigenous persons who were considered troublesome or 'incorrigible' (Wotton v State of Queensland [No. 5] 2016, para.44). Up to 4000 people, representing 57 different Aboriginal and Torres Strait Island groups, were removed to the Island from other reserves in the period between 1918 and 1971 (Legislative Assembly of Queensland 2005, p. 1). The Island is still known amongst Queensland Indigenous peoples as 'Punishment Island'. Most of Palm Island's traditional owners, the Manbarra people, were removed from the Island ahead of its designation as a reserve (Wotton v State of Queensland [No. 5] 2016, paras.27–8), and while most are resident in Townsville in mainland Queensland (Legislative Assembly of Queensland 2005, p. 4), some Manbarra people retain their traditional connection to the Island (The Manbarra People v Great Barrier Reef Marine Park Authority 2004, para.10). Significantly, in *Maloney v The Queen*, the judges of the High Court made no mention of the Manbarra people or their displacement, nor for that matter, did they mention the Bwgcolman people by name, nor did they discuss the diverse cultural composition of the Palm Island community (a point noted by Kirkby 2014, p. 10). This is so even while the history of forced relocation has been acknowledged elsewhere as a factor that complicates the community's internal politics:

> [T]he removal of people from their traditional lands to Palm Island would have meant that people lost contact not only with their land but also their kin, customs and traditions. Apart from being removed to a heavily regulated environment, groups with different languages, rituals and religions were also placed together. (Legislative Assembly of Queensland 2005, p. 10)

The relationship between the Bwcolgman community and the Queensland government has been consistently fraught and frequently violent. Living conditions on the Island are poor. As one judge has recently observed, 'Palm Island's history also manifested itself in continuing socioeconomic disadvantage' (Wotton v State of Queensland [No. 5] 2016, para.52 (Mortimer J)). In

2016 the socio-economic performance of the community was ranked 475 out of 531 surveyed Australian Indigenous communities (Wotton v State of Queensland [No. 5] 2016, para.53). The unemployment rate for Indigenous residents of the Island, for example, is 17 per cent compared to 4.7 per cent for Queenslanders more generally (Wotton v State of Queensland [No. 5] 2016, para.54), a figure compounded by the distance between Palm Island and the mainland (the Island is 50 kilometres north-west of Townsville, the nearest urban centre), and the high cost of travel to and from the community, which makes it impossible for residents to commute to urban centres for work. As is the case for many Indigenous communities, rates of domestic and alcohol-related violence are much higher on Palm Island than elsewhere in Queensland (Maloney v The Queen 2013, para.125 (Crennan J)). These features have contributed to a difficult relationship between the Bwcolgman community and police stationed on the Island.

In 2004, longstanding tensions and frustration erupted in a series of violent encounters between the police and Indigenous residents, beginning on 19 November with the death in custody of Mulrunji, previously known as Cameron Doomadgee (Mulrunji is the traditional name which his family preferred he be called after his death, Wotton v State of Queensland [No. 5] 2016, para.4). Mulrunji died in the Island's jail after being arrested for causing a public nuisance. The preliminary autopsy report advised that his death was caused by 'a compressive force on [his] body where four ribs were broken and that caused a rupture to his liver, which caused heavy internal bleeding' (Wotton v State of Queensland [No. 5] 2016, para.318). This aspect of the report confirmed the community's suspicion that Mulrunji had been killed by his arresting officer. Immediately after the autopsy results were announced to community members at a meeting on 26 November, a crowd of approximately 100 residents gathered near the police barracks. Rocks were thrown at police and a police car was stolen and burnt. Later the home of the arresting officer, the police station, and the Island's courthouse were set alight and were destroyed by fire (Wotton v State of Queensland [No. 5] 2016, paras.322–6; Legislative Assembly of Queensland 2005, p. 2). The Queensland government immediately issued an emergency declaration allowing Palm Island police to exercise 'a variety of coercive powers, and powers of entry, search and seizure, which otherwise would not be available to them without warrant' (Wotton v State of Queensland [No. 5] 2016, para.329). A 'special emergency response team' was dispatched to the Island, and over the course of three days police officers searched 18 homes, often in the very early morning, and arrested 11 people.[6]

The events of 2004 further undermined the already difficult relationship between the Bwgcolman community and the Queensland government. In particular, Mulrunji's death and the police response to the riots seems to have vastly complicated the process of designing an AMP for the Island by increasing local resistance to government intervention (Legislative Assembly of Queensland 2005, p. 3). In the Court of Appeal, McMurdo J noted that

> The relationship between some members of the Palm Island community on the one hand and the Queensland executive and legislature on the other were strained following the tragic death of Mulrunji Doomadgee in police custody in November 2004 and the subsequent riot[7] which caused significant damage to Palm Island infrastructure…. This strained relationship seems likely to have placed tensions on the discussions about the relevant [alcohol management] provisions between the Queensland government and members of the Palm Island community at this time. (R v Maloney 2013, para.46 (McMurdo J))

Certainly the civil unrest on the Island intensified government insistence on the need to restrict the availability and use of alcohol in the community. Two days after the riots occurred, the Queensland government presented a 'Five Point Plan' to the Palm Island Aboriginal Shire Council which referenced their intention to finalise an AMP for the Island, and in 2005 the Council 'was informed that an Alcohol Management Plan would be introduced in early 2006' (Queensland Government 2005, p. 39). Significantly, since 2002 the Shire Council had itself been working to control the supply and consumption of alcohol on the Island by using its limited law-making powers. It is reported in arguments presented to the High Court that the Council had 'previously had its own alcohol management plan which was more extensive and covered different alcohol than that imposed by the State' (Maloney v The Queen 2012, HCATrans 243 (Ronalds)), but had faced difficulties enforcing the law. It is clear that both the Palm Island CJG and the Shire Council (and for that matter Joan Maloney herself) wanted some sort of alcohol restriction on the island, but none of the four recommended plans put forward by those bodies were adopted by the Queensland government in the final form of the regulations (Maloney v The Queen 2013, para.276 (Gageler J), quoting from Explanatory Notes, Liquor Amendment Regulation (No. 4) (2006) (Qld), para. 9). The AMP is thus described in its explanatory notes as being '*based* on the recommendations of the Palm Island Community Justice Group (CJG) and Palm Island Shire Council (Council)' (Explanatory Notes, Liquor Amendment Regulation (No. 4) (2006) (Qld) para. 9 (emphasis added)), but it does not implement the recommendations of either body. Notes

accompanying the AMP advise that '[t]he proposed alcohol restrictions do differ from the recommendations of the CJG and Council. There is ongoing division within the CJG and between the CJG and the Council. This division has inhibited community agreement on an Alcohol Management Plan' (Maloney v The Queen 2013, para.276 (Gageler J), quoting from Explanatory Notes, Liquor Amendment Regulation (No. 4) (2006) (Qld) para. 9). Part of the contestation appears to turn on the different composition and status of the CJG, which is recently constituted, as compared to the more longstanding institution of the Shire Council. The Palm Island CJG was not a statutory body until created by regulation in late 2005, just before the AMP came into effect. Prior to that, it functioned as an informally constituted voluntary advisory body. It seems at least possible that the CJG was awarded formal status to provide an alternative source of advice on alcohol management and to break a deadlock between the Queensland government and the Shire Council—an inference consistent with points made by Maloney in oral argument, when she suggested that adequate consultation would require that

> government approaches the racial group with an attitude of mutual respect, with a preparedness to listen and not just to persuade in an attempt, not only to engage with a self-selected group – and the community justice group at that stage was not on a statutory basis. It was appointed by the government as a kind of informal advisory body. It is not enough to go, in our submission, to a self-appointed advisory group and seek their guidance. (Maloney v The Queen 2012, HCATrans 342 (Kirk))

Whatever the source of the disagreement within the community and between its institutions, it is clear that the consultative obligation sought by Maloney was intended in part to draw attention to these issues and procedural flaws. A higher degree of judicial scrutiny may have revealed, for example, reasons for the tensions between the CJG and the Palm Island Aboriginal Shire Council, and exposed any governmental bias in the Queensland executive's dealings with those entities, including the possibility that the process adopted was intended as a punitive measure to sanction the Council and its members for their noncompliance.

In Maloney's appeal, however, very little evidence on the quality and form of consultation was submitted. Maloney provided 14 affidavits recording views on the adequacy of the consultation, authored by Councillors of the Shire Council, members of the CJG, community elders, and an educator. She argued that these 'establish[ed] a lack of genuine or extensive consultation' (R v Maloney 2013, para. 112). The affidavits suggested variously that the

consultation was inadequate, that no community meetings had been held, and that the community wanted to devise its own AMP (Maloney v Queensland Police Service 2011, paras.37–8). Some noted that the 'Council Mayor' and elders of the CJG were 'driving the AMP', while others (presumably including the four Councillors of the Shire Council) disagreed with the AMP. One affidavit noted that the CJG wanted to 'dissect, discuss or rebut the Government draft AMP' before it was put to the community and advised that, because government officials did not accept this process, 'they never held the meetings' (R v Maloney 2013, paras.108–10). The judge at first instance found that the affidavits were expressions of personal belief that could not be held to represent the views of the people of Palm Island, and so were 'insufficient for the purpose of determining a matter as broad as the issue about consultation' (Maloney v Queensland Police Service 2011, paras.43–4). He held, finally, that '[he did] not consider the affidavit evidence is sufficient to displace the strong inference open from the [legislative] Explanatory Notes that consultation did occur as a matter of fact' (Maloney v Queensland Police Service 2011, para. 59). The Court of Appeal and subsequently the High Court accepted this inference. Notably, one judge on the Court of Appeal accepted the Queensland Premier's characterisation of the Shire Council as 'basically dysfunctional', as support for the proposition that consultation was impracticable. Describing the Premier's 2005 report to the Queensland parliament on a meeting with the Shire Council to discuss the AMP, the judge observed that

> The meeting was unproductive and, indeed, acrimonious. The Premier told Parliament that he was 'shattered' by the behaviour of council members. He said: 'I no longer believe that this council can adequately represent the people of Palm Island. I do not believe that they can deliver services to the people. I think they are basically dysfunctional and that the people of Palm Island are badly served.' It cannot, I think, be right that legislation, intended as a special measure to secure adequate advancement of a racial group requiring protection to ensure equal enjoyment or exercise of human rights and fundamental freedoms, will be invalid if the consent of such a group as that described by the Premier is not first obtained. (R v Maloney 2013, para.119)

To summarise, the type and scope of consultation undertaken by the Queensland government was discussed by the judges hearing Maloney's appeal in only the most rudimentary terms and with a strong emphasis on the reports provided by government officials. The judgments reveal an overriding concern that consultation could not reasonably be undertaken with a

divided community. Again, this emphasis is detached from the history of the Island. It largely absolves the Queensland government of responsibility for the Island's governance problems and makes no mention of ongoing obligations to support the mandate of Indigenous institutions by recognising the authority of elected local officials. Further, past policies designating Palm Island as an Aboriginal reserve and penal settlement continue to complicate the task of self-governance, as reported by the Queensland Palm Island Select Committee in 2005:

> Wide community support in the election of any Palm Island Council is difficult to achieve by the fact that the Island comprises so many different family groups. Strong loyalty in those groups combined with a large number of candidates means that Councillors are often elected with a relatively small percentage of the total vote. . . . Only a few of the large number of family groups on the Island can be represented on the Council at any one time. (Legislative Assembly of Queensland 2005, p. 7)

The emphasis on consultation in Maloney's argument, then, is important for reasons other than the assessment of the AMP as a special measure. It draws attention to the self-governance claims underpinning her appeal.

Instead of a focus on the right of the Palm Island community to decide for themselves what measures were required to manage alcohol use in their community, and how to manage competing preferences and rights in the public interest (as any other government would do), the structure of antidiscrimination law required Maloney to identify, in precise terms, the nature of the right she held and sought to defend. In the High Court's analysis, an argument that sought to affirm the community's agency, self-determination, and capacity to make law was transformed into one in which Maloney was compelled to defend her fundamental human right to 'possess alcohol'. Much debate in the High Court was devoted to determining whether Maloney had succeeded in identifying a human right or fundamental freedom that could be said to be limited by the AMP and its enabling legislation. Significantly, Maloney relied only on the rights enumerated in Article 5 of the ICERD (despite the fact that on its face Section 10 is not limited to those enumerated rights, and that the High Court had previously suggested that Section 10 also encompasses a 'larger class of rights' falling within the scope of ICERD's Article 1(1)) (Maloney v The Queen 2013, para.145 (Keifel J); Gerhardy v Brown 1985, paras.85–6 (Gibbs CJ)). She claimed that the measures limited her right to equal treatment before tribunals and other organs administering justice

(Article 5(a)), her right to own property (Article 5(d)(v)), and her right to access public places and services (Article 5(f)).

In her interpretation of the right to equal treatment, Maloney drew on arguments supporting a general right to 'equality before the law', as mentioned in the 'chapeau' of ICERD Art 5. This approach was also endorsed in arguments submitted by the Australian Human Rights Commission, which suggested that the rights protected by ICERD included a general right of equality because Article 26 of the ICCPR and Article 7 of the Universal Declaration of Human Rights establish that such a right was among the 'human rights and fundamental freedoms' protected by the ICERD (see Maloney v The Queen 2013, para.160 (Kiefel J). This framing appropriately emphasises that it is the unequal operation of law by virtue of race that is at stake in Maloney's claim, not the right to own or possess a particular chattel. The form of this type of argument was usefully summarised by the dissenting judge in the Court of Appeal as follows:

> [T]he practical purpose and effect of the relevant provisions is to discriminate directly against the overwhelmingly Aboriginal inhabitants of Palm Island as to their right to own a particular type of property. As a result of their Aboriginality, they cannot own alcohol other than beer in their own community in the way that other Queenslanders can. The right is not the right to own rum or bourbon, but the right to own rum or bourbon in the same way and to the same extent as non-Indigenous Australians. (R v Maloney 2013, para.18 (McMurdo J)

However, only two judges in the High Court considered the argument that the right in question should be broadly conceived as right to be free from discrimination or to be 'equal before the law'. One dismissed the claimed general right to nondiscrimination as a 'broad objective' of the ICERD and RDA, but not a right on which Section 10 could operate (Maloney v The Queen 2013, para.161 (Kiefel J)). The other expressed the view, *in obiter* comments, that the right was one covered by the ICERD but that the inquiry could be confined to the scope of the enumerated rights referenced in Maloney's argument.[8] As a result, the right in question was very narrowly defined. One judge characterised it as a 'right to own property' (Maloney v The Queen 2013, para.73 (Hayne J)), one deemed it a 'right to own alcohol' (Maloney v The Queen 2013, para.38 (French CJ)), two thought the measures affected both the right to own property and the right to access a public service (Maloney v The Queen 2013, paras.224–6 (Bell J)), one found that what was claimed was a 'right to possess alcohol' which was not amongst the

rights protected by the provisions of the ICERD and RDA, and one judge did not discuss the identification of the right at all (Crennan J).

In light of this, it is significant that Maloney did not claim a human right to possess unlimited amounts of alcohol, and did not claim that alcohol should be freely available on the Island. She objected instead to the way in which limitations on her rights, which did not apply to persons in non-Indigenous communities, were devised by the Queensland government. Maloney did not argue in the High Court (as she did in the Court of Appeal) that the consulted community could withhold consent to a proposed regulatory measure. She argued instead that the standard should be 'consultation with a view to obtaining consent', noting that consent itself is 'not always required, but [is] a significant relevant factor' (Maloney v The Queen 2012, HCATrans 342 (Kirk)). This is familiar phrasing drawn, it appears, from the ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, s.6(2), which states that

> The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. (ILO Convention 169 (1989))

If meaningful purposive consultation of this kind is not present or is inadequate, then, argued Maloney, this should lead to 'a higher degree of scrutiny, not to a knockout point' (Maloney v The Queen 2012, HCATrans 342 (Kirk)). Maloney's case, and its place in the history of Palm Island, (and of state-Indigenous relationships more generally), draw attention to what I think is a particularly Australian judicial understanding of the purpose of special measures—one which is effectively agnostic on the question of benefit. Two judges, for example, noted that the special measures exception usually correlates with the concepts of 'affirmative action' in which benefits are conferred on a disadvantaged minority that are not offered to members of the majority, but accepted nonetheless that measures criminalising the conduct of members of a minority could also qualify as special measures. French CJ conceded, for example, that 'special measures' are ordinarily measures of the kind generally covered by the rubric 'affirmative action' (Maloney v The Queen 2013, para. 46), and Bell J noted that '[f]oisting a perceived benefit on a group that neither seeks nor wants the benefit does not sit well with respect for the autonomy and dignity of the members of the group' (Maloney v The Queen 2013, para. 237).[9] Despite these important observations, noting that the criminalisation of members of a racial minority is an unusual form of

affirmative action, all judges upheld the burdens imposed on the Bwgcolman community by the Queensland government as special measures.

Conclusion

In sum, the precedent established by *Maloney v The Queen*, and the logic of the antidiscrimination law on which it depends, serves to deny the distinctiveness of Indigenous experiences, claims, and rights by positioning Indigenous peoples as a disadvantaged racial group and not as polities or bodies politic. It further accepts that Indigenous peoples are susceptible by virtue of their race and disadvantage to uniquely invasive forms of government regulation. Despite their vulnerability and the fact that they constitute only tiny minorities vastly outnumbered by the non-Indigenous majority, Indigenous peoples are left to advance their views about the laws imposed on them in the same way and via the same mechanisms as other citizens, as made clear by Crennan J when she observed that

> Those mechanisms include free, informed public debate, a free press and regular elections. Because of those mechanisms, however precautionary or desirable in some sense consultation with constituents may be (and even if a legislature encourages consultation, as here), ordinarily neither consultation with constituents nor their consent to a law is a precondition to the legality of a statute, particularly a protective measure, passed in Australia by an elected Parliament. (Maloney v The Queen 2013, para.135)

By implication, then, communities in need of 'protective measures' have an even weaker claim to be consulted about those measures than the population at large. Because the special measures exception is now the only way for Australian governments to defend measures that target Indigenous groups, and because the RDA is the only federal legislation that conditions distinctions made between Indigenous and non-Indigenous peoples, the correlation of race and disadvantage means that Indigenous groups are more susceptible to coercive and unilateral governmental interventions than any other community in Australia. The question then must seriously be asked: for Australian Indigenous peoples, in the absence of anything better, is antidiscrimination legislation worse than nothing at all?

Notes

1. Now called the 'Stronger Futures Legislation', encompassing the Stronger Futures in the Northern Territory Act 2012 (Cth) ('Stronger Futures Act'); Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth); and Social Security Legislation Amendment Act 2012 (Cth). The measures include income quarantining, the compulsory acquisition of leasehold interests over Aboriginal land, restrictions on the supply and possession of alcohol and pornography, and the removal of customary law and cultural practices as considerations in criminal sentencing (see Chap. 10).
2. A similar idea is discussed by Steven Curry (2003) 'Indigenous Rights' in T. Campbell, J. Goldsworthy and A. Stone (eds) *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press) p. 307.
3. For a recent example, see V. McCall, (8 April 2016) 'Te Awa Tupua (Whanganui River Claims Settlement) Bill: Consistency with the New Zealand Bill of Rights Act 1990', Crown Law Office, para.3. Identical language is used in Crown Legal advice on at least 21 other Treaty settlement bills. 'The Bill does not *prima facie* limit the right to freedom from discrimination affirmed by s.19 of the Bill of Rights Act through conferring assets or rights on the Whanganui Iwi that are not conferred on other people. Discrimination arises only if there is a difference in treatment on the basis of one of the prohibited grounds of discrimination between those in comparable circumstances. In the context of this settlement, which addresses specified historical claims brought by the Whanganui Iwi, no other persons or groups who are not party to those claims are in comparable circumstances to the recipients of the entitlements under the Bill.'
4. See also Hayne J at para.84: 'Those who live on Palm Island are overwhelmingly Aboriginal persons. The extent to which the residents of Palm Island enjoy the right to own property differs from the extent to which persons resident elsewhere in Queensland enjoy that right, and argument in this Court proceeded on the implicit footing that those who are resident elsewhere are predominantly non-Aboriginal persons.' See further in para.71: 'There was no dispute that the persons who it was alleged did not enjoy the relevant right or rights were Aboriginal persons on Palm Island.' The interpretation is consistent with the framing of the relevant section of the Racial Discrimination Act 1975. Section 10 of the RDA does not require that the law in question make a distinction expressly based on race, but is triggered by the differential effect of such a law on members of a particular race. See, e.g., *Maloney v The Queen* (2013) 252 CLR 186, para.10 (French CJ).
5. Several judges thought that a lack of consultation might, in some circumstances, be a factor relevant to the question of whether a measure could reason-

ably be deemed a 'special measure', but did not think this limitation was applicable to the facts. The Chief Justice noted 'that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure': *Maloney v The Queen* (2013) 252 CLR 168, para.25 (French CJ). Especially, he noted, where the measure imposed a restriction on the freedoms of some members of the beneficiary group.

6. Three of the arrestees subsequently brought a class action suit that was heard by the Federal Court in 2016, resulting in a finding that the Queensland police acted in breach of the Racial Discrimination Act in their conduct on the island. The police were ordered to pay compensation to the three lead applicants, one of whom had spent 19 months in jail after being convicted for inciting violence on the island. Other claims are expected to be made pending the possible appeal of the decision to the federal appellate court. See, e.g., R. Ison (21 September 2015) 'Palm Island Case Hears of Police "Racism"', *The Australian*, http://www.theaustralian.com.au/news/latest-news/palm-island-discrimination-case-to-start/news-story/3d9bb27f4b841056d9961240483471ce, date accessed 13 June 2017; C. Knaus and AAP (5 December 2016) 'Police Discriminated against Palm Island's Indigenous Community, Federal Court Finds', *The Guardian*, https://www.theguardian.com/australia-news/2016/dec/05/police-discriminated-against-palm-island-indigenous-community-federal-court-finds, date accessed 13 June 2017.
7. This is the word used in media reports. In *Wotton*, Mortimer J preferred to describe the events as 'protests and fires'—'To use the word "riot" to describe these events would be to convey an impression that does not reflect my view of the evidence before me. I have used the composite phrase "protests and fires" in these reasons to describe what happened on 26 November 2004': *Wotton v State of Queensland [No. 5]* [2016] FCA 1457, para.8.
8. *Maloney v The Queen* (2013) 252 CLR 168, para.219 (Bell J), but see para.223: 'In circumstances in which, as will be explained, Ms Maloney's submission that her rights under Art.5(d)(v) and (f) are impaired by the liquor restrictions should be accepted, it is unnecessary and for that reason inappropriate to determine whether s.10(1) protects a right to equality before the law of the breadth for which the AHRC contends.' Three judges considered as relevant the human rights of vulnerable members of the community. They emphasised, in general terms, the rights of women and children to 'security of the person and State protection from violence' (para.249, Bell J), to 'a life free from violence' (para.184, Kiefel J and para.371, Gageler J, citing ICERD Art.5(b)), and to 'public health' (para.371, Gageler J, citing ICERD Art.5(e)(iv)). See also, para.107 (Hayne J).
9. See also, Parliamentary Joint Committee on Human Rights (Cth) (27 June 2013) 'Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory

Act 2012 and Related Legislation, 11th report', p. 31 (s.1.111): 'The committee is unaware of any case in which an international body has classified such a measure as a "special measure", and the High Court judgments contain no reference to any such instance under international law. The examples given internationally and the assumption underlying international discussion of special measures is that they involve the direct conferral of benefits on members of a particular racial group which are not provided to persons who are not members of that racial group, in order to advance the enjoyment of human rights of the benefitted group.'

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4

Pueblo Water Rights

Darren Modzelewski

Pueblo communities have lived in what is now the American southwest since time immemorial. They have practiced irrigated agriculture since well before the Spanish arrived in 1540 (Cohen's Handbook 2012, §4.07(c); New Mexico v Abbot 2010). In the American West, water is allocated on a first-in-time basis—called prior appropriation. On its face, applying the rules of prior appropriation would appear to mean the Pueblos have paramount water rights to all other users. Yet, despite their long history of water use, Pueblo communities' right to water remains in question. The story of why this is so illustrates some of the problems that occur when colonising powers treat Indigenous groups as if they have no laws and as if there is no differentiation among Indigenous groups. It also demonstrates how a focus on procedural details can provide the appearance of fairness while concealing substantive injustice (Hendry and Tatum 2016). This chapter will propose a new way of looking at the particular problem of the Pueblos of the American southwest and their rights to water.

I would like to thank Holly Doremus and Robert Glennon for their comments on an earlier and longer versions of this chapter. I would also like to express my appreciation to the editors of this volume for their welcomed and insightful review and commentary. Finally, I would like to express my deep appreciation for the Pueblo governors, officials, citizens, and attorneys who continue to advance their substantive rights as sovereign nations.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_4

Pueblos and Colonising Powers

In 1540, Spain became the first European colonial power to interact with the Pueblo communities. In 1598, just 58 years after the initial encounter between Coronado and the Pueblos, Juan de Onate established the first Spanish settlement at Ohkay Owingeh.[1] While the so-called Doctrine of Discovery gave Spain control of the area,[2] Spanish law at least recognised Pueblo water rights.

This recognition was accomplished by transmuting Pueblo land-use patterns into the nearest Spanish equivalent. For the Pueblos, a network of complex social and cultural relationships underlies their personal and communal land-use norms. Under Spanish authority, the imbricated nature of Pueblo land ownership was simplified into the Iberian-binary of public and private space. Pursuant to Spanish law, the public owned everything except that which was used by a private entity-person or Pueblo (Briggs and Van Ness 1987, p. 74; Myers 1996). Within this overly simple bifurcation of Pueblo land use, the Spanish Crown functioned as a trustee and sought to keep separate Spanish settlers and Pueblo people. The Crown restricted local administrators from granting land from the public domain in a way that would harm the Pueblos (Briggs and Van Ness 1987, p. 75). If a grant were allowed, administrators were required to ask the Pueblos if the grant would harm them. The Crown also required that cattle ranching grants, for example, could not be within a league and a half of Pueblo communities and sheep ranching grants could not be within a half a league (Aamodt II 1985, p. 997).

By 1821, Mexico successfully declared itself independent from Spain. A new national government meant changes in policy towards the Pueblos. Where Spain highlighted the differences between Spanish settler and Pueblo communities, Mexico espoused the idea of *la gran familia mejicanca* promoted by Mexican liberal political philosophers. In theory, la Gran Familia emphasised unity:

> Making these Natives understand that just as their old burdens have ceased, so also have their old privileges ended, leaving equal, one to another, all the additional citizens who with them make up the great Mexican family. (DuMars et al. 1984, p. 23; Briggs and Van Ness 1987, p. 85)

To some extent it did; the Mexican government declared everyone within the nation state a citizen and conferred all the rights and privileges of citizenship equally to people of Spanish, African, and Indian descent. Yet the status of the

land on which the Pueblos lived was not entirely nationalised. Mexican settlers could now purchase privately owned Pueblo land without government oversight, but they were still unable to alienate Pueblo communal lands (Aamodt II 1985, p. 998). A consequence of this subtle change was an increased number of land sales between the Pueblos and Mexican settlers (Gomez 1985, p. 1074; Briggs and Van Ness 1987, pp. 85–94). By 1846 there were more non-Indians than Indians living within grant lands of the Tesuque, Nambe, Pojoaque, and San Ildefonso Pueblos (Briggs and Van Ness 1987, p. 91). The impact of these changes on water rights was not entirely clear (Briggs and Van Ness 1987, pp. 85–94).

Nonetheless, Mexican control over the area was fairly short-lived. At the end of the Mexican-American War in 1846, Mexico ceded its territory north of the Rio Grande River to the United States through the Treaty of Guadalupe Hidalgo. Mexicans who suddenly found themselves living in the United States might seem to have been protected under this treaty. But as Malcolm Ebright, historian, attorney, and Director of the Center for Land Grant Studies, pointed out, 'the United States looked at the treaty as an enormous real estate deal; it expected to get clear title to most of the land it was paying for regardless of the property rights of Mexicans' (Ebright 1987, p. 29). Article VIII of the treaty provided that Mexicans living in the ceded territory had one year to decide whether to return to Mexico or stay and become American citizens. In relevant part, Article VIII reads:

> Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. (Treaty of Guadalupe Hidalgo 1848)

Article VIII is the only article of the treaty that protects land grant property rights. Interestingly, this article places the burden of requesting a transfer of title on the property owner. If the request was not made in a timely fashion, the property could be declared part of the public domain of the United States (Ebright 1987, p. 31). For most property owners, this process was straightforward, though not necessarily fair. The New Mexico land board

rejected approximately 94 per cent of the petitions it received from Mexican citizens requesting recognition of their titles (Gomez 1985, p. 1074). Additionally, courts were reluctant to make any final determinations in land grant disputes (U.S. v Percheman 1833; Botiller v Dominguez 1889). This aversion resulted in significant confusion—especially in relation to Pueblo water rights.

Uncertainty about Pueblo water rights continued until 1864, when the United States confirmed land grants establishing the Pueblo boundaries in the United States and issued patents that read much like land deeds. Congressional confirmation transferred title to the Pueblos in fee simple with apparent finality. On their face, the patents confirmed the exterior boundaries and Pueblo ownership of the Spanish land grants but left open the issue of water.[3]

A disclaimer added to the patents worked to undermine Pueblo water rights claims in subsequent litigation (Aamodt I 1976; Aamodt II 1985; U.S. v Abousleman 1983). The disclaimer states, 'shall cause a patent to issue therefore as in ordinary cases to private individuals: Provided that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of the said lands and shall not affect any adverse valid rights, should any exist' (United States of America to Various Pueblos, 1 November 1864). Courts have interpreted this language to mean that the United States has no property interest in Pueblo lands, unlike the government's relationship to other federally created Indian reservations. In this sense, the Pueblos hold title to their land just as any other American citizen. Furthermore, this status issue raised questions about whether or not Pueblo citizens were 'Indians' for purposes of the application of Federal Indian law principles, and whether or not the Pueblos could claim water rights under either *Winters* or *Winans*.

The Pueblos and Federal Indian Law

In the United States today, 'Indian' refers to citizens of federally recognised tribes and thus reflects a political status (Morton v Mancari 1974). This status derives from the fact that federal Indian law applies to tribes that have been recognised by the federal government. In the late 1800s and early 1900s, however, 'Indian' was more commonly understood to be a racial status and was treated accordingly by the federal courts.

Courts addressed the question of whether Pueblo peoples were Indians (for purposes of the application of federal Indian law) on three different occasions

between 1869 and 1913. In *United States v Lucero*, a New Mexico territorial court determined that Pueblo citizens were not Indians because they cultivated land and were not 'barbarous Indians' or 'savage tribes' that were 'given to war and the chase for a living' (U.S. v Lucero, 1869, pp. 430–1 and pp. 452–4). The US Supreme Court reiterated this interpretation in *U.S. v Joseph* (1876). There, the Court directly considered whether Pueblo citizens were Indians within the meaning of the 1851 extension of the 1834 Trade and Intercourse Act and whether title to their land was such that the Act would apply (U.S. v Joseph 1876, p. 615). As to the first question, the Court applied the same racialised logic as in Lucero and stated, 'They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilised Indian Tribes' (U.S. v Joseph 1876, pp. 616–17). As to the second question, the Court held that since the Pueblos were granted land by Spain and those grants were protected under the Treaty of Guadalupe Hidalgo as confirmed by Congress, their land rights were sufficiently different from other Indian tribes that the Indian Trade and Intercourse Act of 1834 did not apply (U.S. v Joseph 1876, pp. 618–19).

Despite the ruling in *Joseph*, shortly after New Mexico was admitted into the Union the issue of whether or not Pueblos were Indians was raised again. This time the issue was a test of the 1910 New Mexico Enabling Act. Section two of the Enabling Act expressly restricted the authority of New Mexico over Indian communities. Specifically, the Act made it illegal to sell alcohol to Indians. This clause was challenged in *United States v Sandoval* (1913). The Court held that Pueblo citizens were 'Indians' despite being 'sedentary, rather than nomadic, in their inclinations, and disposed to peace and industry' and that the authority to regulate Indian affairs was not undermined by the admission of New Mexico into the Union.[4] The Court also took the opportunity to comment on the status of the Pueblos' land title in relationship Congressional plenary authority. The Court noted:

> It is true that the Indians of each pueblo do have such a title to all the lands connected therewith … but it is a communal title … and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands … were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs. (U.S. v Sandoval 1913, p. 48)

While the Court's decision in *Sandoval* pulled the Pueblos within the ambit of federal wardship, it reopened questions concerning the nature and scope of Pueblo land ownership and water rights.

Two pivotal cases affirm Indian water rights: *United States v Winans* (1905) and *Winters v United States* (1908) (Cohen's Handbook 2012, §19.02). *Winans* addressed water rights on reservations established by treaty. In its ruling, the US Supreme Court declared that, '[a] treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted' (U.S. v Winans 1905, p. 381). Thus, if a treaty was silent as to water rights, it should be interpreted to reserve sufficient water rights to tribes to give effect to provisions recognising traditional hunting and fishing activities.

Winters addressed water rights on reservations established by federal law. It established that first, the creation of a reservation by the federal government impliedly reserved water rights for a tribe or tribes occupying that reservation; second, those water rights were reserved to carry out the purposes of the reservation; and third, those Indian water rights had priority over non-Indian water rights perfected under state law (Cohen's Handbook 2012, §19.03(1)). Unlike most federally recognised tribes however, the land bases of Pueblo communities were not established by treaty, executive order, or act of Congress. Instead, as has been discussed, they were created through Spanish land grants and, later, recognised by the United States through Treaty of Guadalupe Hidalgo.

On first impression it might seem unnecessary to attempt to apply *Winans* and *Winters* to Pueblo water rights, as Congress had twice addressed those rights by statute, in 1924 and in 1933. First, The 1924 Act was intended to quiet title to the lands within the Pueblo grants (Pueblo Land Act of 1924; Aamodt I 1976, at 1009). To do this, Congress created the Pueblo Lands Board (Pueblo Land Act of 1924, s.2). Its mission was to assess the scope of Pueblo and non-Indian lands, decide if the Pueblos had suffered a loss of land and water rights (Pueblo Land Act of 1924, s.6(b)), and provide fair market value compensation for that loss (Pueblo Land Act of 1924, s.6(c)). The Act also provided that title to non-Indian land would be recognised if certain conditions were met. For example, ownership had to have begun prior to 1889 or 1899 (depending on the nature of the claim) and taxes must have been paid (Pueblo Land Act of 1924, s.4).

However, the Board valued Pueblo land and associated rights at $35.00 per acre, which was significantly below the $100 per acre price that should have been used (Aamodt I 1976, p. 1115). Recognising this discrepancy, Congress passed the 1933 Pueblo Land Act to provide additional compensation (Pueblo Land Act of 1933). Section IX of the 1933 Act provides:

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running

> through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.

The meaning of Section IX is unclear. On the one hand, Congress might have intended the language 'prior right' to recognise a *Winters* right. This would certainly be in line with the Courts holdings in *Sandoval* and *Candelaria* (Aamodt I 1976, p. 1113). On the other hand, the court in *Aamodt II*, held that while the Acts preserved aboriginal rights, they did not preserve a *Winters* right (Aamodt II 1985, pp. 1009–10). The court in *United States v Abousleman*, confronted the meaning of the Pueblo Land Acts of 1924 and 1933 found there was a genuine issue of material fact as to the question of whether the texts of the Acts implied a *Winters* right (U.S. v Abousleman 1983, p. 33). Because the meaning of Section IX was unclear, the question of applying *Winters* re-emerged.

Winters and Pueblo Water Rights

United States v Abousleman provides an excellent illustration of how modern courts may approach the question as to whether *Winters* water rights can be applied to Pueblos. In *Abousleman*, the court considered the state of New Mexico's motion for partial summary judgment regarding a Special Master's report on the Pueblo's future water use and claims by the Pueblos of Zia, Jemez, and Santa Ana (U.S. v Abousleman 1983, p. 2). The court addressed five claims to which New Mexico sought a ruling: first, the proper quantification of the Pueblos water rights; second, that aboriginal title was not a basis for property ownership of a water right; third, that the Spanish land grants to the Pueblos did not confer water rights apart from actual uses; fourth, that *Winters* does not apply to the Pueblos; and fifth, that *Winans* does not apply to the Pueblos.

This chapter will focus only on the state's fourth claim—that *Winters* did not apply.[5] To address this fourth claim the court engaged in a three-prong analysis described below. In summary, the court found that the *Winters* doctrine did not apply to the Pueblos for three reasons. First, it noted that there is a difference between a reservation and a grant of land (U.S. v Abousleman 1983, p. 23). Second, it found no change in the underlying purpose of the reservation (i.e. there was no shift from hunting and gathering to agriculture) (U.S. v Abousleman 1983, p. 23). Third, the justices reasoned that the Treaty

of Guadalupe Hidalgo did not create new rights but rather confirmed existing ones (U.S. v Abousleman 1983, p. 23); and that the extension of the 1834 Trade and Intercourse Act implied a right to water for the Pueblos (U.S. v Abousleman 1983, p. 25). A closer look at each of these reasons reveals significant flaws in the court's analysis.

Reason One: Grant Versus Reservation

In making its argument, the court placed considerable weight on what it saw as an important distinction between Pueblos and other Indian Nations: Pueblo lands, the court pointed out, were defined through Spanish grants whereas the land bases of other tribal communities were established as reservations by the US government. The court in *Abousleman* quoted at length the court in *Aamodt I*:

> The recognized fee title of the Pueblos is logically inconsistent with the concept of a reserved right. By the Treaty of Guadalupe Hidalgo the United States agreed to protect rights recognized by the prior sovereigns. … A relinquishment of title by the United States differs from the creation of a reservation for the Indians. In its relinquishment the United States reserved nothing and expressly provided that its action did not affect then existing adverse rights. (U.S. v Abousleman 1983, p. 23)

Yet this may be a distinction that fails to capture a meaningful difference between the types of Indian land. In both *Sandoval* and *Candelaria*, for example, the Supreme Court noted that the Pueblos' ownership of land in fee simple should not make a difference in the way the federal government treated Pueblos and their citizens as compared to other Indian communities and their members (Aamodt I 1976, p. 1111). In this respect, case law favours viewing the Pueblos as situated similarly to other tribes in the United States.

Indeed, the history of the Pueblos' interactions with Spain and Mexico roughly parallels the history of other Indian tribes' interactions with the United States. Spain's recognition, protection, and even limitation of Pueblo sovereignty compares well to the situation described in *Johnson v M'Intosh* (1823). While under Spanish authority, Pueblos were treated as 'domestic dependent nations', as *Cherokee Nation v Georgia* (1831) held that other tribes in the United States were. The Pueblos' situation changed under Mexican rule, when their lands were opened for sale. This action is similar to the US General Allotment Act, which divided reservations into individual

allotments assigned to tribal members and opened remaining lands for sale to non-Native settlers (General Allotment Act 1887). Although the Pueblo communities retained communal property, the effect of Mexican authority was the same: Pueblo land was diminished. In fact, Pueblo land diminishment continued into the American period and ultimately prompted the 1924 and 1933 Pueblo Lands Acts. Through these Acts, the federal government sought to ameliorate the effects of land loss on Pueblo communities. Conceptually, this reversal is similar to the repudiation of the General Allotment Act through the Indian Reorganization Act (IRA) of 1934. An explicit goal of the IRA was to end land loss through allotment and to shore up tribes' communal land bases. In sum, where other tribes in the United States experienced an array of policy shifts through time under one sovereign, the Pueblos experienced the same policies under several sovereigns.

Reason Two: Purpose of the Reservation

The second prong of the *Abousleman* analysis focused on the primary purpose of the reservation. In *Winters*, the Court stated that the purpose of the reservation was to help Fort Belknap's Indian residents make the forced transition from hunting and gathering to agricultural subsistence practices. The court in *Abousleman* interpreted this language to mean that the reservation in *Winters* was created for a fundamentally 'new' purpose (U.S. v Abousleman 1983, p. 23). Further, the court reasoned that this underlying new purpose was the operative element in deciding whether the *Winters* doctrine applied to the Pueblos. It found that because the Pueblos were already farmers, their land grants by definition were not created for a new purpose, and thus, the *Winters* doctrine could not be applied (U.S. v Abousleman 1983, p. 23).

However, the *Abousleman* court's focus on the creation of a reservation for a new purpose may be misplaced. In *Adair*, for example, the Ninth Circuit explored whether the primary purpose of the Klamath Reservation was for hunting, fishing, and gathering, and whether water rights for these activities were implied in the treaty creating the reservation (U.S. v Adair 1983). The defence argued that because several articles of the treaty creating the reservation pointed to an agricultural purpose, water rights for hunting, fishing, and gathering were not implied. The court rejected this argument and found that it did not need to decide between such purposes. Rather, citing *Colville Confederated Tribes v Walton* (1981), it noted that a reservation could be set aside for dual purposes and that the court need not prioritise one over the other when considering water rights (U.S. v Adair 1983).

Reason Three: Implied Rights

The third prong of the *Abousleman* court's analysis involved the Treaty of Guadaloupe Hidalgo. Here, the court noted that the Treaty did not create any new rights but rather confirmed existing rights. It also noted that later patents confirming land title were issued 'as in ordinary cases to private individuals' (U.S. v Abousleman 1983, p. 23). Focusing on the issuance of patents, the court refused to find an implied right to water when the confirmatory acts of Congress were final as to the validity of the Spanish land grants (U.S. v Abousleman 1983, p. 24). Furthermore, the court also rejected the United States' claim that the extension of the 1834 Indian Trade and Intercourse Act implied reserved water to the Pueblos. It found that the Act was not a source of implied water rights but rather a 'generic enactment by Congress to protect Indians, including Pueblos, and does not establish the purposes of any reservation' (U.S. v Abousleman 1983, p. 25). Rather, the court noted, it was only a treaty, act of Congress or an executive order that could impliedly reserve water rights for Indians (U.S. v Abousleman 1983, p. 25).

Overlooked Arguments

In focusing so intently and narrowly on *Winters*, two additional and significant arguments supporting Pueblo water rights were overlooked. The first is premised on the doctrine of acquired rights and the second is premised on the idea that Pueblos are federal enclaves for the purposes of establishing their water rights.

The Doctrine of Acquired Rights and Winans

If one worked from the premise that *Winters* does not apply to the Pueblos, a *Winans*-based water right may still be available. Drawing parallels to *Adair*, the *Abousleman* court noted that the application of *Winans* to the Pueblos depended on the US government's recognition of Pueblo water rights (U.S. v Abousleman 1983, p. 28). The court went on to state that because the Pueblos did not sign a treaty or treaties with the United States, as did the Klamath tribe in *Adair*, recognition of Pueblo water rights under *Winans* must be tied to the Treaty of Guadalupe Hidalgo. The court further stated that the Treaty of Guadalupe Hidalgo would be an adequate vehicle for protecting Pueblo water rights only if those rights had been recognised under a 'previous

sovereign'—and whether those rights had been recognised as an open question for the court (U.S. v Abousleman 1983, p. 28).

It should not have been. As noted earlier, Pueblo citizens' overarching political status changed—they were domestic dependent nations first under Spanish authority and then under Mexican authority—but their land rights did not. The change to Mexican rule opened the door to a new model of land acquisition, and one that precipitated a significant loss of land by the Pueblos; it did not change the underlying title to the lands retained by the Pueblos or Mexico's recognition of that title and accompanying water rights.

Significantly, because there was no change in underlying title to the land or to the recognition of water rights by Mexico, courts are free to apply the Doctrine of Acquired rights to find that a 'previous sovereign' recognised Pueblo water rights—and that *Winans* may be applied to the Pueblos. The Doctrine of Acquired Rights is a principle of international law that requires a succeeding sovereign to respect the vested rights of citizens of the prior sovereign (Gomez 1985, pp. 1068–1070; Ederington 1997, pp. 298–316; O'Connell 1967). Here, it is not foreign law but rather foreign rights that are being enforced and respected (Federal Trial Handbook Civil, §4:7). Importantly, the doctrine cannot be 'canceled without full satisfaction of the equities attaching to them' (Sornarajah 1986).

The doctrine's applicability in the United States was clearly articulated by Chief Justice John Marshall in *United States v Percheman* (1833). In this case, the Court considered the status of a land grant made by Spain to Juan Percheman, a Spanish citizen, for his military service to Spain prior to Spain's cession of Florida to the United States in 1819. While Percheman argued that he had good title to the land, a commission created to settle land claims in the territory refused to recognise it. The commission argued that Percheman had insufficient documentation to prove good title. The Chief Justice disagreed. He concluded:

> It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, *and their rights of property*, remain undisturbed. (U.S. v Percheman 1833, pp. 86–87)

While perhaps the most clear statement of the doctrine, it was not the Chief Justice's first. In *United States v Soulard* (1830), Justice Marshall considered the nature and extent of the rights of individuals living within the Louisiana Purchase. He intoned:

> In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. *The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.* (U.S. v Soulard 1830, p. 512 (emphasis added)).

The sanctity and scope of the property rights established by the prior sovereign and to be protected by a subsequent sovereign has been continually upheld by the Court (Ederington 1997, fn 159–160).

The language of the Treaty of Guadalupe Hidalgo is clear with regards to the continuing rights of Mexican citizens. Article VIII states in part, 'In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected.'[6] If the Pueblos were successful with an argument based on the Doctrine of Acquired Rights, they might establish the most telling and impactful priority date for water rights, time immemorial.

Federal Enclaves

If the Pueblos pressed to establish their water rights under *Winters*, they might be able to do so indirectly by arguing they are federal enclaves. Federal enclaves are lands or other real property given to the federal government by a state. Enclaves can include military bases, post offices, and federal courthouses to name a few. There are several ways for property to become an enclave. Importantly, land can become a federal enclave if, at the time of admission to the Union, the state relinquishes jurisdiction to the federal government over that land (Collins v Yosemite Park Co. 1938).

In *Sandoval*, the Court considered whether or not the lands of the Pueblos were Indian Country and thus allowed Congress retained the right to prohibit the sale of liquor on those lands. The Court noted that the Pueblo lands were Indian Country and that the Pueblos were indeed Indians (U.S. v Sandoval 1913). The Court also found that its application of federal law in this case did not undermine the equal footing doctrine because the New Mexico Enabling Act stated, as a condition of entrance into the Union, that 'all the laws of the

United States prohibiting the introduction of liquor into and "Indian country" shall include the Pueblo and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them' (Enabling Act of New Mexico (1910)). It would seem clear from the court's decision in *Sandoval* that the state of New Mexico relinquished jurisdiction to the federal government over Pueblo lands and thus the Pueblos may be considered federal enclaves.

The court in *Arizona v California* not only upheld the *Winters* doctrine but extended it to other federal reservations including national forests, parks, and military bases (Arizona v California 1963). Importantly, in *United States v District Court for Eagle County*, the Supreme Court stated, 'As we said in Arizona v California, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands. The federally reserved lands include any federal enclave"' (U.S. v District Court for Eagle Count 1971, pp. 522–3).

Based on this reasoning and for the purposes of water rights only, it may be useful to consider the Pueblos federal enclaves as a way to attach *Winters*-based federally reserved water rights.

Conclusion

This chapter has attempted to briefly summarise the relevant history and a small portion of the case law associated with adjudicating the water rights of the Pueblos. It has also attempted to present several of the key issues and demonstrate that the unique social and legal history of the Pueblos challenge the assumptions of federal Indian law. In a system of prior appropriation it should be simple to adjudge Pueblo water rights. They lived in the southwest first, they should have priority to water. However, as this chapter shows, that is not the case. And furthermore, even after the Pueblos were considered Indians within the meaning of federal Indian law, they have, and continue to be, subjected to Gordian-Knot-like reasoning wherein the sovereign, whether Spain, Mexico, or the United States, continually defines new exceptions (Schmitt 2005; Williams 2012). This binary approach of attempting to fit the Pueblos into either dominate western legal theories, or Indian-law specific theories, does not work. In highlighting these inconsistencies, this chapter helps to set the stage for a central project of this volume: pathways to reconceptualising the fundamental principles guiding the federal Indian relationship—one that respects the assertions and commitments of the United States.

Notes

1. Ohkay Owingeh is the original name for the Pueblo formerly known as San Juan. A discussion of the treatment of Pueblo people by the Catholic Church and Spanish settlers is beyond the scope of this chapter. For an excellent study of the Pueblo Revolt, see Wilcox (2009).
2. Simply put, the Doctrine of Discovery is grounded in the idea that a European king or queen could give permission to an explorer to possess and conquer the lands of 'savages' (Williams 2012).
3. An additional wrinkle to Pueblo water rights was that the patents did not address land titles within the Pueblos held by non-Indians. For example, by 1913, 80 to 90 per cent of Pueblo lands close to urban centres had passed to non-Indians (DuMars et al. 1984, p. 56).
4. See also, *United States v Canderlaria* (1926) 271 U.S. 432 (holding with specific reference to the 1851 application of the 1834 Indian Trade and Intercourse Act, that the Pueblos were indeed 'Indians' and that they were subject to exercise of Congressional guardianship).
5. Unfortunately, there is insufficient space in this volume to fully describe the court's reasoning in this case. For an excellent summary of *U.S. v Abousleman* and the other cases in the Pueblo water law litigation see, Hughes (2017) pp. 236–40.
6. Treaty of Guadalupe Hidalgo (1848). It is important to note that, 'Mexican' in this context is a term inclusive of citizens of the Pueblos.

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5

Human Rights and Neoliberal Wrongs in the Indigenous Child Welfare Space

Teresa Libesman

May 2017 marked the 20th anniversary of *Bringing Them Home*, the Australian Human Rights Commission report into the forced and unjustified removals of Indigenous children from their families (NISATSIC 1997). The report concluded that these actions were part of a sustained campaign by the Australian government to eradicate Aboriginal and Torres Strait Islander families, communities, and culture. Nearly a third of the report examined and made recommendations with respect to contemporary removals under child welfare, juvenile justice, and family law. These recommendations were part of the reparations and were aimed at creating laws and policies designed to ensure the discriminatory practices would cease and would not be repeated.[1] Twenty years post-*Bringing Them Home*, however, Indigenous children are being removed from their families in unprecedented numbers (Libesman 2016, pp. 46–7).

Indigenous children continue to be grossly over-represented in all Australian jurisdictions in child protection systems, despite reforms which have transferred considerable delegated authority to Indigenous organisations and communities. Across 2015 and 2016, Indigenous children were seven times as likely as non-Indigenous children to have received child protection services—46,632 Indigenous children in total—and were on average younger than those non-Indigenous children in contact with child protection services (AIHW 2016, pp. 15–6). Further, many families continue to experience

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_5

discriminatory, arbitrary, and unfair conduct. Many more families experience the structural drivers of neglect and, in some instances, abuse, including poverty and cultural displacement (Department of Prime Minister and Cabinet 2017; Australian Productivity Commission 2016). Indigenous children are removed for emotional abuse and neglect (at 39 per cent and 36 per cent of child protection substantiations respectively) more than for any other abuses. Neglect is closely associated with poverty, and the comparative proportion of child protection substantiations regarding neglect of non-Indigenous children is 20 per cent (AIHW 2016, p. 29).

This chapter examines why the human rights response of *Bringing Them Home* has been unsuccessful and how the common thread of colonial practice in contemporary neoliberal child welfare laws and policies perform a modern iteration of past assimilation law and policies. It argues that two core human rights recommended by *Bringing Them Home* (and advocated for by Indigenous children's organisations), equality and self-determination, have been transformed from claims to distribution of material and political goods to a commitment to conformity to a neoliberal value set which privatises responsibility for the welfare of vulnerable children. The chapter concludes that to attain the spaces of Indigenous justice—which *Bringing Them Home* found necessary to address Indigenous children's welfare and wellbeing—significant change is needed to enable recognition of, support for, and engagement with Indigenous law and authority within Indigenous communities and between Indigenous and non-Indigenous communities.

Human Rights and Child Welfare

Campaigns to recognise community capacity and control of children by Indigenous peoples have taken place continuously from colonisation, and human rights advocacy is a particular manifestation of this advocacy (Briskman 2003). Human rights have been adopted as a paradigm for claiming equality by Indigenous communities—in Australia and globally—since the 1970s (Anaya 2001, pp. 109–17). Human rights are conceptualised in a number of different ways. The framing of rights, including the influence of this framing on justice advocacy, is the subject of much contestation. Human rights are most commonly conceptualised as universal moral rights which attach to each human being by virtue of them being human. While this conception of universal rights has considerable political and ethical leverage, it is one which more than alternate conceptions preferences dominant western values. An alternate conceptualisation of human rights is the space of contestation

between universal human rights ideals and their particular political manifestation. Within this conception, human rights are not static standards but rather a political space within which the meaning of rights and distribution of political power (i.e. aspects of self-determination) are contested and created.

These competing conceptualisations of human rights (universal and standard-setting versus pluralised and inclusive) have translated into different understandings of social and political relationships with respect to Indigenous children and young peoples' welfare and wellbeing in Australia (Libesman 2014, pp. 27–53 and pp. 144–71). While both conceptions are and have been enlisted by Indigenous children's advocates in Australia, there has been a preference for the latter (pluralised and inclusive). This is seen in the framing of Indigenous children's rights with respect to the right to self-determination and then advocating for the translation of this right into domestic legislation, which recognises cultural safety, community identity, and incrementally the transfer of jurisdiction, albeit in the form of delegated authority, to Indigenous children's organisations (Libesman 2014, pp. 144–71).

The conceptualisation of shared jurisdiction within *Bringing Them Home* took place within a framework of pluralised human rights. It was premised on the understanding that responsibility for child welfare, and associated decision-making, requires an exercise of public power and authority. It further relied on a related commitment to resources which enabled effective service provision to support vulnerable communities and families. This included services for early intervention and support for families and legal aid where child protection services did intervene. It was, however, more broadly underpinned by a commitment to community development and a holistic response to the inequality and disadvantage which had been concomitant to colonisation.

Bringing Them Home recommended that a negotiated transfer of responsibility for child welfare from government agencies to Aboriginal and Torres Strait Islander organisations takes place in accordance with their capacity and desire to assume this responsibility (Libesman 2014, pp. 27–53 and pp. 144–71). As a result of this recommendation, claims to the right to self-determination play a central role in the sphere of child welfare reform. Indigenous organisations across Australia differ in the scope of both the power, usually delegated, and the reach of responsibility they exercise with respect to child welfare. Advocacy around cultural care and the right to self-determination, however, created a space for claims with respect to Aboriginal participation in all spheres of decision-making from early intervention, to participation in child welfare processes from the point of notifications, to children's court decision-making (Libesman 2014; Libesman and Cripps 2017). For example, in all Australian states and territories, the legislation requires that Indigenous

organisations, and in some jurisdictions also family, must participate in all significant decisions which involve Aboriginal children and, in some jurisdictions, must be consulted about all other decisions (Libesman 2014, pp. 144–72). There is, however, little structural support or guidance across the legislation for implementation of these rights.

Despite different arrangements for recognition of Indigenous peoples' decision-making, what is common across the jurisdictions post-*Bringing Them Home* are levels of *legal* recognition of Indigenous peoples' responsibility for and authority with respect to aspects of their children's wellbeing and the simultaneous retreat from this recognition with the influence of neoliberal reform agendas and related populist rhetoric (Libesman 2016; Libesman and Cripps 2017). In the two decades since *Bringing Them Home*, the ascent of neoliberal values has corroded the public paradigm of child welfare decision-making and muddied the distinction between public responsibility for and authority with respect to child welfare decision-making and privatisation of the child welfare sector.[2]

The Rise of Neoliberalism and Its Impact on the Child Welfare System

There is an extensive literature on neoliberalism (Jones 2012; Soss et al. 2001; Wacquant 2009). For the purpose of this chapter, neoliberalism is defined as a political rationality which extends liberal market economic values, as opposed to liberal political values, into the centre of politics. Within a neoliberal polity, the political and social spheres are dominated by a commitment to developing market-ready individuals and policies which facilitate 'free' market success, with other spheres of value largely relegated to lifestyle choices. The moral engine of neoliberalism is a belief in 'personal responsibility' which in this context means individuals looking after their own needs and ambitions.

Neoliberalism is distinct from classic economic liberalism in that the state plays a role in creating 'free market' economic conditions, and it is distinct from liberal political values as the core political commitment is to the market rather than classic liberal democratic values such as equality and the rule of law. These distinct neoliberal values are seen in the child welfare sphere in the high level of government intervention and expenditure directed at Indigenous communities. Both aim to modify Indigenous peoples' values and behaviour while at the same time reducing funding and transferring responsibility for services to the nongovernment sector (Libesman 2016, pp. 46–7).

While rights and free markets are not inherently connected, with the rise of neoliberalism their nexus has gained momentum. This is evident with the assent of capitalist development as a neutral 'good' above the fray of contested values. Within this market model, individual moral failing, rather than systemic inequality, is the cause of poverty, and public resources are dedicated to changing individual behaviour rather than provision of social services and support (which within the rhetoric of neoliberal values promotes passive welfare, which in turn is blamed for child welfare and other problems) (Cape York Institute 2007).

Within this framework, the over-representation of Indigenous children in Australian child welfare systems is framed as largely a result of personal moral failings rather than systemic inequality founded in historic experiences. A prevalent discourse within government debates and popular media frames Indigenous families and communities as 'dysfunctional', 'pathological', and in need of intervention to 'normalise' their lives.[3] The response has been policies which encourage 'personal responsibility' and punish welfare dependence.

Two aspects of this artificial association between 'free markets' and child welfare are evident in contemporary child welfare law and policy. The first is the reduction in social services and social support. With a growth in inequality, and reduction in tax base, support and services to sustain the growing population of vulnerable children are considered 'unsustainable'.[4] Privatising child welfare is evidenced by legislative and policy reform which prioritises early permanent exit of children from the public child welfare system to private homes who then bear the cost of vulnerability. It is also evident through the legislative and policy framework of the Northern Territory Intervention and by the Cape York Families Responsibility Commission.

The Northern Territory Intervention and Cape York Families Responsibility Commission are both major legislative and policy programmes in Australia which expressly claim to address Indigenous children's safety but are separate from child welfare systems.[5] These programmes aim to transform and 'save' communities rather than exclusively targeting particular families who have had contact with a child welfare system. They overtly embody neoliberal values with their aim to punish and discipline Indigenous peoples into the moral ethos of individualism, efficiency, personal responsibility, and market readiness. The Cape York Welfare Reform, which is closely associated with Noel Pearson's publication '*From Hand out to Hand up*', aims to transform four Cape York communities by engineering changes in attitudes to social welfare and transitioning people into the 'real economy' (Cape York Institute 2007). The programme ties social security to behavioural expectations in the areas of child welfare, education, housing, and employment with the central

mechanism for implementing this change being a Tribunal of the Family Responsibilities Commission. The premise of this programme is that there is a nexus between 'passive welfare' and 'dysfunction' in communities and this can be addressed through transitioning people into the market economy. The Northern Territory Intervention, which subsequently changed names to Stronger Futures, was implemented ostensibly in response to crises in child sexual abuse in Aboriginal communities in the Northern Territory in 2007. The Northern Territory Intervention, like the Cape York experiment which preceded it, but on a much larger scale, aims to transform and save Northern Territory Indigenous peoples through conditional welfare. In both these programmes, the suffering of Indigenous peoples is framed as a product of their own moral failings rather than structural inequalities or the legacy of colonial experiences. Despite huge investment, both these programmes have failed on the most reliable nonpartisan evaluations available (Gray 2015; Katz and Raven 2013).

These policies which individualise and privatise responsibility for systemic problems, with a failure to politically or historically contextualise Indigenous children's experiences of marginality and vulnerability, risk reiterating discrimination and assimilation along what have become 'neutral', that is unstated, racial lines. The racial hierarchy of saved and saviours is evident in both the Northern Territory Intervention and the Cape York Family Responsibility Commission, as well as more broadly in human rights interventions where conflict or poverty present violations of human rights (Orford 2011). Prior to the Northern Territory Intervention, considerable publicity presented Aboriginal communities as dysfunctional, failed, and sites for predatory sexual abuse of Aboriginal children who need to be saved by white humanitarian intervention (Lovell 2014).

Inequality in the space and form that Indigenous peoples participate in human rights forums is evident in child welfare law and practice in a stratified way at all levels. What binds this inequality is the requirement that Indigenous participation takes place within and subject to legal and policy frameworks which reiterate contemporary colonial aims and values. For example, peak Indigenous children's agencies work within mainstream legislative and policy frameworks with much of their time spent managing out-of-home care placements, which is the most severe and final point of child welfare intervention. The ambiguity between Indigenous agency objectives and claims to self-determination, and government policy of privatisation and cost-cutting, most acutely demonstrates the inequality in the spaces and forms which Indigenous agencies and community groups participate in child welfare forums.

This is practically evident with the transfer of casework and out-of-home care responsibility for vulnerable children, who are removed from their families, to private homes and residential facilities by nongovernment for profit and not-for-profit agencies which are frequently driven by profit, growth, and/or cost-saving imperatives (Haly Knox 2010). This transfer is being accelerated by legislative and policy reforms which mandate early permanent placement of children and incentivise this with contractual obligations and performance measures based on achieving early permanent placements. These policies are part of a larger reframing of responsibility for vulnerability to parents' individual moral choice and 'deficits', rather than understanding vulnerability as founded in personal as well as historical and systemic factors. Within this framework abused children, in particular Indigenous children, are objectified and treated as expensive residue. The scandals around abuse of children in care, particularly residential care, are cyclical, and the poor outcomes for children and young people in care, including the drift to juvenile justice where they often face further abuse and disadvantage, are also well documented (Royal Commission 2017). The contemporary response to long-term government neglect, and intergenerational trauma experienced by Indigenous families, is the attainment of 'equality' through transfer of Indigenous children from their family to placements where material and value systems circumvent historically founded inequality and cultural difference.[6] Related to the failure to substantively implement a pluralised and inclusive form of sharing of public responsibility is the failure to acknowledge the legitimacy and in some instances the existence of Indigenous laws and culture. There is therefore a non-Indigenous desire for legitimacy through inclusion, but this is stymied by the ongoing requirement that recognition only takes place on terms which present a mirror image of the colonial self.

Not only is there the transfer of responsibility for vulnerable children from government to private for profit and not-for-profit out-of-home care agencies, the neoliberal reform agenda is seen most clearly with the incentivisation of business model objectives, including reduction of costs and increases in 'profits' per 'unit', that is, child or young person in care. Further, successful tendering for contracts to provide these services is tied to objectives which are about paper rather than material outcomes and compliance with objectives that are often external to the experience of the clients of services. For example, the NSW government in March 2017 announced a major new approach to building a better child protection system (Department of Family and Community Services 2017). A curious announcement as there is nothing new about the twin objective of transferring welfare services for vulnerable children to the private sector and

cutting costs (Haly Knox 2010). For Aboriginal families and communities, the mixed messages of cultural recognition and privatisation and cost-cutting, and the mixed intentions of those participating in this process, create an ambiguity around the relationships between human rights and neoliberal agendas and differences between the recommendations made by *Bringing Them Home* and contemporary reforms.

While the legislative achievements within a relatively short period of time have been significant, the complex of social and economic power and legacy of marginalisation and loss to be addressed are enormous (Libesman 2014; Department of Prime Minister and Cabinet 2017). This has meant that a limited proportion of Indigenous children have benefited from the reforms and Indigenous organisations have not had the resources or the breadth of mandate to address the many underlying historical and colonial causes of the prevalence of neglect and abuse (Blackstock 2016, pp. 40–1). These failings are evident in the advocacy of groups such as Grandmothers Against Removals and Family Matters, which point to the unprecedented increase in removal of Aboriginal children from their families, the failure to hear Aboriginal voices in child protection disputes, and the loss of services and support for families and communities (Grandmothers Against Removals 2017; Family Matters 2017).

Exacerbating the project of privatising responsibility for child welfare through neoliberal reforms, three interrelated factors have undermined the effective implementation of participatory rights with respect to Indigenous child welfare. These are the internal norms and resistance of child welfare bureaucracies (Libesman 2014, pp. 78–105), the lack of resources to address poverty and more immediately culturally based child welfare and wellbeing programmes (Australian Productivity Commission 2016), and the depth of impact which layers of compounded intergenerational trauma have had on many families and communities (NISATSIC 1997; Atkinson 2002). In the context of poverty and trauma, Indigenous communities have had limited ways of dealing with introduced toxicity such as alcohol, ice and other drugs, and gambling. For some communities, the mix of poverty, lack of opportunity, a breakdown of internal (Indigenous law/norms) or external (Australian laws/ norms) creates an environment which does not provide the protection from violence and abuse, in particular for women and children, which most non-Indigenous Australians take for granted. The exceptionalisation of Indigenous peoples through a simultaneous excessive use of child protection law and a failure to protect Aboriginal children is evident in contemporary

Australian legal responses to child victimisation and abuse and neglect. Delegation of powers under child protection legislation fails to Indigenise laws, and within a neoliberal political and policy context risks creating further marginalisation by both subjecting Indigenous children to a non-Indigenous regime and failing to provide them with the capacity to benefit from this regime.

This is not however a linear trend. As a result of Indigenous advocacy and law reform, Indigenous children's organisations have grown and have attained greater influence.[7] They have attempted to use privatisation and their role within service provision to further principles of equality and cultural care (VACCA, undated current website; Howard-Wagner 2016). However, their assumption of greater responsibility within an environment of privatisation and contractual metrics can provide ambivalent benefits. For example, the NSW government is in the process of transferring the responsibility for all Indigenous children in out-of-home care to Indigenous organisations. This is being pursued through legislation and policy framed around early permanent placement and adoption. The transfer is also part of a broader privatisation and cost-cutting in out-of-home care programmes discussed above.

The Indigenous child welfare sector has, in contrast to the Northern Territory and Cape York programmes, been for more than two decades infused with human rights understanding, and these have created a counterdiscourse to the moral, rather than economic, hegemony of contemporary Australian neoliberalism. This however has been, and is currently being, more extensively challenged through neoliberal child welfare regulation and practice discussed above. Child welfare law reform around Indigenous participation and the Indigenous child placement principle has, despite the failure to make inroads into the over-representation of Indigenous children in child welfare systems, and the ongoing unfair treatment of many Indigenous children, improved the experience of child welfare for many other Indigenous children and the capacity of peak and local Indigenous children's organisations. These improvements have been geographically uneven and have reformed child welfare from within rather than Indigenised child welfare. Moreover, much of the opportunity and hope which human rights inspired reforms, in particular delegated jurisdiction sparked, is being diluted by over-riding impacts of neoliberal regulation of child welfare, related punitive social welfare reforms, and material inequality.

Freeing Human Rights in the Child Welfare Context From Neoliberalism

Neoliberal values dominate Australian politics, and with this there is a dominance of monetary market values and policies to discipline and transform welfare clients into responsible, market-ready individuals over other traditional political values (Carney 2006). Human rights are underpinned by a particular social and political responsibility to the individual and collective. Whether framed as universal or particular, the moral force of rights is found in the inherent value that they accord each person, and the political responsibility that they confer for ensuring these rights are accorded in particular to those who are vulnerable. Within a human rights framework that recognises collective rights, equality with respect to the distribution of political power is a prequel to determining the particular meaning and form for according rights (Libesman 2014, pp. 27–54). In contrast neoliberal values are premised on the individualisation and privatisation of social values with morality attached to the individual's capacity to fend for themselves. Vulnerability and suffering, and in the alternate power and strength, are attributed to personal moral weakness or strength rather than historical experience and identity at an individual and collective level (Jones 2012; Soss et al. 2001; Wacquant 2009).

While the redemptive aspects of a rights framework have been mobilised by Indigenous children's organisations, the genealogical critiques of human rights niggle below the surface. Some critiques are more powerful and probing with respect to the more dominant conception of human rights as individual and universal. These are less emphasised in the context of Indigenous children's rights advocacy because of the pluralised and historicised approach which has been taken. However, there remain unsettling questions about how effectively the politics of human rights has or can respond to the juggernaut of neoliberalism (Brown 2000, pp. 230–41; Moyn 2012). Some of these critiques include the colonial and Eurocentric origins of international law (Matua 2002; Anghie 2005), the individual focus of human rights (Golder 2011, pp. 283–312), the paradoxical nexus between human rights and 'free markets' and the way human rights often reiterate ongoing poverty through the apparently neutral frame of economic development (Pahuja 2011; Kennedy 2004), the reiteration of hierarchical and racially charged dichotomies around the saved and saviours (Matua 2001; Orford 2011), inequality in the space and form that Indigenous peoples participate in human rights forums (Libesman 2014, pp. 27–53 and pp. 144–71), the lack of effective implementation and enforce-

ment of rights (Douzinas 2000; Moyn 2012), and the ubiquitous contingency of rights language (Kennedy 2004).

The issues which these critiques raise are evident with respect to Indigenous child welfare in Australia. For example, international law was used to justify a hierarchy of races. Its own concepts of *terra nullius* and the doctrine of discovery underpinned the idea that Indigenous peoples were politically, legally and culturally void (i.e. their presence did not amount to occupation of the land) (Behrendt et al. 2009, pp. 3–17 and pp.188–203). This nonhuman status is evident in protectionist and assimilationist law and policy which facilitated the forced and unjustified removal of Aboriginal and Torres Strait Islander children from their families on the basis of their Indigeneity (NISATSIC 1997). Removal of children from their families was part of a broader programme of dispossession from land and culture (Goodall 1996).

The colonial racial hierarchy persists in contemporary child welfare in two ways. One is through an assimilationist ideal that influences the framing of suitability of parents and families to look after their children. For example, neglect (typically the most common reason for removal of Indigenous children) is related to poverty. This is framed as a failure to take personal responsibility, and an individual failing, when systemic and historic factors are drivers of poverty which individual families have limited capacity to address. Racist colonial ideas about a hierarchy of civilisation, which were framed in terms of a lack of culture or advancement (which within the neoliberal paradigm is a question of private lifestyle choice), are replaced by a hierarchy of economic organisation and associated social values. Western-style development is presumed to be at the top of the hierarchy and Indigenous culture and values are reduced to private choice. Indigenous culture within this value hierarchy vacillates between being a romantic curiosity with potential consumption value to being an inhibitor to success. This reiteration of hierarchy is seen in the Cape York Families Responsibility Commission and NT Intervention discussed above.

The dominant human rights focus on individual rather than collective rights, within child welfare also contributes, albeit often unintentionally, to reiteration of individual rather than systemic and historical factors as bearing relatively greater responsibility for neglect and abuse. A focus on individual children and families frames neglect and abuse primarily in terms of deficits in parenting, in this way minimising historical and systemic factors.

Human rights reforms have not addressed the material inequality which is faced by Indigenous children compared with other children or the broader material inequality within society more generally. Poverty is exacerbated by neoliberal reforms which reduce support for and expenditure on social welfare

and service delivery to the poor (Fernbach 2017). With the cause of poverty no longer understood systemically, but rather as a product of personal moral failing, public responsibility to provide services and support for those who are disadvantaged loses its persuasive force. Poverty is a large driver of neglect and neglect is the most significant reasons for removal of Indigenous children in Australia (AIHW 2016).

The dominance of neoliberal values reduces the significance of other exercises of legal rights and political power. This is seen in the dominance of child welfare regulation, punitive behavioural management, and budgetary constraints undermining the impact of delegated Indigenous jurisdiction with respect to Indigenous child welfare. Much of the energy and expertise of Indigenous children's advocacy groups and agencies is spent negotiating the mainstream child protection agenda of retaining funding and developing child protection practice within the bounds of imposed legislation, largely at the most severe end of the spectrum out-of-home care. Contemporary child welfare law and practice fails to address differences in power or meaning at the meeting points between Indigenous families, service delivery agencies, and departmental and children's court decision makers—that is, the space, or jurisdiction for meeting and conduct within this space, enhances western rather than Indigenous authority. The institutions and forums of child welfare, as outlined above, often ignore Indigenous rights to participate, but even when they are given effect the forums of investigation and dispute resolution around contemporary child protection largely reproduce colonial institutions rather than build Indigenous ones. Within this framework of participation, Indigeneity is framed as a deficit, and the language, process, values, and relationships largely presume and reproduce colonial spaces, actions, and institutions. Shared jurisdiction is about building Indigenous child welfare institutions. This is what *Bringing Them Home* anticipated. However, *Bringing Them Home* did not adequately address the depth of colonial resistance to power-sharing or the impacts of the change from liberal to neoliberal colonial values.

Neoliberal values have somewhat flattened the power of human rights to speak back effectively against injustice. This is part of a broader dominance which economics and the markets have subsumed over law and juridical framing of normative values. While human rights may have attained with all its paradoxes, or perhaps because of its paradoxes, dominance in the sphere of claims to justice for children, the market has claimed dominance with respect to how child welfare policy in fact operates. This is a central reason why juridical success has not translated more fully into effective practical change. The question of the capacity and future opportunity of human rights as a space for

justice with respect to Indigenous child welfare is therefore bound to the larger question of the political space for material justice, in a market dominated society with its associated value of individual responsibility, valorisation of autonomy, and the framing of opportunity and circumstances as a matter of free and individual choice. Structural inequalities caused by colonialism, poverty, and historical disadvantage are within this paradigm codified as personal deficits making the temporal individual rather than historical and systemic factors responsible for contemporary child welfare experiences. In this way, community and collective rights are made less relevant and the colonial underpinnings of contemporary Indigenous child welfare are minimised. A pluralised conception of human rights relies on collective rights and community. The political and pluralised conception of human rights which has driven child welfare reform is incompatible with the neoliberal imaginary which erases concepts of community and relocates identity politics in the private space of lifestyle choices. With the contemporary heightened influence of neoliberal politics in Indigenous affairs in Australia, it is timely to question whether we can mobilise the political currency of human rights more effectively to respond to neoliberal erosion of Indigenous children's interests or whether we need to think about supplementary or alternative strategies and responses.

Notes

1. See, for example, Recommendation 3 stating that, for the purposes of responding to the effects of forcible removals, 'compensation' be widely defined to mean 'reparation'; that reparation be made in recognition of the history of gross violations of human rights; and that reparation consists of acknowledgment and apology, guarantees against repetition, measures of restitution, measures of rehabilitation, and monetary compensation (NISATSIC 1997).
2. In a presentation to the NSW Legal Aid Care and Protection Conference, 7 August 2015, Judge Peter Johnstone, President of the Children's Court of NSW, noted, 'I am informed nearly 50% of casework for children in the care of the Minister has been transferred to NGO's.'
3. This language is pervasive in popular media. For an analysis of political rhetoric which frames Indigenous peoples as deficient, see, M. Lovell (2014) 'Languages of neoliberal critique: The production of coercive government in the Northern Territory intervention', in J. Uhr and R. Walter (eds), *Studies in Australian Political Rhetoric*, (Canberra: ANU ePress), 221–240.
4. For reduction in company tax, see, for example, S. Mann (2001) 'The social cost of corporate welfare', *Australian Journal of Law and Society,* 15, 209–222;

for claims with respect to the cost of child welfare being unsustainable, see, for example, NSW government (2017) 'Their Futures Matter: A New Approach to Reform Directions from the Independent Review of Out of Home Care in NSW' https://www.facs.nsw.gov.au/__data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf, date accessed 10 April 2017. For a discussion of current (April 2017) debates to cut Australian company tax, see, for example, B. Oquest (2017) 'The economic case for a company tax is collapsing', https://www.crikey.com.au/2016/03/29/the-economic-case-for-a-company-tax-cut-is-collapsing, date accessed 10 April 2017.

5. For critical consideration of these programmes, see, for example, R. Scott and A. Heiss (eds) (2015) *The Intervention: An Anthology,* (Australia: Concerned Australians); N. Watson (2014) 'From the Northern Territory Emergency Response to Stronger Futures–Where is the Evidence that Australian Aboriginal Women are Leading Self-Determining Lives?' in S. Perera and S. H. Razack (eds), *At the Limits of Justice: Women of Colour on Terror*, (Toronto: University of Toronto Press) 335–355; S. Bielefeld (2016) 'Income management and Indigenous women: A new chapter of patriarchal colonial governance?' *UNSW Law Journal*, 39(2), 843–878; I. Katz and M. Raven (2013) 'Evaluation of the Cape York Welfare Reform Trial', *Indigenous Law Bulletin*, 8(7), 19–23.
6. This is in practice taking place through permanency planning. Advocacy for this approach is seen in J. Sammut (2014) *The Kinship Conundrum: The Impact of Self-Determination on Indigenous Child Protection*, (Sydney: Centre for Independent Studies).
7. See, for example, the Victorian Aboriginal Child Care Agency (https://www.vacca.org/), and for a discussion of the achievement of VACCA, see Libesman, above n.5, pp.160–4.

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Part II

Incorporating Indigenous Laws, Methods, and Practices

6

Tsilhqot'in Nation: Aboriginal Title in the Modern Era

Renee Racette

Aboriginal title ceased to be an academic legal exercise in Canada on 26 June 2014 when the Supreme Court of Canada, by unanimous decision, granted a declaration of Aboriginal title to the Tsilhqot'in Nation (Tsilhqot'in Nation v. British Columbia 2014). A legal declaration of Aboriginal title provides constitutional protection for a unique tenure of land that has its existence in the Tsilhqot'in Nation's prior occupation and continued use of lands. The Tsilhqot'in Nation successfully established Aboriginal title to approximately 1700 square kilometres of land southwest of Williams Lake, British Columbia, by proving to the Court's satisfaction that the Nation has a continued deep connection to the lands in question.

The *Tsilhqot'in Nation* decision was the culmination of a century-long debate in the common law regarding Indigenous land tenure. Through a series of cases beginning in 1887 with *St. Catharines Milling,* the Supreme Court of Canada recognised and defined the basic contours of the concept of Aboriginal title (St. Catharines Milling v. The Queen 1888). The Court also declared that in assessing a claim of Aboriginal title, courts must consider the customs and traditional practices of the group in question. Although numerous cases have sought to establish the existence of Aboriginal title, until *Tsilhqot'in Nation,* the courts always found some aspect of the proof lacking. This chapter examines the contours of Aboriginal title, how the Tsilhqot'in Nation succeeded in meeting the required threshold of proof, and what questions are left unanswered by the Supreme Court's decision.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_6

The Scope and Nature of Aboriginal Title

From its earliest decisions on the topic, the Supreme Court of Canada declared that Aboriginal title is *sui generis* and cannot be characterised under classic common law rules of property or under Aboriginal laws of property (Chippewas of Sarnia Band v. Canada (AG) 2000). Several factors contribute to the *sui generis* nature of Aboriginal title. One of those is the communal nature of such title. Aboriginal title is a collective right to land held by the members of an Aboriginal nation, not by individuals (Delgamuukw v. British Columbia 1997). Aboriginal title is also an exclusive right (Delgamuukw v. British Columbia 1997). Communities who have Aboriginal title have a right to hold the land to the exclusion of others. It is not a title that mirrors Crown land where members of the public have rights of access and recreational use. Another feature of Aboriginal title that makes it *sui generis* is its inalienability; lands held under 'Aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown' (Delgamuukw v. British Columbia 1997, para. 113). Aboriginal title is not, however, an absolute right. The government can infringe upon Aboriginal rights so long as it has a compelling and substantial objective that satisfies the constitutional requirements of section 35(1), and implementing the objective fulfils the requirements imposed by the special fiduciary relationship between the Crown and Aboriginal peoples. If the government does infringe upon Aboriginal title, it must pay fair compensation (R. v. Sparrow 1990).

Aboriginal title encompasses a use and occupation that allows for a variety of purposes that do not have to be aspects of the Aboriginal practices, customs, and traditions integral to the distinctive culture (Delgamuukw v. British Columbia 1997, para. 111). The Court has held that Aboriginal title permits Indigenous people to have broader uses for their lands than those classically argued in front of the courts or those stereotypically applied to Aboriginal communities. The Court noted, however, that there are limits to the uses which are permitted. The protected uses must not be irreconcilable with the nature of the group's attachment to that land (Delgamuukw v. British Columbia 1997, paras. 126–28).

Proving Aboriginal Title

Because 'Aboriginal rights arise from the prior occupation of land, [and] …. from the prior social organization and distinctive cultures of Aboriginal peoples on that land', the Supreme Court of Canada requires that:

> In considering whether a claim to an Aboriginal right has been made out, courts must look at both the relationship of an Aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of Aboriginal rights. (R. v. Van der Peet 1996, para. 74)

The Aboriginal perspective on land and the common law must be taken into account in the proof of occupancy and for proving Aboriginal title generally. Aboriginal society would have had conventions or rules about land at the time of the assertion of sovereignty and those rules or conventions or laws equivalents, about, for instance, land use, would be relevant to proving occupation of the lands in a claim for Aboriginal title (Delgamuukw v. British Columbia 1997, para. 148). An Aboriginal society's physical occupation is proof at law for a title claim to land (Delgamuukw v. British Columbia 1997, paras. 147–48).

A claim for title is made out when a group can demonstrate 'that their connection with the piece of land . . . was of a central significance to their distinctive culture' (Delgamuukw v. British Columbia 1997, para. 149). This may be established in a variety of ways such as construction of dwellings through cultivation, enclosures of fields, to regular use of definite tracts of land for hunting, fishing, gathering, or otherwise exploiting resources (Delgamuukw v. British Columbia 1997, para. 149). In 2005, in the *R v. Marshall, R. v. Bernard* decision the court found that occasional forays for hunting and fishing, and perhaps seasonal use, were not sufficiently regular to support a claim of title (R. v. Marshall; R. v. Bernard 2005, paras. 79–82).

In the facts of that case, there was not proof of sufficient use of the lands claimed. The group's size, manner of life, material resources and technological abilities, and the character of the lands claimed must be taken into account in considering sufficiency of occupation to prove title. These principles apply to nomadic and semi-nomadic Aboriginal groups; the right in each case depends on what the evidence, including expert opinion, establishes (Delgamuukw v. British Columbia 1997, para. 139).

If present occupation is relied on as proof of pre-sovereignty occupation, the claimants must establish continuity between present and pre-sovereignty occupation. It is difficult to prove conclusive evidence of pre-sovereignty occupation, so a claimant community may provide evidence of present occupation to evidence pre-sovereignty occupation in support of a claim of title. 'Continuity is required, in the sense of showing the group's descent from the

pre-sovereignty group whose practices are relied on for the right' (Delgamuukw v. British Columbia 1997, para. 70). The Aboriginal society does not have to establish an unbroken chain of continuity between present and prior occupation. The nature of the claimant's occupation may change as long as the substantial connection between them and the land is maintained and provided the lands are used in ways that are consistent with the continued use by future generations (Delgamuukw v. British Columbia 1997, para. 154).

At the time of the assertion of sovereignty, the occupation must have been exclusive. Proof of exclusivity requires that the court must rely on both the perspective of the common law and the Aboriginal perspective equally (Delgamuukw v. British Columbia 1997, para. 156). Other Aboriginal groups may be present or frequent the claimed lands as long as the claimant group demonstrates 'the intention and capacity to retain exclusive control' (Delgamuukw v. British Columbia 1997, paras. 156–57). Exclusivity is the right to exclude others. For example, an Aboriginal society may have had rules of access that they enforced; this would evidence their intention to control. This examination must take into account the context of the Aboriginal society at the time of sovereignty.

Exclusive occupancy and joint title can be reconciled by recognising that joint title can arise from shared exclusivity. For example, there may be situations where 'two Aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's' (Delgamuukw v. British Columbia 1997, para. 158). If Aboriginal groups are able to demonstrate nonexclusive rights short of title but intimately tied to land, permitting a number of uses, these rights are not to the land. These lands may be subject to site-specific Aboriginal rights but this does not provide legal entitlement to the lands to those who hunted there (Delgamuukw v. British Columbia 1997, para. 159).

Proving Title: Occupation (Sufficiency, Continuous, and Exclusive) in *Tsilhqot'in Nation*

The Tsilhqot'in Nation was found to be a loosely organised formerly seminomadic group of six First Nations sharing a common culture, history, and language, many of whom lived within the remote valley or the lands subject to the claim (Tsilhqot'in Nation v. British Columbia 2008, para. 5). The Province of British Columbia, in 1983, granted forestry concessions on the lands which the Tsilhqot'in Nation used. The Tsilhqot'in Nation objected to

those concessions and sought declarations to prevent the commercial logging. After years of struggle over control of the lands the Tsilhqot'in Nation and the Crown finally sought resolution of their land conflict in court. The highly contested trial occupied 339 days over a five-year period during which the Tsilhqot'in Nation members introduced extensive evidence of witnesses and experts. The highly adversarial setting resulted in a barrage of motion applications, made by the Crown, which greatly slowed the trial process, interrupting presentation of evidence, requiring counsel for the Tsilhqot'in Nation to turn their attention away from the demanding process of presentation of evidence, to respond to repeated procedural Crown objections (Browne and Baker 2008). After a long and highly adversarial trial the Supreme Court of British Columbia (trial court) found that the Tsilhqot'in Nation was entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area but that the court could not make a declaration for procedural reasons (Tsilhqot'in Nation v. British Columbia 2008, paras. 129–130).

In reaching this decision, the trial judge considered evidence that the character of the land, which was mountainous, could not have sustained a population larger than the population found there in 1846 (Tsilhqot'in Nation v. British Columbia 2008, para. 60). He took a pragmatic approach in evaluating evidence about what the territory could reasonably sustain. He noted that much of evidence was historic, and consequently, lacked, by its nature, precision. He was, however, able to infer boundaries based on his examination of a large number of individual sites which the Tsilhqot'ins used regularly and exclusively (Tsilhqot'in Nation v. British Columbia 2008, para. 63). This approach and decision was controversial in light of the test requiring that an Aboriginal group show evidence of a strong presence over the lands, demonstrating exclusive control. The trial court proceeded on the premise that the notion of occupation must reflect the way of life of the Aboriginal people. The common law examination of Aboriginal title must be based on both a culturally sensitive approach to sufficiency of occupation that is based on dual perspectives of the Aboriginal group (its law, practices, size, technological ability, and character of land) and the common law notion of possession. The British Columbia Court of Appeal disagreed, stating that the case law did not support title being proven on a broad territory but required proof of site-specific occupation on a particular piece of land (William v. British Columbia 2012, para. 230–239).

This disagreement set the stage for the case to go before the Supreme Court of Canada, which, amongst other legal findings, clarified key legal principles about the proof and content of Aboriginal title by holding that Aboriginal

title is not limited to small sites, but rather can be territorial. Title lands can be established on larger tracts of land and need not be site specific or require evidence of intensive use. Namely, that occupation to prove Aboriginal title is 'not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty' (Tsilhqot'in Nation v. British Columbia 2014, para. 50). The Court required regular use of exploitation of resources over lands which the Aboriginal group has effective control.

The Court of Appeal's approach would require the Tsilhqot'in Nation, a semi-nomadic people who ranged widely over a large expanse of land in order to survive, to prove site-specific occupation. This was a standard that the Tsilhqot'in Nation could not meet, as the territory within which the Tsilhqot'in Nation lived did not allow for that more sedentary life style. The Supreme Court of Canada was able to apprehend that different geographies require different life practices, 'Occupation sufficient for title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of sovereignty' (Tsilhqot'in Nation v. British Columbia 2014, para. 50). Additionally, and as restated by the Court, the perspective of the Aboriginal group and the common law must be considered when establishing sufficient occupation. The courts must consider the customs of the Aboriginal group and the nature of the land; the court 'must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts; thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights' (Tsilhqot'in Nation v. British Columbia 2014, para. 32). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group and it is dependent on the circumstances, in particular the nature of the land and manner it is used—it is context specific. The Court found that the trial judge correctly applied the appropriate legal test to the evidence. There was compelling evidence that although the population was small there was regular use, thus sufficient occupation. The trial court considered the geographic proximity between sites for which evidence of recent occupation was tendered, and direct evidence of historic occupation, to satisfy the test of continuous occupation (Tsilhqot'in Nation v. British Columbia 2014, para. 58). The Tsilhqot'in evidence that they controlled the land by repelling outsiders was pivotal in establishing that their occupation met the test of exclusivity. The Supreme Court of Canada found that the Tsilhqot'in occupation was both sufficient and exclusive at the

time of sovereignty given their direct evidence of occupation at sovereignty, which was additionally reinforced by evidence of more recent continuous occupation (Tsilhqot'in Nation v. British Columbia 2014).

Aboriginal Title after *Tsilhqot'in Nation*

Although the decision in *Tsilhqot'in Nation* resolved key issues about how courts should evaluate and incorporate evidence of Aboriginal tradition and custom in Aboriginal title cases, many questions remain unanswered. The Tsilhqot'in Nation brought strong evidence of their claim. Many of the Nation's members continue to live in a manner similar to that of their ancestors of 1846, many of their members speak Tsilhqot'in, retain their age-old oral histories, and harvest their plants and animals off the land. In particular, the people of Xeni Gwet'in live remotely, live without electric power and telephone, and rely on the lands for sustenance. This begs the question as to what happens in situations where Indigenous people have land claims in urban areas? What happens to Indigenous people when their landscapes have been so greatly altered by force not of their choosing such as residential school and the 1960s scoop (these had grave adverse impacts on culture and heritage transmission and has been a hardship in maintaining land activities)? Can the nature of their attachment to the land change significantly throughout years? Can the urban Aboriginal groups that still remain in their territory and have a strong attachment to their land continue to hold title? When the Court refers to 'historic' occupation that supported continuity, how far back does that reach? What will be acceptable? Now that title is established, what activity might conflict with the nature of the attachment to the land? After years of struggle to establish title could a Court declare activity irreconcilable?

In addition, the *Tsilhqot'in Nation* decision declared that the applicant nation has Aboriginal title to the lands in question. What changes 'on the ground' will develop? What difference will 'title' make, on a day-to-day basis? How is the federal, provincial, and Aboriginal legislative authority over Tsilhqot'in Nation members' activity on Tsilhqot'in title lands reconciled? Whose laws will have priority in cases of conflict? One of the clear implications from the Court's decision is that the Crown must move away from its assumption that discovery gave it rights over the lands without regard to the Aboriginal inhabitants. Further, the Court made it clear that decisions regarding Aboriginal title must give due deference to Aboriginal tradition and custom. Hopefully the Court will carry the message and this lesson through future decisions regarding the scope and consequences of Aboriginal title.

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Customary Law and Land Rights: The Cautionary Tale of India, Jharkhand, and the Chotanagpur Tenancy Act

Amrita Mukherjee

On 13 September 2007, India joined 142 other members of the United Nations General Assembly in voting in favour of the UN Declaration on the Rights of Indigenous Peoples.[1] Article 26 of that document guarantees to Indigenous people the 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired', and obligates states to 'give legal recognition and protection to these lands, territories and resources'. In providing this recognition, states should provide 'due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.

This requirement is reinforced in Article 27, which declares that 'States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources …'

While the concept of looking to the customary laws of Indigenous people is new to many states, India has a long tradition of recognising customary law. Tribal peoples in the Chotanagpur area in the state of Jharkhand, India, have for centuries observed their own customary rules and practices, many of which deal with land tenure. These customary rules and practices were codified during the colonial period, such as in the 1908 Chotanagpur Act, and

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_7

this approach was referenced in the Constitution, Article 13 of which defines 'law' to include 'custom or usage having in the territory of India the force of law'.

In practice, however, these customary and legal regimes and norms, which ostensibly protect tribal lands and identities, are treated as subordinate to the formal law and have been subject to amendment, allowing interference from state and private actors and diminishing the land rights of the tribal people. Customary rights to land are being increasingly ignored or marginalised to enable a system that permits 'land grabs'. This chapter will use the state of Jharkhand as a case study for exploring the problems that can occur during the process of recognising and giving effect to customary practices regarding land rights.

Recognising Customary Law in Theory and in Practice

Land is at the heart of most disputes between Indigenous people and the dominant culture that surrounds them for many reasons, although two reasons stand out above all others. First, most dominant and minority/Indigenous cultures have very different approaches to land and land use. These often fundamentally different approaches and value systems make it difficult to reach an agreement on how to allocate land rights. Second, most dominant cultures structured their legal systems and their laws to justify taking land from Indigenous peoples. For both of these reasons, it is important that customary laws be calculated into any formula to determine land rights. Indeed, the UN Declaration places custom at the heart of the process for identifying and delimiting Indigenous peoples' rights over their lands for just such purposes.

While directing states to recognise and give effect to customary law regarding land rights is a lofty and important goal, it is also one that is fraught with obstacles. These obstacles have been grouped into two major categories: (1) conceptual problems (which include homogenisation, freeze-framing, and subversion) and (2) implementation problems (which include codification, application, and amendment) (Hendry et al. 2018).

'Conceptual problems' are the ones that occur at a more theoretical and abstract level. They refer to the topics of how to approach customary law and integrate it into the legal system of the dominant culture (Hendry et al. 2018). How do you develop a workable system that maintains the important differences between tribal cultures and avoids unduly homogenising of the various

tribal groups into one unit? In addition, customary law, like culture, is an ever-changing entity. How does dominant culture avoid 'freeze-framing' the Indigenous cultures and locking them into a static moment in time? Finally, how can customary law be truly accounted for and respected, as opposed to creating a system of nominal respect while in reality paying lip service to customary law and subverting the process to continue a 'land grab'?

'Implementation problems' are ones that occur as the dominant system attempts to identify and understand the specifics of customary law and apply that law in a given case (Hendry et al. 2018). How does the dominant culture locate and properly codify customary law? How can the dominant culture ensure that it has properly interpreted and applied customary law in a given case? How and when is it appropriate to amend codified versions of customary law? Each of these problems is illustrated in India's approach to customary law in the state of Jharkhand.

Jharkhand and Customary Law

On first glance, India may not seem like an obvious choice for examining the intersection of land rights, customary law, and Indigenous people, particularly in a volume focusing primarily on CANZUS (Canada, Australia, New Zealand, and the United States) countries. Indeed, the role of the state in tribal affairs in India may be differentiated in many ways from that of settler state systems which were marked by conquest and subjugation.

There are, however, marked similarities. First and foremost, India was also, of course, subject to British colonial authority, as were CANZUS countries. Although the exercise of power was carried out in particular and often distinctive ways in India from other colonised places, the issues with respect to Indigenous peoples and land were very similar. In India as elsewhere, much of the debate concerned the same issue of 'land grabbing', often for the exploitation of resources that occurred across the globe. In addition, India, as with the other CANZUS countries, consists of a central, federal government, as well as state governments. Variations in law exist between the state jurisdictions, and tension also exists between the federal and state governments as to who exercises control over different aspects of customary law and control over the relationships with tribal people.

India, however, has explicitly recognised its tribal people and tribal customary law in its Constitution. The Indian Constitution was adopted after the withdrawal of British rule and took effect in 1950. Two aspects of that

Constitution are important for purposes of this chapter—the creation of 'scheduled tribes' and the use of customary law.

India is home to more than 645 distinct tribes (many of which are referred to as scheduled tribes (STs)) living in over 29 states. Tribal people comprise 8.6 per cent of India's total population of 1.25 billion people. They constitute very diverse sections of Indian society and aspects of individual variety in terms of their preferences and culture. The Constitution recognises this diversity to some extent by creating and defining several areas, often represented by states, in which customary law governs and in which tribal peoples have a degree of autonomy.

These are known as 'scheduled areas and tribes' provisions because they are listed on one of the schedules appended to the Constitution. The Fifth Schedule of the Constitution of India applies to the majority of India's tribes in nine states, whilst the Sixth Schedule covers areas that are settled in the north-eastern states.

Such states are accorded special significance, where the populations are predominantly tribal and where they are considered to be able to effectively exercise their tribal autonomy. The level of autonomy provided varies between states and tribal groups. For example, in relation to Nagaland and Mizoram, ownership and transfer of land is decided by state law rather than through acts of the federal parliament.

The Sixth Schedule gives tribal communities considerable autonomy; the states of Assam, Tripura, Meghalaya, and Mizoram are autonomous regions under the Sixth Schedule. The role of the governor and the state is subject to significant limitations, with greater powers devolved locally. In relation to a number of states, federal law does not apply to the administration of the civil and criminal justice involving their customary law and transfer of land and its resources and this is supported by the inclusion of these particular states into the Sixth Schedule of the Constitution.

Part III of the Constitution both recognises and puts limitations on the use of customary law. Specifically, Article 13(3)(a) of the Constitution recognises custom and usage as sources of law, in so far as they are not inconsistent with Part III of the Constitution. Part III protects fundamental rights, which include the right to equality (Articles 14–18); right to freedom (Articles 19–22); right against exploitation (Articles 23–24); cultural and educational rights (Articles 29–30); right to property (Article 31); and the right to constitutional remedies (Articles 32–35).

To truly understand the role of customary law in India, however, it is important to look beyond the text of the Constitution and examine the way

these provisions function in practice. This chapter uses the state of Jharkhand as a vehicle for conducting that examination.

The state of Jharkhand was established in 2000, carved from the larger state of Bihar as a result of political leadership of the Jharkhandi activists which included the Indigenous Jharkandis' movement (Shah 2010). These groups sought to ensure better representation of marginalised peoples, including *adivasis* ('original inhabitants' or 'first peoples/citizens') in the Chotanagpur area (Radhakrishna 2016). The Chotanagpur area which covers much of Jharkhand has been the subject of colonial administration and tenancy laws (relating to surveys carried out from the nineteenth century), and which remain in force today. It is also an area of India considered to hold 40 per cent of the known mineral resources of the country and subject to immense pressures for mineral extraction and for companies to have access to protected tribal areas.[2]

It is important to note that Jharkhand is also an example of an area in which many tribal people have left their traditional lands and sought to pursue other employment and business pursuits. It is also apparent that there are many tribal people who have benefited economically from mining but also many who have been left with very little; with the loss of livelihood and little in the way of compensation. This focus of this chapter, however, is on the tribal people who remain on their traditional lands and for whom the land remains an essential connection for their way of life.

Wilkinson's Rule 1837 and Chotanagpur Tenancy Act 1908

The two main codification documents that give effect to customary laws in the area are the Wilkinson's Rule 1837 (WR)[3] and the Chotanagpur Tenancy Act 1908 (CNTA).[4] These lawmaking acts recognise traditional institutions as well as customs and allow for some level of tribal autonomy.

These rules were created first by the East India Company after it obtained the Division of Bengal and Bihar in 1765 and later by direct British rule through the Crown from 1858. The '*zamindari* system' developed by the colonial authorities accorded the Crown legal ownership over the soil and collected revenue from cultivators through revenue farmers, thus turning cultivators to mere landless labourers (Gupta 2002, p. 113). The WR and the CNTA were enacted as a result of long drawn-out negotiations after a number of tribal uprisings during the eighteenth, nineteenth, and twentieth centuries against the expanding colonial authorities' powers into tribal areas. In order to

reach a level of compromise on land alienation, and further colonial control, some local customs were absorbed into the legal and administrative system through which tribal people were allowed to apply their traditional customs. The Bihar Land Reform Act 1950 came into force after Indian independence transferred title to the government, so the state government became the sole landlord of tribal lands. The colonial system and capture of land tenure has continued on. Despite certain amendments to the CNTA (including the most recent in December 2016), which have sought to erode the provisions preventing land alienation, these legislative provisions have provided a 'rich source for political framing of *adivasi* identity as well as a claim of local autonomy' (Upadhya 2009). They remain a crucial legal recognition of tribal distinctiveness and community values.

Under the WRs, tribes are accorded some aspects of self-governance in relation to civil law matters (as criminal matters were later subsumed into the national legal regime). The Rules were first framed by the then Agent to the Governor-General in Council of the region, Captain T. Wilkinson and related to the administration of civil justice in Chotanagpur. According to Article III of the Rules, the state judiciary is not able to decide civil law matters which relate to tribal areas and instead special courts were constituted under the Rules.

The main object of the Rules is to protect the tribal system of administration and to preserve the paternalistic governance structure through the village communal system. The idea was to preserve village life as the central organising feature of the community and protect the area as a reserve for the particular tribe and its customs (Upadhya 2009). A core element of the decision-making powers in relation to land disputes rested in the '*mankis* and the *mundas*' system which relates to the role of the headman and other recognised representatives in the village system. A specific role was played by the Deputy Commissioner (DC), a special officer, who acted as the final arbitrator for matters that could not be decided by the tribal leaders and was accorded special powers to settle land disputes (Oraon 2003). The DC is able to intervene in the case of illegal transfer or illegal settlement by a village headman in order to safeguard the interests of a *raiyat* or tenant. This system allowed for some level of tribal authority but nonetheless still subject to the intervention of governmental authorities and so not completely independent of the intervention of the state.

The Chotanagpur Tenancy Act 1908 (CNTA) was enacted by the colonial authorities after the Birsa Munda movement of the 1890s, which was a grassroots response to colonial efforts to impose a new system of land tenure upon local cultivators and allow for land alienation (Upadhya 2009, p. 33). The

CNTA sought to protect the rights of local cultivators and prevent land alienation. The Act seeks to protect the earlier claims of the original settlers of the areas and was the result of several surveys of land use and a consolidation of earlier laws.

The Act was drafted by John Hoffmann, a missionary social worker who worked alongside colonial administrators and anthropologists (Upadhya 2009, p. 34), and it is largely through this 'outsider' interpretation of customs and usages that the provisions of the Act were framed. Christian missionaries played a significant representational role in Chotanagpur and in studying, identifying, and recording their understandings of different tribes through their knowledge systems as well as converting many tribal people to Christianity. They applied their own information systems and in the process carved out identities that did not always reflect the true nuanced and multilayered personhood and the relationships between the tribes (Dasgupta 2016, p. 448). Also, the interpretation of certain tribal customs was applied to a much wider range of places and peoples—to the whole population of Chotanagpur plateau. This created uniformity, but at the cost of losing record of important tribal customs and cultural practices.

Section 3 of the CNTA also includes detailed provisions relating to forests which consider the 'community forest' as part of the culture of village life. The same section accords tribal people the right to collect and sell minor forest produce, the right of habitation and cultivation for livelihood. These provisions are particularly significant given the pressures from companies to set aside the land rights conferred on tribal people and other traditional forest dwellers. There is a need for forest dwellers to be able to assert their rights through traditional bodies, such as the *gram sabhas* which give their informed consent to the diversion of forest land.

Analysis

The conceptual problems with India's approach are immediately obvious. The decision to codify customary law as legislation within the structure of the dominant legal system created a system that suffers from every one of the obstacles identified earlier. Legal pluralism is a laudable goal, as the incorporation of traditional sources along with the presumed knowledge of the community helps to derive common consent and avoid conflicts. But such codifications of practices need to be accurate in reflecting the actual present customs, and must recognise that these customs may vary according to different tribes and different communities. There is an overriding need to give voice

to the subjects and also to the multilayered aspects of tribal identities. There are many different communities whose needs have to be considered—and normative authority is only legitimate when exercised in accordance with the interests of tribal people—which will not be uniform and static.

Further, as one writer has pointed out:

> The concept of land rights needs to address also the concept of intersectionality – the multiplicity of identifications and collective identities that constantly subvert each other. For example there are tribal people who have moved away from their traditional lifestyles but who may still feel the need to continue some forms of involvement in these common understandings. Development and protection of land rights involves a dynamic process whereby a multiplicity of actors may engage and help shape a resolution that is in keeping with community or shared values, or indeed endeavours to. It should also protect those vulnerable within these groups – for example disabled people and women. Within these groups those who are most closely attached to the land should be protected – traditional land communities. (Upadhya 2009, p. 34)

At its core, the Indian system incorporated English common law principles (applying statute and legal precedent to determine disputes) and the foundational concepts of English property law, which is at variance with the idea common to many Indigenous cultures of holding land as part of a community rather than subject to individual ownership. The land was still subject to ownership systems of landlord and tenant, even though tenants exercised rights over the land.

In addition, the present codified customary laws, which were interpreted and codified during the colonial period, and remain the main sources of reference, are no longer (if they ever were) accurate records and reflections of the nuances and actual customs and practices of different tribes. Apart from the sometimes anachronist views and values that are espoused, they have failed to describe the very different practices of different tribal groups. It is evident that what has been handed down and codified by the customary laws 'lens' adopted (and subsequently adopted and developed by the independent state), relate to the dependency and normativity of statehood as the primary values.

In addition, to borrow from Sally Engle Merry, this reflects 'spatial governmentality' rather than a real and true furtherance of tribal rights through legal pluralism (Merry 2001). This approach may be applied to highlight how the regulation of tribal people directly and indirectly is developed by the control of space. Applying this approach also allows a heightened understanding and appreciation of the powers that are retained and even developed by the nation state, whilst seemingly giving the appearance of increased tribal autonomy.

The increased spatial governmentality allows for also increased non-state actors' interference who are supported by governmental forces and so the paternalistic government allows for interference by those who directly challenge tribal rights and values.

In the language of categories identified earlier, India's approach created a system that resulted in 'freeze-framing' the Indigenous cultures as well as laid the groundwork for subverting the stated purposes of the law and the rights of the Indigenous people. As Upadhya points out:

> As a result of this inscription of 'customary law' in formal law, what was presumably a variable and flexible system of social organization and land use came to be identified as the singular 'aboriginal' system of the region. Moreover what was probably adaptable kinship-based system of control over land and resources was reinterpreted through the language of property rights. Here as in many places across the world, the codification of 'customs' in modern law substantially transformed them 'freezing' adaptable practices into a 'vastly simplified and uniform property regime'. (Upadhya 2009, p. 35)

One further example encapsulates and illustrates the problem. One of the central provisions of the CNTA relates to Section 46 of the original Chotanagpur Tenancy Act 1908 which states the restrictions on the tenant's or in *raiyat's* (a person who has acquired a right to hold land for the purpose of cultivation) transfer of rights:

> 46. Restrictions on transfer of their rights by raiyats. –
>
> (1) No transfer by a *raiyat* of his right in his holding or any portion thereof.-
>
> (a) By mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or
> (b) By sale, gift or any other contract or agreement, shall be valid to any extent:
>
> Provided that a raiyat may enter into a *bhugut bandha* mortgage of his holding or any portion thereof for any period not exceeding seven years.
> (2) No transfer by a *raiyat* of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing.
> (3) No transfer in contravention of sub-section (1) shall be registered, or shall be in any way recognised as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction.

(4) At any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application, of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner.

The Act has been amended but the main emphasis has remained to ensure that transfer of tenure of land belonging to the tribe should remain in the tribe. Transfer may be made through land sale, exchange, gift, or by will to a fellow ST member and residents of their own police station area. Further, as a result of an amendment—passed in November 2016 by the Jharkhand Legislative Assembly, which amended Articles 21 and 49 of the CNTA, some of the important protections have been removed.

Article 21 which had stated that *raiyats* could only use their land for agricultural purposes has been amended to allow their lands to be used for commercial purposes. The state government has argued that this amendment is justified on the basis that this allows tribal peoples to propose economically and in the process strengthen their claim to the land.[5]

Therefore, it is clear that the protection accorded under Article 46 is not absolute. Section 49 allows for the transfer of land from a tribal person to a non-tribal person for industrial purposes or mining 'or for any other purposes which the State Government may, by ratification declare to be subsidiary thereto to or for access to land used or required for any such purpose'. This provision retains the overarching power of the state government to interfere and allow for land alienation for industrial purposes, with compensation paid to the landlord, but takes away the rights of the cultivator. The state government may also acquire land for the purposes of 'public interest' such as building schools and hospitals. In addition, the 2016 (Amendment) Ordinance allows for a wider range of permissible purposes—for the construction of roads, irrigation, laying of drinking water pipelines, power substations, schools, colleges, universities, and railway projects as well as *anganwadi* centres and *panchayat bhavans*. In such circumstances, the *raiyat* would have been required to get permission from the DC for the transfer of land but this is no longer required under the Amendment Ordinance. Also under the new provisions, if the work for which the land has been transferred is not completed within five years of the date of transfer, the title to the land returns to the *raiyat* and the money paid will not be demanded back from him or her.

The land tenure rules, even before the 2016 changes, have not been able to protect tenure holders in certain circumstances where they are made vulnerable by certain fraudulent activities—when, for example, the tribal person

receives much less from the transfer of the land than the ultimate purchaser, who may not be a tribal person or when it is alleged that he or she is physically incapable of cultivating the land (Sharan 2009, pp. 82–95). Further the actions of those classified as 'tribal elites', who are more powerful than the poorer land workers, may seek benefit from land alienation away from the traditional and collective land usage.

Despite these concerns the CNTA has been listed in the Ninth Schedule of the Indian Constitution, which implies that it is beyond judicial review. This would have been in order to protect the provisions of the Act, but the result is that the highest court in the land is prevented from analysing its provisions and that local courts (which include courts located in the state itself) most often decide cases on the application of the Act. The CNTA, which has been amended on a number of occasions, may be amended by the state legislature on the recommendations of the Tribes Advisory Council.

The original Act applied only to the lands of STs and vested the power of land transfer on the plea of the right owner, with the DC. In 1962, the Bihar government amended the CNTA to include 'economically weaker castes (EWCs)', so allowing for scheduled castes and others designated economically weaker groups to be able to benefit from the Act's provisions.

Conclusion

Land alienation is a significant problem in India, as in other places with large-scale dislocation, eviction, fraudulent transfers, and conversion of traditional forests. These problems often relate to a dissonance or an incompatibility between the legal frameworks of formal and customary laws. The values accorded to each system contrast, as individual property rights and those accorded to community values necessarily clash. More often than not formal laws prevail as the customary authority is weakened. A continuing problem remains the continuing exclusion of tribal peoples from modern state operations so that 'spatial governmentality' is always entrenched and is also always evident even in tribal spaces. Similarly there needs to be a greater drive towards engaging and gaining greater knowledge of tribal spaces and the customs that pervade it. Relying on codifications of tribal customs such as the CNTA, which look at tribal customs through specific knowledge systems and power relations has caused distortions, particularly as the customs of certain tribes have been misrepresented. Further, they encourage the understanding that custom has remained static—when so much has changed.

The significance of this study relates not just to India, but to similar struggles occurring in many places globally, where there are tensions between the claims of different groups to take control and ownership of land. There are many contested claims and many interest groups, including tribal elites who may claim to represent the interests of different groups. However, those who are more directly rooted to the land have been facing hardships—those who have a continuing reliance on the income from the land and therefore more vulnerable to any changes in the protection of their land rights. Similarly in many places across the world, Indigenous and tribal land rights have over many centuries been undermined, to the point where people have lost their lands or have not received the full benefits from the sale and exploitation of it. The traditional rights to the peaceful enjoyment of their traditional lands and culture have been the subject of much public debate, including at the international level. However, exploring the inherent and problematic conceptions of what constitutes tribal law by state actors, should help furnish a better understanding of the truly pluralistic nature of customary law. Tribal values and tribal justice are distinct in relation to different tribes and until more fully accounted for in the legal system, will continue to cause major conflicts between different interest groups.

Notes

1. United Nations General Assembly Resolution 61/295 of 13 September 2017.
2. See http://www.jharkhand.gov.in/minerals, date accessed 10 June 2017.
3. Rules for the administration of Civil Justice within the jurisdiction of the Agent to the Governor-General under Regulation XIII of 1833. The Original copy of the Rules, with the signature of Captain Wilkinson is missing. However, the High Court in Patna, Bihar, has been applying a copy in deciding cases.
4. Bengal Act 6 of 1908, an Act to amend and consolidate certain enactments relating to the law of Landlord and Tenant and settlement of rents in Chotanagpur.
5. See https://www.thequint.com/india/2017/04/04/local-tribes-protest-changes-in-jharkhand-land-laws, date accessed 10 June 2017.

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Chotanagpur Tenancy Act 1908.
Constitution of India.
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Wilkinson's Rule (WR) 1837.

8

Making Space for Indigenous Justice in the Child Welfare and Protection Context

Sarah Ciftci

The *Bringing Them Home* report clearly demonstrates that colonial intrusion into Aboriginal family life is both a dark chapter in Australia's shameful past *and* an ongoing problem for the Australian state. The report offered recognition of past injustices and symbolic atonement for the misdeeds of colonisation, while simultaneously calling for a transformation of the current policies and practices that operate to exclude Aboriginal people from decision-making processes relating to the care and protection of their children (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families [NISATSIC] 1997, Recommendation 43). In so doing, it called attention to the fact that Aboriginal children remain significantly over-represented within the child protection system across all jurisdictions.

In response to the report, the New South Wales (NSW) government introduced the Aboriginal Care Circle pilot programme, an innovative, alternative model for deciding Aboriginal child protection and care matters that seeks to accommodate and incorporate important principles of Indigenous justice and cultural values (Best 2011; NSW Government 2011; Wood 2008: Recommendation 12.1). The programme removes such matters from the court space and creates a new out-of-court, 'culturally appropriate' legal space where Aboriginal Elders and community representatives are invited to actively participate in the decision-making process. As such, it is an attempt to create a mechanism and set of relationships capable of reconciling the demands of the community with those of the colonial state.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_8

While the Aboriginal Care Circle pilot programme can be viewed as a sincere and genuine step in the right direction, the extent to which it is *practically* able to transcend the entrenched colonial ideologies that have plagued the Australian legal system for over two hundred years cannot be assumed. Does the new space provide an effective means of Indigenous inclusion and recognition in the NSW legal system? Or is it actually a reimagined space of oppression, misrecognition, imperial domination, and asymmetrical power? This chapter explores the questions using data from empirical sociolegal research on the implementation of the Aboriginal Care Circle pilot programme in two regional towns in NSW.[1] First, it reviews the history that brought NSW to the Care Circle model. It then considers the experience of children, families, Elders, and other Aboriginal participants with Care Circle model to determine whether the programme represents colonial stasis or empowering change.

Understanding Indigenous Child Welfare in Australia

> Any understanding of how Aboriginal people view child protection, welfare and juvenile justice issues today *must* be contextualised by the history of colonial intervention aimed at disrupting Indigenous family life. (Cunneen and Libesman 2000, p. 101)

The 1788 British invasion and subsequent colonisation of the continent that has become known as Australia marked the meeting of two utterly different societies and the beginning of ongoing, destructive disruption of Aboriginal and Torres Strait Islander ways of life. The forced removal of Aboriginal children from their families and communities served as one of the most aggressive and shameful colonial strategies of 'protection', assimilation and integration. Developed against background notions of racial superiority often referred to as Social Darwinism, it was believed that the Indigenous 'noble savage' could be absorbed and integrated into 'civilised society' through process of child removal (Harris-Short 2012, p. 22). Although the nature of forced removals differed across states, each state's practices were grounded in a belief that 'full-blood' Indigenous people were a dying race and 'half-blood' children could be integrated into the general (non-Indigenous) community (Chisholm 1998, p. 209).

In NSW, the removal of Aboriginal children from their families and communities, and the child protection laws that 'legitimised' such removals, can be traced to the 1880s. The state established the Aborigines Protection Board in 1883 and enshrined its existence in legislation through the Aborigines

Protection Act 1909 (NSW). Among other powers, the state gave the Board the authority, with the consent of the court, to remove children from their families and communities on the grounds of 'neglect' (Goodall 2008, p. 241–2). In 1915, amendments to the Act strengthened these powers by allowing removal without proof of 'neglect' and without permission from the court (Harris-Short 2012, p. 26). Although the state replaced its policy of 'protection' with one of 'assimilation'—by introducing the Child Welfare Act 1939 (NSW) which eliminated the race-specific dimensions of NSW's child welfare laws—the practice of removal remained widespread. The replacing of the Aboriginal Protection Board with the Aboriginal Welfare Board in 1940, along with the new legislation that made it more difficult to separate Aboriginal children from their families, did little to curb the practice of Aboriginal child removal. State guardianship of Indigenous children continued well into the 1960s, and the activities of the Board were so pervasive that it was difficult, if not impossible, to find an Aboriginal family in NSW that had not been affected in some way (Behrendt 1995, p. 4). It was not until towards the end of the 1960s that the Board was dissolved, accompanied by the termination of the formal policy of assimilation following the successful 1967 referendum which gave Aboriginal people full citizenship rights in the Australian Constitution and enabled the federal government to legislate for Aboriginal people. Nonetheless, assimilationist-driven practices of Aboriginal child removal continued until the 1970s.

Child removal policies, such as those practiced in NSW, are now widely understood as acts of cultural genocide (NISATSIC 1997; Van Krieken 2004; Bamblett and Lewis 2007; Harris-Short 2012; Libesman 2014). They were used to deny the reality of Indigenous community life and disempower Indigenous people by stripping them of control over their own destinies. The colonisation of Aboriginal childhood stood at the centre of the colonisers' failure to recognise Aboriginal people as self-determining agents with control over their own destinies and collective rights to sovereignty. The rights of Aboriginal families to remain together were consistently denied.

Bringing Them Home and Its Aftermath

> Sometimes formal acts of recognition, such as apologies for past injustice, are important elements in overturning relations of domination, but they are not a substitute for concrete measures to eliminate arbitrary cultural biases in public institutions or to dismantle structures of material inequality. (Williams 2014, p. 16)

The *Bringing Them Home* report, released in 1997 following a national inquiry into the historic practice of Indigenous child removal, was the Australian government's first formal recognition of the injustices its policies had visited on Aboriginal families and communities and of the impact of these injustices into the present. It acknowledged, for example, that 'the laws, policies and practices which separated Indigenous children from their families have contributed directly to the alienation of Indigenous societies today' (NISATSIC 1997, p. 4).

Bringing Them Home also concluded that while legislation and even practitioners' language had changed, paternalistic attitudes persisted. The relationship between Aboriginal families and the child welfare system in NSW and elsewhere was 'overwhelmingly one of cultural domination and inappropriate and ineffective servicing, despite attempts by departments to provide accessible services' (NISATSIC 1997, p. 400). To induce real change, the report recommended a welfare services overhaul that involved Aboriginal communities as partners in designing the services and programmes most appropriate for their particular contexts (NIATSIC 1997, Recommendation 43).

Following the release of *Bringing Them Home,* all state and territory governments offered formal apologies to the members of the Stolen Generations and reviewed their child welfare laws. NSW adopted the Children and Young Persons (Care and Protection) Act 1998, which provided greater formal recognition of the rights of Aboriginal peoples to participate in decision-making relating to their children. For example, Sections 11 and 12 call for self-determination and allow for the implementation of programmes and strategies that promote it. Section 37 states that 'models for conferencing may be developed to accommodate the unique requirements of a community (whether cultural, geographic or language)'.

Nonetheless, the *Special Commission of Inquiry into Child Protection Services in NSW* found that the Act did not fulfil its promise (Wood 2008). In practice little, if anything, had changed, cultural misunderstanding remained, and Aboriginal people continued to experience alienation from the child protection system; 'where there is a lack of understanding and lack of acceptance of extended Aboriginal family relations, the functioning of the extended family within an Aboriginal cultural context is seen as pathological or dysfunctional, and what is "normal" Aboriginal practice signals a problem to many welfare workers' (Wood 2008, p. 746). Further, evidence provided to the Inquiry indicated that care proceedings were increasingly, and unduly, adversarial in nature (Wood 2008, p. 514). As a result, care matters shift from being facilitated, collaborative arrangements among parties with mutual interests in

ensuring the safety, welfare, and wellbeing of children to contests between competing interests.

The Inquiry report concluded that these issues—Indigenous alienation from care proceedings and the adversarial nature of the Children's Court—pointed to Aboriginal and Torres Strait Islander Peoples' need for a real alternative to the dominant legal system, and Recommendation 12.1 advocated for the use of alternative dispute resolution (ADR) mechanisms prior to and during care and protection proceedings. The NSW government's response was to implement four models of ADR at different stages in the child protection system: a family group conferencing pilot programme, dispute resolution conferences, the Legal Aid pilot, and the Aboriginal Care Circle pilot. All four models have received positive independent evaluations that emphasise the benefits of integrating ADR mechanisms in the care jurisdiction (Best 2011; Morgan et al. 2012; Boxall et al. 2012). The Aboriginal Care Circle pilot was the first of these models to be developed and is the only one intended to meet the specific needs of Aboriginal families and communities in NSW. It has been piloted only in two smaller regional localities in the state.

Locating Care Circles in the Theory and Practices of Liberal Recognition

The Aboriginal Care Circle pilot programme is a joint initiative of the Department of Justice, Department of Family and Community Services (FaCS, herein referred to as the 'statutory department') and the Children's Court. Care Circles aim to ensure that all parties adhere to and address the Aboriginal and Torres Strait Islander principles in the Children and Young Persons (Care and Protection) Act 1998. Specifically, its stated aims include empowering Aboriginal families and communities by reducing barriers that currently exist between Aboriginal people and the courts, contributing to self-determination of Aboriginal people in care proceedings, increasing participation in decision-making about Aboriginal children by Aboriginal families and communities, and increasing confidence in the care process. From this perspective, the Aboriginal Care Circle pilot programme is a recognition of Aboriginal and Torres Strait Islanders' status and rights. And yet, what exactly is the nature of this recognition, and what does this recognition *do*?

The concept of recognition has become a prominent paradigm in the contemporary claims-making of Indigenous people in Australia and elsewhere. Struggles for the 'recognition of difference' are born out of a historical

nonrecognition of cultural difference. Theories of recognition agree that a universalist 'difference-blind' approach to justice not only suppresses individual and collective identities but is in itself highly discriminatory (Taylor 1994, p. 43). Given that identities are understood as being shaped by a reciprocal 'dialogue with others, in agreement or struggle with their recognition of us' (Taylor 1991, p. 45), a lack of recognition can significantly undermine the realisation of human freedom (Thompson 2015, p. 173). Identities, therefore, can be developed both through processes of recognition or a lack thereof. Indeed, 'nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning one in a false, distorted, and reduced mode of being' (Taylor 1994, p. 25).

Since recognition is described as being a 'vital human need' (Taylor 1994, p. 26), recognition theorists argue that the state must institutionalise regimes of reciprocal recognition (Taylor 1994; Fraser and Honneth 2003). This body of scholarship also proposes that it is the distinct and vital role of the state to secure justice through implementing more accommodating practices of recognition. Along these lines, it is believed that through institutionalising a liberal regime of reciprocal recognition, Indigenous people would be better positioned to realise their status as self-determining agents (Coulthard 2007, p. 442). It is assumed that in order for Indigenous people to thrive as self-determining actors the state must afford them cultural recognition and institutional accommodation.

Yet these promising possibilities may come at a cost. The liberal paradigm of recognition has been critiqued by scholars for its inherent acceptance of power imbalances (Tully 2004; Turner 2006; Coulthard 2007, 2014; Butler and Athanasiou 2013). The need for recognition is by nature nonreciprocal, given that the colonial state does not require recognition from the formerly self-determining communities on which it is founded. Rather, recognition comes from 'above' and is understood to be 'granted' or 'accorded' to a suppressed group by the dominant group. By this logic, any policy or programme based on the state model of recognition is innately unable to modify or transcend the power dynamics at play in colonial relationships. Consequently, the liberal recognition paradigm sustains the project of colonisation and further entrenches subjection and domination.

Viewed through the lens of this critique, the shift in NSW Aboriginal child protection law can be understood as movement from non- and mis-recognition to *liberal* recognition. In other words, the Aboriginal Care Circle pilot programme may be little more than a state-imposed recognition space within the larger and encompassing colonial child welfare and justice system. In fact, this is exactly what empirical research suggests. While the programme does provide

for cultural accommodation and makes legitimate attempts to increase Aboriginal self-determination and participation in child protection processes, it also institutionalises recognition in the state's court structure and in its care and protection jurisdiction. The evidence also shows that, ultimately, the process serves as a mechanism for legitimising the bureaucratic decision-making of NSW child welfare authorities.

Examining the Evidence

On its face, the Care Circle process is a form of culturally appropriate ADR. Care Circles take place in a community setting and involve input from Aboriginal Elders who represent the local Aboriginal community. They can be requested once a determination has been made that an Aboriginal child is in need of care and protection and prior to final orders for that child being made. Significantly, however, they are a step within the entire court process rather than an alternative to it. In the process of determining need, for example, state child welfare workers document each case and the Children's Court legitimises the department's decisions.

Certainly, Care Circles can provide a space in which Aboriginal culture is meaningfully foregrounded and valued, something that is lacking in dominant court processes. In interviews, Care Circle stakeholders frequently mentioned this orientation and approach:

> It's not just about breaking down the layout or artifice or the things around judicial authority—for example, taking a magistrate off a bench and making them sit in a circle with other members of the community. *It's about recognising other forms of authority*. The magistrate has clearly a lot of authority and a lot of legal power but *the community Elders and others have a different kind of authority* and part of having a magistrate participate as an equal with those people, I've heard community members say, *it's a recognition of their different type of authority within the community*. They are kind of sitting equally with a magistrate so it's not a diminishment of the magistrate's authority, it's more a recognition of other forms of authority. (Interviewee 1, Department of Justice)

> It is really *acknowledging that a community has a particular understanding of their particular needs*, of what these parents may have gone through. They understand their background, they understand their family and what these people have been subjected to in their own childhood, and they know what happened to their grandparents. The stolen generation keeps coming through, the effects of

> the stolen generation keep coming through. So I think that certainly *Care Circles are not tokenistic*. The fact that they can't decide the ultimate outcome is not to the point. The process is part of the outcome and the process is part of a good decision and *the process is honouring people, is honouring that knowledge, and it's that knowledge that we need not knowledge of the law.* We need that knowledge to help our understanding and to make some good decisions. (Interviewee 20, Magistrate)

Interviewee 20's comments are instructive. Care Circles are clearly an improvement on alienating adversarial court processes and offer a more culturally appropriate space for Aboriginal parents and community representatives to engage. Nonetheless, Care Circles are limited in their capacity to support Indigenous justice; they are constrained by the broader child welfare system in which they sit.

This is a key theme in the interviews with Care Circle stakeholders. When viewed as an alternative to court, participants saw the Care Circle process as a positive process, allowing Aboriginal parents a greater participatory role and providing a culturally appropriate environment through the inclusion of the Elders. But when viewed as a part of the NSW state government's child protection and welfare system, the programme's location within that structure was identified as one of its greatest flaws. Whatever its roots, it appears that in practice, a state-based model of recognition is still a colonial model:

> I guess one of the one big limitations of Care Circles is that they can only be referred a) when there's a court matter and b) after the matter has been established and the children have been found to be in need of care and protection. I understand the reasoning for some Elders to be not keen on being involved in a Care Circle prior to establishment. But quite often the kids have been removed already, so some form of involvement around that decision about whether they are, in fact, in need of care and protection—my personal opinion is that they or the community should be able to express a view about whether the children should be removed or not. Where the Care Circles capture the decision-making now, it's often at a point where, sometimes the panel member's input in relation to removals would be more helpful, like in terms of being able to say to a parent 'it was right to remove from you', or [being able to say to] caseworkers that didn't really do work with this mum, 'so why have you removed?' They don't really get to push that question or influence that decision in relation to a finding in need of care. It's really about placement and restoration that their input is sought. And you often can't go back and revisit some of those issues with the panel members because we are forward thinking at that stage rather than backward-looking. (Interviewee 17, ALS solicitor)

> While it's happening, in comparison to the mainstream court process, yes [I think that the Care Circles empower Aboriginal families or the community]. But not to the extent that it could be . . . The other qualifying statement is questioning the actual level of empowerment beyond the confines of when the Care Circle is actually happening because so many other factors come into play. Is the Department really willing to turn around on the position they've already adopted? . . . They, community services, still hold the power.

> A cultural shift within community services [is the way to move away from that]. I guess more willingness, even when serious risk factors have been identified, to work with the family to find a way to preserve as a higher priority than removing. They would say that they do that at the early intervention stage, and then once they file proceedings it's too late. If there's a way a Care Circle type forum could be held earlier on [that might make a difference] . . . because at the moment, at least in this area, early intervention is kind of vague casework. (Interviewee 11, private solicitor)

Because these accounts are from advocates for Aboriginal families and children, it is perhaps not surprising that they draw attention to the need for Aboriginal self-determination and participation earlier on in the child protection process. Yet even interviewees who work for the statutory child welfare department that makes removal decisions highlighted a lack of Aboriginal input into that decision when reflecting on where Care Circles fit into the broader system:

> So when kids are removed by community services, it's a last-ditch effort. I wonder if a Care Circle format could be used as more of an early intervention type thing before you get to court because often when you get to court, it's like closing the gate after the door is bolted. If there was a Care Circle before that then maybe that would change things. (Interviewee 3, statutory department worker)

> I think one of the other issues though that is really significant in this area is that a lot of the kids that are removed, it's just pretty clear from the outset that there's not going to be a realistic possibility of restoration to the parents. I can certainly see where perhaps there needs to be more emphasis on something like Family Group Conferences or something like this, even Care Circles, as an early intervention measure because I would say that another barrier to Care Circles being beneficial or useful is that the parents feel like the decision has already been made and that wouldn't necessarily be an incorrect assumption. A lot of the time the decision has already been made. The Department is agreeing to participate as a means of mediation or to help the parents understand why, but nonetheless *the decision has already been made from the Department's point of view.* Obviously

there's the court process and it ultimately requires the court to endorse it, but I can see why parents, and Elders as well, would feel disenfranchised by that process if the decision has already been made. . . . I don't really know how you overcome the issue of the fact that it is a pathway through a court process where the Department probably does already have a view. That is a big issue. (Interviewee 16, statutory department worker)

Statutory workers also pointed to an important implication of this 'misplacement' of Care Circles in the child protection process. Because they were not privy to information used upstream in the decision-making process, Elders' participation was less useful than it could have been—or viewed as not useful at all:

I think there's lots of reasons why [the Care Circle process] doesn't work particularly well some of the time or a lot of the time. I think the Elders that are in the Care Circle have very limited knowledge of child protection issues and safety and risk issues for children. I think they have different motivations for being there at a Care Circle. I think *they have a lack of understanding* of the court process and what the Circle is trying to achieve . . . I think it could be improved enormously if the Elders got the information that had already been before the court, because they don't get any of that. So we are essentially going into a circle where the court has already been presented with a whole range of evidentiary information, both from parents and from community services, but when you go into a Circle, the Elders know nothing, and it becomes very difficult to present all of that evidence again. I think if they had access to that prior to the first circle, they would have a better view of what's happening or what has happened up until that point. Because frequently their view is influenced by—and it always will be—it's influenced by what they know from the community. There's often times they actually don't know certain things that were presented to the court, and that can be very difficult. (Interviewee 2, statutory department worker)

They don't know the history of what's going on, *they don't understand* all of the problems that have happened. I don't know what kind of briefing they had about that, so what advice can they give and what can they share as Elders because *they are also outsiders*. They may be Aboriginal but *they are still outsiders*. Would it be better to have Elders here [within the office]? (Interviewee 15, statutory department worker)

The other thing—it's going to sound like the 'white welfare worker' having a dig at the Aboriginal Elders—is there are some people who have sat on [one] Circle that I think just don't, or don't necessarily have, a focus [on] or an understanding of why they're there. A number of Care Circles that I've been to, the only thing that the Elders have said is about their own experience in the Stolen

> Generation and have used the Care Circle as a platform to talk about that, which is relevant, but not in those proceedings . . . So, when you have [an Elder] who has the right level of focus, I think it's to a degree about the level of education, I think it's focused on the actual purpose that we're there for, then it works. But if you don't, it's just like "hurry up, let's get on with it, move along", and it's a lost opportunity for getting really good cultural decisions, information, input, agreements that do reflect self-determination . . . Well lost in the sense of, a community member will go off on a tangent that's not relevant to these particular proceedings, that's the loss. Then it's like *we will just make decisions on our own, and that self-determination just isn't given full weight*. (Interviewee 3, statutory department worker)

When I asked an Elder after a Care Circle sitting whether she felt that process had given her a sense of empowerment, she replied, 'No, I don't think I've been given empowerment. I think I've just been there to have a say'. She then went on to describe her continued lack of faith in the statutory child welfare department and the care and protection system:

> Why can't [they] work with [parents]? [The statutory department] take the kids and then turn around and say you've gotta do all this, but they're not helping them neither, are they? So I see from [the department's] point of view, they just don't want to care. . . . They're just judging. They're not helping. These poor kids get taken into care, and they're going to have their own problems too 'cause they're not with mum or dad. So to it's just another stolen generation again because [they] aren't working with people, they just want to take the kids and that's it.

These comments from statutory workers and from Aboriginal Elders suggest that Elders are simultaneously included in and excluded from the child protection process. They are invited to participate and then criticised for having insufficient knowledge to make informed decisions about the safety, welfare, and well-being of Aboriginal children from their communities. From the perspective of the statutory child welfare department, the ability to make an informed decision relating to the welfare of a child is derived from casework, yet neither Elders nor other appropriate Aboriginal community is given the opportunity to participate in the casework process or, sometimes, even know the evidence gathered through casework. Given the feedback above, it would not be unrealistic to imagine that some Care Circles are viewed by both Elders and by state child welfare staff as a waste of time. It would seem, then, that Aboriginal input is *symbolic* in nature and only considered valuable if it preserves the colonial status quo.

Concluding Remarks

By highlighting how Care Circles reproduce the asymmetrical power imbalances that they seek to transcend, these accounts reinforce Coulthard's critique of the dominant liberal recognition paradigm. Care Circles are a case-in-point of liberal recognition practices that ignore the workings of entrenched colonial relationships. They are an example of how Indigenous people can be recognised by the coloniser (through accommodating principles of Indigenous justice into the court process) and repressed at the same time (through excluding them from the larger child welfare process). Non- and mis-recognition may be more visible, but like those policies, liberal recognition can express domination and create dependency (Thompson 2015, p. 182).

Coulthard's critique predicted the intrinsic failure of state models of recognition to support Indigenous people's self-determination. Locating Care Circles within the NSW child protection system ensures that the colonial relationship between Australian child welfare authorities and Aboriginal families and communities remains undisturbed. It becomes clear that the terms of recognition are determined by the coloniser and are exercised through a discourse of whiteness. An examination of the location of Care Circles stresses the need for the principles of Aboriginal self-determination and participation to be embedded throughout the whole child welfare system rather than accommodated in one part of the system only.

While Coulthard's work is in some ways discouraging, he goes on to call for a transformative practice of *self-recognition*. Drawing on the work of Fanon, he argues that the colonised must 'turn away' from the colonial state and resist the 'assimilative lure' of its statist recognition agenda. Instead, they must initiate their own practices of self-determination and freedom (Coulthard 2007, p. 456). For Butler, the effectiveness of recognition depends on Indigenous peoples' 'ability to function as subjects who can instrumentalize state power without becoming subjugated by it' (Butler and Athanasiou 2013, p. 83), even if it is 'that which we cannot want' (Butler and Athanasiou 2013 p. 76).

How might that be achieved in the child welfare context? While this is a topic for future research, it is worth noting that over the last decade, there has been a significant transference of responsibility to Indigenous children's organisations in some parts of Australia. This has been heavily influenced by Indigenous people's claims to self-determination and campaigns for the right to exercise jurisdiction over their children (Libesman 2014). The approach taken in the United States has been to transfer legislative, administrative, and

judicial decision-making in relation to all Indian children residing on tribal reserve lands over to Indian tribes, thus according Indigenous jurisdiction and autonomy over Indigenous child welfare matters grounded in Indigenous self-determination and sovereignty (Indian Child Welfare Act 1978). Of course, the Australian and US jurisdictions are not easily comparable given that each jurisdiction has developed against a background of context-specific experiences with processes of colonisation. While the US model might not be easily achieved in the Australian context, Libesman argues that *pluralising* child welfare frameworks to incorporate Indigenous organisations and communities would better support the right to self-determination and offer a structure that could ensure effective and just decision-making (Libesman 2014, p. 211). Rather than 'making space' for Indigenous justice in the child welfare space as Care Circles do, this approach would transform the entire child welfare space into one that enables greater integrity with respect to Indigenous justice. In terms of successful child welfare outcomes, rather than expanding the Aboriginal Care Circle pilot programme and proliferating Care Circles, the creation of this kind of plural system might be a better investment for the state of NSW.

Note

1. The research adopts a qualitative approach and employs in-depth interviewing, participant observations and discussion circle methods. Fieldwork commenced in May 2014 and concluded in December 2016.

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9

Taking Justice to Aboriginal People: Everyday Access to Justice as a Promising Area of Indigenous Policy in Australia

Deirdre Howard-Wagner

As Australia moves into the twenty-first century, its policy towards its Aboriginal and Torres Strait Islander peoples has focused on two primary areas: (1) making Aboriginal and Torres Strait Islander communities safe as part of the Council of Australian Governments National Indigenous Reform Agreement (Closing the Gap); and (2) providing a fair, equitable, and accessible system of justice for Aboriginal and Torres Straits Islander peoples.

With regard to this second category, bureaucracies, governments, and the judiciary are adopting strategies to address the deep distrust Aboriginal people have with the justice system in Australia (Blagg 2008). The Australian state of New South Wales (NSW) launched a number of programmes, including creating Aboriginal court programmes and community justice groups, and employing Aboriginal justice staff. These staff positions were spread across the police service; the courts; corrective services; and in wider programme areas, such as NSW Community Justice Centres, NSW Office of State Revenue, and NSW Office of Birth Deaths and Marriages, with the intent of improving Aboriginal peoples' access to justice in NSW.

This research was supported under Australian Research Council's Discovery Early Career Research Award funding scheme (project DE120100798). The views expressed herein are those of the authors and are not necessarily those of the Australian Research Council. The final draft of this chapter was sent to the New South Wales Department of Attorney-General and Justice and the Office of State Revenue for consideration and comment. Their comments were incorporated into the final draft prior to submission for consideration for publication.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_9

Drawing on in-depth interviews conducted as part of project examining Aboriginal success in addressing Aboriginal disadvantage and improving Aboriginal well-being in the Australian city of Newcastle, this chapter explores the work of Aboriginal justice staff in this new everyday justice space. This research suggests that these staff play a pivotal role in achieving justice for Aboriginal people. This chapter begins by exploring the 'everyday justice space', and then turns to the research, setting out the methodology and the preliminary findings of the project.

The Everyday Justice Space

Everyday justice refers broadly to the realm of justice outside the informal and formal justice space. The Australian Attorney-General's Department situates access to everyday justice as 'access to information, support and opportunities, and about having a fair and equitable experience in everyday life' (Australian Government Attorney-General's Department 2009, p. 1). Within the policy context of access to justice in Australia, improving everyday access to justice means improving the personal capacity of individuals to seek support to meet their legal needs (Australian Government Attorney-General's Department 2009). This suggests that strategies and programmes need to be adopted that enable people to facilitate a resolution to their own legal needs in the everyday space.

Developing these strategies and programmes for Aboriginal people, however, becomes complicated for a number of reasons. Research has suggested that Aboriginal people often do not recognise their legal needs as such, ignore legal matters, and their legal needs and matters remain unresolved (Cuneen and Schwartz 2008, p. 39). The reasons why are complex, but history plays a role. For example, Aboriginal people 'have a lack of confidence in justice and related institutions due to cultural alienation and the role such institutions played historically, leading to unwillingness to access services' (Blagg 2008, p. 7). Within the policy context of access to justice in Australia, improving everyday access to justice means improving the personal capacity of individuals to seek support to meet their legal needs.

In light of this dynamic, the everyday space assumes an even greater importance in the context of Aboriginal people's access to justice, especially given the growing recognition of the consequent effects of unresolved legal matters in terms of Aboriginal peoples' contact with the formal justice system down the line. A quick example regarding state debt illustrates the point. Aboriginal people in NSW, and Australia more widely, are over-represented in terms of

state debt associated with fines, such as not having a train ticket or having an unregistered dog, which 'quickly accumulate and, if unpaid, can lead to the cancellation of the driver license' (Ivers and Burn 2014, p. 1). State debt is having a deleterious effect on Aboriginal people in terms of not only contact with minor offending and bringing Aboriginal people into contact with the criminal justice system at two to three times the rate for non-Aboriginal people, and leading to incarceration, but annually, there continue to be Aboriginal deaths in custody in Australia for imprisonment for unpaid fines and driving offences associated with a cancelled driver's licence (Ivers and Burn 2014, p. 1).

The question, then, is how to develop effective strategies for serving Aboriginal people in the everyday justice space. Importantly, the findings of Cuneen and Schwartz suggest that everyday justice needs to be brought to Aboriginal people (Cuneen and Schwartz 2008). The finding of an in-depth qualitative place-based research project in the Australian city of Newcastle study suggests that hiring Aboriginal justice staff is an effective strategy for achieving that goal. However, what the research illustrates is the importance of how Aboriginal justice staff go about making justice more accessible. They are changing the way justice is done, privileging an Aboriginal cultural mandate or authority in the way justice business is transacted on behalf of the bureaucracy and the judiciary, operating as intermediaries between Aboriginal people and communities and the bureaucracy and the judiciary (Marchetti and Daly 2004; Blagg 2008). So, it is how Aboriginal justice staff make the everyday justice space more accessible that makes this a new 'promising' justice space, bringing everyday justice to Aboriginal people. This chapter explores their activities. It shows how the actions of Aboriginal justice staff in the everyday justice space facilitate Aboriginal people's access to justice. It demonstrates how they engage in activities that directly or indirectly assist Aboriginal people with their legal needs and, in so doing, address Aboriginal people's access to justice. Aboriginal justice staff are making justice more accessible to Aboriginal people and communities (Marchetti and Daly 2004, p. 2).

The employment of Aboriginal justice staff thus complements broader changes to the justice system, such as urban Indigenous courts and circles (Marchetti and Daly 2004), which are aimed at creating culturally appropriate spaces in justice settings. It can also be read as an example of what Harry Blagg describes as governments trying to be 'in-step with emerging national and international good practice where Indigenous justice is concerned …' (Blagg 2008, p. 183).

Designing strategies and programmes that promote everyday justice for Aboriginal people can be complicated, however. For a variety of reasons—and

reasons that are different from those that prevail in the mainstream—Aboriginal people often do not recognise their legal needs as such or ignore legal matters, and their legal needs and matters remain unresolved (Cuneen and Schwartz 2008, p. 39). In particular, given the consequent effects that unresolved legal matters have on Aboriginal peoples' contact with the formal justice system down the line, these unmet needs imply both that the everyday space is of relatively greater importance to Aboriginal people's access to justice and that the strategies in this space may differ from those for non-Aboriginal people. What the findings of Cuneen and Schwartz suggest is that everyday justice needs to be brought to Aboriginal people (Cuneen and Schwartz 2008).

The Study and Its Methodology

Ultimately, a descriptive qualitative analysis provides insights into the importance of what sociologists refer to as 'agency' or the capacity of Aboriginal justice staff to act in relation to the justice system and to change outcomes for or the circumstances of Aboriginal people within the justice system. What is primarily at play is their capacity to privilege an Aboriginal cultural mandate or authority in the way justice business is transacted on behalf of the bureaucracy and the judiciary, which is central to this agency. Arguably, the capacity of Aboriginal justice staff to act and empower Aboriginal people in relation to their legal needs is critical in the sense of changing a system or structural forces that have led to inequality and proportionally greater levels of contact among Aboriginal people with the justice system. Aboriginal agency is contributing to closing the justice gap between Indigenous and non-Indigenous people.

The overall research is focused on closing the gap in urban communities and looks to place-based solutions for doing so (Turnbull 2016). It seeks to understand 'how to create the right conditions for Aboriginal people to feel they can participate … [and also to] identify the significant challenges faced by Aboriginal people and communities in cities and urban regional areas, as well as how all governments—local, state and federal governments can address these significant challenges' (Turnbull 2016). The specific focus of this chapter is on the role of Aboriginal people working in or alongside the justice system as actors and agents, improving Aboriginal peoples' access to justice in the greater Newcastle region of NSW, Australia.

Data for this study are drawn from 71 interviews conducted from the end of 2012 to early 2016 with Aboriginal people working in local, state, and

government departments delivering programmes and services to Aboriginal people; Aboriginal people working in local and regional Aboriginal organisations that are delivering programmes and services in the Newcastle area; and Aboriginal and non-Aboriginal people working in mainstream nongovernmental organisations delivering programmes and services to Aboriginal people in Newcastle. Eleven of the 71 interviews were conducted with NSW government employees, Aboriginal justice staff, working for the Department of Attorney General and Justice and Office of State Revenue, including Aboriginal Sheriffs, Aboriginal Community Justice Officers, local court Aboriginal Advisory Client Officers, Aboriginal Probation and Parole officers, Aboriginal Juvenile Justice Officers, Aboriginal Mediation Advisors, and Aboriginal Mediators. Another six interviews were conducted with Aboriginal staff of Aboriginal Legal Services and the Aboriginal employees of not-for-profit Aboriginal and non-Aboriginal precontact, rehabilitative, preventative, and diversionary programmes and services in the greater Newcastle region. In conducting this research, consent was sought from senior position holders in Aboriginal organisations and government departments to interview Aboriginal justice staff in the greater Newcastle region.

The first section of the chapter identifies the programmes and Aboriginal people working in the everyday justice space in the greater Newcastle region. The second section describes how specific Aboriginal justice workers make the justice system more accessible through specific programmes that not only take Aboriginal justice to Aboriginal people, but also allows Aboriginal justice staff to do business their way.

Making Justice More Accessible in the Everyday Space: What Aboriginal Justice Staff Do

Indigenous identified liaison officer positions, what this chapter defines as Aboriginal justice staff positions, have been created across the NSW justice system in the areas of policing, juvenile justice, courts and tribunals, community and corrective services, and postrelease programmes. As a result, Aboriginal justice staff are employed at all points of contact between Aboriginal community members and the state justice system. They work in various capacities to assist Aboriginal victims, defendants, offenders, and the Aboriginal communities with their justice needs.

Aboriginal justice staff engage in a considerable amount of not only community justice work, but also community work, weaving community justice

into the work that they do with communities, building community trust, and making a difference for local Aboriginal people and their local Aboriginal communities.

> [the Toronto Aboriginal Justice Officer and Toronto Aboriginal Justice Group, which is made up of local Aboriginal Elders,] do so much community work, that it's almost overwhelming. They did the Elders dinner for NAIDOC and they do the sports days, as well. So, there are so many different activities. The White Ribbon Day for domestic violence issues and those sorts of things. They just continue to improve the community, the Aboriginal community, but also those outside the Aboriginal community, because they've been so involved, they have had a real understanding and insight into Aboriginal people and Aboriginal culture (Interview 8).

Aboriginal justice staff in the greater Newcastle region not only 'give a face to the service' through their broader community work, but also build relationships and trust among local Aboriginal people and the local Aboriginal communities, which increases community participation (Andersen 1999, p. 306) and thus community capacity (Gilbert 2012, p. 3; Hunt and Smith 2007). This comes essentially from their desire to 'make a difference' for the Aboriginal community and the lives of local Kooris. Importantly too, because of the community work they do, Aboriginal justice staff get to know their way around the communities in the region, including the families, kinship, and nation groups or subcommunities in community; their genealogies and their family histories; as well as the conflicts and issues within communities.

They also get to know the justice needs of the local Aboriginal communities, where the gaps in community justice are, and what initiatives are needed to respond to the justice needs of local Aboriginal people. The Toronto Aboriginal Community Justice Officer and the Toronto Aboriginal Community Justice Group come together to 'examine crime and offending problems in their communities and develop solutions' (NSW Justice and Attorney-General 2009). As interviewee 17 notes, 'they identify the needs and problems and then identify the programmes that are available to address the needs and problems' (Interview 17). For example, 'They identify the issues in the communities …' (Interview 17). The Toronto Aboriginal Community Justice Officer's role extends beyond examining problems and developing solutions to 'looking after the young offenders and providing support for young offenders when they are brought in' (Interview 19). To illustrate, 'they are down there, making sure that they understand what they are being charged for, but also to make sure that they get home safely and that the police were appropriate' (Interview 19).

Having a community focus in engaging Aboriginal communities is critical to achieve positive outcomes in their area of work. They learn through understanding, knowing, and following the protocols and practices of engaging with the community and they easily navigate their way around community forming relationships with community. They are trusted members of the Aboriginal community, who have their own life stories to tell. As is evident in the following accounts,

> Only because of what I've gone through, but in saying that it does give me a bit better sense and sensitivity to other people within the Court and I can relate to a lot of them… I understand where they're coming from and like myself and the other officer there, we don't judge anyone. We treat them all equally … (Interview 38).

> Like I say, I can understand …. I've walked the same walk. I've been in the same places. I've been locked away in prison. It was part of my life when I was growing up. I did that long walk—I've been to those places. Until I broke that addiction—alcohol and drugs …. I did my alcohol and drugs, certificate four. I have done my medical health certificate four. I did my diploma in community service focusing on drug use as well (Interview 35).

They are trusted because they do not simply do a job. Aboriginal justice staff go beyond duty statements and 'give to' community. They engage in a considerable amount of unrecognised community service. They operate in accordance with an Aboriginal cultural mandate and within the framework of Aboriginal protocols. This is central to their success. For example, along with the Aboriginal Community Justice Officer, who gives so much of her own time to organising NAIDOC week activities through to sitting with young offenders on suicide watch while they are in lock-up, there is the local Koori Sheriff who volunteers to drive the Wungura bus around on Friday and Saturday night. He spends those nights of the week driving the Wungura bus around picking up and taking young Koori kids from parties, venues and those meandering along the streets to their homes, ensuring that they do not end up in lock-up as a result of overzealous policing of Koori kids on the street. Aboriginal justice staff ensure that justice is met by acting as the custodians of justice, such as the justice custodians for Koori kids.

Often what Aboriginal justice workers do is not in their job description. This is a consistent theme emerging from the interview data. That is, Aboriginal justice staff go above and beyond their job descriptions, working out of hours; making their services 'visible to the Aboriginal community' (Interview 9); 'doing work within the community' (Interview 11); and achieving what

police, courts, community offender services, juvenile justice services, and other areas of the justice sector have been unable to achieve. This is reflected in the following extract from an interview with the Aboriginal Community Justice Mediator at the Community Justice Centre, who, in describing her role, highlights how she engages with the local community to improve access to justice for local Aboriginal people.

> I was brought on as the Aboriginal Mediator Advisor. So, it is a designated position. So, that anybody who is from the Aboriginal community, if they wanted to speak to an Aboriginal person on the intake level, that they had somebody that they could identify with. So, that was initially my role and I've been pushing the boundaries as far as making the Community Justice Centre more visible to the Aboriginal community broadly, because they—and it has been a big job, but there hasn't been—the profile of the Community Justice Centre hasn't been as prominent as it should be. But there has been a lot of great work since I've been doing that work.
>
> I've been here five, going on six years now. We have done some great work within the community, as far as—we get a lot of AVOs (Apprehended Violence Orders) from the courts and the huge Aboriginal multiparty AVO's that we get, we've been very successful in those, even when the police have fallen down as far as they're not being able to resolve it. We have come in later and been able to assist in those areas and they've been quite surprised because we sit down with the key people and break down the issues, because often they are generational and because they're multi-parties, there is quite a few people involved. So, we identify the key people first and then the secondary parties involved and sometimes there are third generation parties involved.
>
> So, because there is an understanding of and sense of community and that I know where they are coming from, we've been successful in that area and going, promoting it in the areas like the Aboriginal Knockout. We've had the road shows, which Attorney-General's does. So, they go to various communities and they have—that was initially done by the Births Deaths and Marriages. It was initially about getting out to the communities and having a lot of people register the children that have not been registered for one reason or another and considered remote communities, but not extremely remote.

This Aboriginal justice worker explains how she adopts a restorative approach, which is in keeping with Aboriginal protocols, listening and breaking down the issues, giving all parties a voice, and working through the dispute with the various parties.

As also indicated in the above interview extract, Aboriginal justice staff do not work in isolation. They work as a community and in collaboration, utilising their networks to achieve outcomes, which means Aboriginal justice staff have high levels of social capital. Their community networking is critical to 'doing their job'. This is evident in the following quote from an interview with the Aboriginal Probation and Parole Officer in Newcastle, whose role it is to case manage the reintegration of Aboriginal men, who are on community service orders; probation and parole; and back into society by working closely with other government agencies, nongovernmental organisations, and community groups.

> I do a lot of community networking and liaison. … I'm a member of both Eastlakes and Westlakes Committee. I attend meetings to assist in that a lot.
>
> We ourselves here, especially with the Westlakes, we actually provide our community service offenders or people on community service orders—Aboriginal clients—we actually get them to go to NAIDOC day and help set up marquees, take down marquees, so using NAIDOC day for a normal community service order say, but they get to go to—take their family along with them to the day as well and be part of the community as well, so we'll get there early and set up the marquees and do whatever we've got to do and do a bit of general volunteer work with community service places and then they just have to clear up afterwards.
>
> So yeah, but that's what we're doing with or trying at Westlakes now. Or there's Bahtabah, which is the Eastlakes [unclear], I'm involved with the Awabakal committee. I've been a part of the Awabakal Men's Group here, which is actually based out at Toronto, and that's just where various Aboriginal men perform government services such as Centrelink, the police, (Families and Community Services) (DoCS)… as well coming along and Centrelink and a couple of other organisations.
>
> We'll just sort of get a team together… and it was twofold, like we were trying to engage the men to sort of see what the men want, but also this was a point of contact for the blokes who do want to tap into other services, like Centrelink, DoCS or, with me through my role as the ACSO is now with probation and parole, so that was with the Awabakal Men's group.
>
> Another committee is the Lake Macquarie Aboriginal Community Consultative Group, which is actually called PACC now—I forget the acronym—and that was where the actual police from the local area command of the actual Westlakes local area command and had consultations with people from the community and raise any issues or any concerns or what issues they have with the police, so that's another one I actually do attend.

> I'm part of the Toronto Aboriginal Community Justice Group. In town we just kicked off the Newcastle Aboriginal Hunter Region Agency Committee, so that's various service providers and non-government organisations getting together and just looking at what we can do for the community, but that's mainly based through—done with Mission Australia. Mission Australia has more or less sort of put it together as well.
>
> I do attend a lot of community forums and meetings and that works twofold, because out of that, then when the probation and parole officer needs a service for one of their clients to tap into, I tend to say okay, look, what is at Awabakal for mental health issues to assist in getting assessments, that sort of stuff. So—yeah,
>
> I work in conjunction with the Police state [unclear]. We've got a day at the Glen Drug and Alcohol Rehabilitation Centre [an Aboriginal centre] and today we're having a barbecue to get in touch with the local boys from Baxter Juvenile Justice at Mt Penang are coming down for the day, so yeah, it's a lot of community sort of engagement and …

Aboriginal justice staff are constantly networking with each other, and with the various areas of service provision from housing through to employment. They share knowledge within the community, providing information to Aboriginal people, Aboriginal organisations, and service providers. They are well respected within the Aboriginal community and they are spoken of highly in terms of their capacity to assist Aboriginal people with their justice needs. And, they are valued within the justice system by other court staff, Aboriginal Legal Services and legal aid and magistrates.

They embrace a proactive, problem-solving approach to create solutions that not only meet the justice needs of local Aboriginal people and communities, but also bring justice to Aboriginal people and communities. This is evident in the innovative programmes Aboriginal justice staff develop, such as Yarn Up developed by the Toronto Community Justice Coordinator, and a policy officer with NSW Aboriginal Affairs, as well as the Koori Love Shouldn't Hurt Forum developed by the Toronto Community Justice Coordinator.

> Yesterday, we had what was called a Yarn Up. So, all the services in Newcastle went out to Bolton Point and we sat in a community hall in—they call it the U, and clients would come in and they would just walk around to each table and get assistance from Centrelink, Office of State Revenue, Tenancy, Ombudsman, [Aboriginal Legal Service] (ALS), Legal Aid—all of the local services, so they come to them and identify any problems they have, and fix it from there. Because a lot of people out there won't come into Newcastle or won't know how to get onto the services, so Anita and Alison Edwards out there set that up.

> They're going to try and do it at least every six to 12 months—have the services go to them for outreach.
>
> Yarn Up was a wonderful success. I thought it was really good. It wasn't a high number of people turning up, but it was a really good day. We helped quite a few with fines and assistance in criminal—so, parents who have kids who didn't know that they could access ALS or Legal Aid, who have court matters coming up very shortly but they didn't know who to go to or what to do. So, I think it was a really big success, because people don't really know that they're out there. Parents whose kids—or they've never been to court, or their kids have never been to court, and didn't know what was going on.

Collectively, Aboriginal justice staff are engaged in creating a new justice space, a space in which they are able to improve Aboriginal people's everyday access to justice. They mediate between two worlds making justice more accessible to Aboriginal people and communities (Churney and Chui 2010, p. 280), improving access to justice by going out into Aboriginal communities.

Importantly then, the everyday space is a space in which Aboriginal justice staff are taking justice to Aboriginal people and communities. By doing so, Aboriginal justice staff successfully address the structural processes that create inequity and thus the structural inequality of the justice system. The justice solutions created by Aboriginal justice workers, such as Yarn Up, make the law more accessible to Aboriginal people. At Yarn Up, for example, Aboriginal justice staff not only act to 'identify any problems' (Interview 31), but also help Aboriginal people to understand and navigate the various aspects of the justice system, the very act of yarning (having informal conversations) with Aboriginal people is an act that creates solutions that makes justice more accessible to Aboriginal people. Yarning is doing business the Aboriginal way.

The Everyday Space as a Space for Taking Justice to the Aboriginal People

A key theme underlying the success of the actions of Aboriginal justice staff is how they make the justice system more accessible by going out to Aboriginal communities, rather than Aboriginal people having to come to courts, legal services, and government departments. This is happening both en masse and through individual action.

The en masse approach takes the form of a 'road show' where Aboriginal Legal Services, the courts, and various government departments, go to com-

munities for legal service days. This often includes Aboriginal justice workers from NSW Registry of Births Deaths and Marriages, Office of State Revenue, Fair Trading NSW, Australian Human Rights Commission, Aboriginal Legal Services, Centrelink, Roads and Maritime Services, Transport NSW, and Local Courts forming a road show that visits local Aboriginal urban, regional, and remote communities in NSW.

Individual efforts occur as many Aboriginal justice staff make taking justice to Aboriginal people a part of their everyday jobs. The Aboriginal Client Advisory Officers in NSW Office of State Revenue and in NSW Birth Deaths and Marriages provide two important examples of this phenomenon. They take their work to Aboriginal communities rather than Aboriginal people going to their offices.

Aboriginal people in NSW, and Australia more widely, are over-represented in terms of state debts. Often Aboriginal people do not understand their rights and responsibilities in relation to state debts. The reasons why are varied, but feelings of disempowerment are predominant among them, resulting in a reluctance to initiate contact with the government concerning fines. State debt is having a deleterious effect on Aboriginal people—it is related to contact with minor offending and brings Aboriginal people into contact with the criminal justice system and can lead to incarceration (see above). By recognising Aboriginal people's reluctance to go to government departments and mainstream service providers and instead going out to them, the Aboriginal Client Advisory Officer for the Office of State Revenue helps reduce the unintended impacts and hardships of fines among Aboriginal people, including licence suspension and secondary offences.

For various reasons, including problems registering births or even a bias against registration, it can be difficult for Aboriginal people to get a birth certificate. Yet a birth certificate is important for many citizenship rights. Without one, for example, citizens cannot obtain a tax file number, open a bank account, enrol children in school, participate in organised sports, access social security, or get child support. This too can have a cause and effect outcome in relation to Aboriginal peoples' contact with the justice system, because lack of proof of identity stops Aboriginal people from getting a driver's licence, although lack of a driver's licence does not stop Aboriginal people from driving and often leads to traffic offences. Clearly, the efforts of the Aboriginal Advisory Client Officer in Births, Deaths and Marriages, who promotes the registration of births and helps Aboriginal people obtain birth certificates contribute significantly to the production of everyday justice space.

In the words of another Aboriginal justice worker, the Aboriginal Client Advisory Officer with the Office of State Revenue is 'a miracle worker':

> So, [the Aboriginal Client Advisory Officer from the Office of State Revenue] sat down there [at a Yarn Up], and he probably fixed up five or six licenses. Yes. He's a miracle worker. Yes, he works really closely with our field officer, Cole Skinner who works from Grafton. They recently jumped in a van and just drove around Moree, and pulled people up under trees and went out on the mission, and stopped people in the street and just said, have you got any fines? People would turn around going, yes, I've got heaps—and just fixing them up, setting up payment plans, all that kind of stuff, and got people back on the road.

What this account illustrates is how an Aboriginal justice worker can bring impartiality to Aboriginal people. Making services accessible by going into communities and setting up payment plans to assist Aboriginal people to address outstanding fines—fines which stop Aboriginal people from having their licence and that can have a flow on effect in terms of Aboriginal people's contact with the justice system—were relatively simple activities with significant results. Getting back someone's licence can mean that a person can drive his wife to the hospital for treatment or get a job because she has transport to get to work.

How they take these services to Aboriginal communities is important too. The Aboriginal Client Advisory Officer from the Office of State Revenue has set up state debt payment plans for Aboriginal people on the boot of his car in the rain. In Aboriginal communities, word of mouth is very important and building trust is essential. Terry Cook builds trust through what he does and the way he goes about doing his job. He takes his service to Aboriginal people, and Aboriginal people are keen to approach him about their fines and resolve longstanding debts that are affecting their lives. Like other Aboriginal justice staff, Terry Cook not only has a greater role in the production of the everyday justice space, but is also successful at using this space to 'make a difference' in the lives of Aboriginal people.

Conclusion

This chapter has detailed the importance of Aboriginal justice staff to making justice more accessible to Aboriginal people and communities in the greater Newcastle region (Marchetti and Daly 2004, p. 2). First it shows how the day-to-day practices of Aboriginal justice staff operate to create a new and more accessible everyday space where a wide range of legal services and legal knowledge can be delivered and transmitted to Aboriginal people. This service and knowledge then enables Aboriginal people to address legal problems that

impact on their everyday lives. Echoing Sen, it shows how Aboriginal justice staff connect Aboriginal people and communities to justice and help them improve the lives they are able to lead (Sen 2011, p. xv).

This chapter also signals how Aboriginal people are creating new ways of improving Aboriginal people's access to justice. What Aboriginal justice staff do is treat the everyday justice space as an important justice space for giving Aboriginal people access to and sharing knowledge about legal issues; educating Aboriginal people about the justice system; preventing, identifying, and resolving disputes; addressing many minor legal matters that, if left unaddressed, have a high likelihood of leading to secondary offending; and improving Aboriginal offenders' access to services and assisting with their reintegration into society.

Importantly, it is the how that matters. Aboriginal justice staff are making it possible for Indigenous culture, ways of doing business, and social and political concerns to be brought to bear on the wider justice space. Put differently, Aboriginal justice staff making the justice system more accessible by imposing Aboriginal culture, knowledge, and practices on it, creating a far more successful space than that which operates in the mainstream justice space. The success achieved by Aboriginal justice staff in the everyday justice space is due to the fact that Aboriginal people have been able to shift the social and cultural boundaries of the justice system within this space. It operates as a space in which Aboriginal people recover Aboriginal practices. Arguably then, it better reflects an Indigenous space than existing formal and informal Indigenous justice spaces because there is more freedom and agency for Aboriginal people to create, as well as operate in accordance with, their 'own ways of doing business'. The consequence of doing so should not be underestimated.

Significantly, this could be a key point of comparison of success between this space and the formal and informal justice spaces in terms of Indigenous people's access to justice, and point to why top-down policy endeavours to improve the formal and informal justice spaces in the area of Indigenous access to justice, using the 'culturally appropriate model' in NSW, and other jurisdictions in Australia and in countries like Canada, New Zealand and the United States, have been less successful. While changes to formal and informal justice spaces endeavour to make the formal and informal justice spaces more culturally appropriate, western juridical comportment and practices remain privileged (Rollo 2014, p. 225). For example, although court settings have endeavoured to establish less formal spaces to improve Indigenous peoples' justice, it is white magistrates, court officers, legal representatives, and state officials—not Aboriginal peoples—who produce these spaces. The tendency is for the aestheticised traditions of Aboriginal peoples to be brought

into the court space, making the space and language less formal and placing a greater emphasis on oral representations, while the more complex social and political issues of the court system which disempowers Aboriginal peoples in these legal settings are neglected (James 2013, p. 6; Ciftci and Howard-Wagner 2013). This chapter illustrates the difference made because of the capacity of Aboriginal justice staff to privilege an Aboriginal cultural mandate or authority in the way justice business is transacted on behalf of the bureaucracy and the judiciary, which is central to this agency.

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10

Thoughts on the 'Law of the Land' and the Persistence of Aboriginal Law in Australia

Wantarri Steve Jampijimpa Patrick
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Warlpiri people have lived in their homelands for countless generations.[1] Western Europeans began to intrude into these places only a century ago. Since that first contact, *kardiya*[2] have shot, poisoned, forcibly relocated, and enslaved *yapa*.[3] They have imposed foreign ideas upon *yapa*, and despised *yapa* ways of being—ceremonies, language, relationships, connection to country, cosmology, and law (Reynolds 1987, 1989). Some Warlpiri call this *ngurra-kurlu* (Pawu-Kurlpurlurnu et al. 2008). It is the Warlpiri way of being, and order of things.

In this process, *kardiya* law has acted as the 'cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion' (Chanock 1985 in Comaroff 2001, p. 3). To justify this imposition, in the centuries after first colonisation, English and colonial courts (e.g., Cooper v Stuart 1889 to Milirrpum v Nabalco Pty Ltd 1971) and legal scholars premised their claim of the superordination of *kardiya* law here on the fantasy

This chapter arises from collaboration undertaken in the course of doctoral field research (2010 to date) by Spiers Williams with Patrick and other law men and women of Lajamanu that was made possible by funding from Australian Institute of Aboriginal and Torres Strait Islander Studies and the ANU College of Law, Australian National University. This chapter develops ideas that Spiers Williams presented in an early form (Williams 2012). The co-authors thank Prof. David Nash of ANU for his helpful comments; any errors are that of the authors.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_10

that pre- (and therefore post-) invasion Australia was lawless. As such (the logic goes) this land may as well have been *terra nullius* ('Calvin's Case' 1608 in Blackstone and Sharswood 1866). An alternative coloniser fantasy is that colonising practices successfully eradicated Aboriginal law, perhaps in the magical act of merely planting a flag (cf Webber 1995). Before and since *kardiya* first came, *yapa* law existed and continued. *Kardiya* legal perspectives continue to elide both the existence and persistence of *yapa* law, despite attempts at recognition (e.g., Australian Law Reform Commission 1986) and self-determination.

This essay does not examine these provocations directly. Instead, it centres on *yapa* ontology and suggests that in some Australian Aboriginal communities, the contradictions in Western law are virtually irrelevant. Using a transnational-translocal methodology (Williams forthcoming) that interrogates law from local and global perspectives (Darian-Smith 2013), the research reported here resists perspectives that construct law only in terms of national/international institutions. By asking 'what is law?' from other perspectives, the approach 'de-centres' nation state law (and the agents of such law) and explores the local, liminal, and transnational spaces in which law is generated.

The benefits of this perspective are significant. By 'de-fatalising' (Hage 2009) the construction of law as state monopolised and by examining power from 'below'—from places of local struggle—it may be possible to find the 'emancipatory' potential of law (Santos 2015). And while the perspective may stretch the expectations and experiences of doctrinally trained legal scholars, it may reveal opportunities to define dilemmas or problems more clearly and to conceive key questions more precisely.

To this end, while we recognise the strategic significance of naming the subaltern (Said 1994, p. 217), we choose not to see *yapa* as the 'subaltern'. In *ngurra* ('country'), *yapa* are not 'subaltern' nor 'other'. Rather, from the position of the refugee settlements that have become the homes of *yapa* people (such as Lajamanu and Nyrrirpi), *kardiya* law and *kardiya* society is distant and peripheral albeit intrusive. For residents of Yuendumu, the closest *kardiya* settlement is 270 kilometres away. The court visits only once every month to Yuendumu, every two months to Lajamanu, and not at all to Nyrrirpi. The police station is always on the edge of town, on the road that is closest to the next *kardiya* settlement.

In Lajamanu and Yuendumu, it is Warlpiri people and *yapa* ways of being that are centred. Aboriginal laws and relationships are the priority. They are what inform the everyday. It is *yapa* who 'police' the streets at night, and who manage the fighting that inevitably arises from overcrowded and impoverished living conditions. It is law men and women who remind *yapa* who they

are, how they are connected, and how they derive their identity and clan affiliations from specific places; it is *yapa* who restore balance again.

Despite the ongoing processes of colonialism, autonomy has been maintained. Colonisers have wrought significant epistemological and physical violence on *yapa*, and yet through *yapa* resilience, *ngurra-kurlu* continues, distinctive and rich, adjusting to modernism. We describe here *ngurra-kurlu* and, especially, *ngurra* that continues to be central to Warlpiri people's ways of being and has the force of law in their lives. From a Warlpiri perspective, *kardiya* if not 'sub' (which is contrary to a *yapa* perspective on other beings) are at least 'altern'. This perspective may seem unrealistic given the power of the *kardiya* state, but it is real when one is in the desert with *yapa*.

Pulyaranyi and *Ngurra-Kurlu*

The dominant culture in Australia seems incapable of seeing the *yapa* way of being. *Kardiya* resist historical facts about Australia's past and influence *kardiya* attitudes in the present—this wilful blindness has been so socially inculcated that it seems there is a cognitive filter rendering them impervious to reason. This intransigence constrains *kardiya* from proper dealing with *yapa*. Consequently, *kardiya* continue to disrupt *yapa* people in ways that can cause intense stress, oblivious to the harm done not only to *yapa* but themselves.

Such times of intensity are like the brewing storms that come at the time of Milpirri.[4] From October onwards, the weather builds up. It is hot, humid, and windless. The sky fills with fat clouds that threaten to storm but the rain does not fall. It is too hot, too humid to travel so one must slow down and listen to country. This is when long and important ceremonies are held, like the Kurduju, Jardiwarnpa, or *Pulyaranyi* ceremonies. The country creates the conditions that allow us to reflect more deeply, to talk about difficult things, to reaffirm connection to each and in relation to *ngurra*, and to remember who we are.

It is time to learn from country, to share knowledge, and to make our relationships strong. *Pulyaranyi* is a ceremony that reminds us that action can be taken slowly and carefully only after we sit down to learn (Corn and Patrick 2015). *Pulya* can mean 'quiet, slowly, careful, easy, softly' (Swartz 2012); *pulyaranyi* can mean 'to blow on, inflate, breathe, puff' (Swartz 2012), and evokes breaths of wind. In any time of intense stress, it is time for *pulyaranyi*—the time to slow down, learn, and reflect. Deeper learning takes time.

'*Ngurra-kurlu*' is a *yapa* way to make sense of the concept that land is a basis for jurisdiction; it is also a way to recognise how law and power can be used

legitimately. Nonetheless, we know that it takes time for *kardiya* to understand what *ngurra-kurlu* is. In the spirit of *pulyaranyi*, we do not attempt now to give a complete account of what law is to *yapa*. Instead we offer the reader a simplified and indirect account that traces the meaning of Warlpiri words and the components of *ngurra-kurlu*.

Understanding Who We Are Because of Where We Are: *Ngurra-Kurlu*

To understand *ngurra-kurlu*, one must start by understanding what *ngurra* is. Throughout Australia *yapa* translate *ngurra*[5] as 'country', which is more than 'land'. Grasping *ngurra's* intersecting meanings and contexts can help *kardiya* change perspective and position in relation to other people and our environment. In particular, a better understanding of *ngurra* leads to an appreciation of the deep sentiment that can attach to country, a connection that is as deep as the love for family. Although *ngurra* can be used to mean something other than country, its meaning is always informed by the sense of country.

For example, *ngurra* also can refer to a home, or a camp, or even any place where one habitually sleeps (Musharbash 2009). Wanta explains that for *yapa*, *ngurra-kurlu* is the 'home within' (Patrick and Louw 2016), connoting a sense of belonging and security.

In the *ngurra*, the camp, *yapa* do not sleep alone; they are always with *warlalja. Warlalja* is family, to whom one is related through blood or kin (Hoogenraad and Laughren 2012). Home, then, for *yapa*, is about close kin/family, social connection, inclusivity, and a deep value of relationships with others (Musharbash 2009). This sentiment is closely related to *ngurra* (Musharbash 2009).

Desert people use *warlalja* not as a means to establish a boundary between 'us' and 'them' but as a way to work out how one is connected through skin-names, clan groups, places (Dousset 2013), and the thousands of kilometres of social networks through trade routes and songlines. Western Desert sociology has 'a strongly inclusivist ethos that defines "society" in the widest *geographical* and social terms' [emphasis added] (Tonkinson 2003; see also Dousset 2013). So while dialectical demarcations particularise Australian Aboriginal peoples (e.g., the Tindale map of Aboriginal languages), those lines do not demark exclusion of others. *Yapa* peoples do not imagine their sociality in this way. When *yapa* map their sociality, they speak of trading routes and *jurrkurpa* (Nash 2016) lines that *move* and *intersect* not bound. This is not to

suggest anyone can simply enter *yapa* country without regard to those who belong to it: one can cross those language lines, provided one is respectful and understands how to behave in *ngurra*. When *yapa* meet, they describe their relationships across the country as 'one mob', 'all family', 'all close', and 'all waltya' (Myers 1988). *Yapa* use the same word, *ngurra-jinta*, to describe the close kin with whom they live everyday in the camp, as they do to describe a person they have just met from a distant tribal group, which is cognate to the English term 'countryman'. For example, at meetings of people who come from multiple tribes, *yapa* will repeat that they are 'all one country' and call each other '*ngurra*-jinta' or 'countryman' (Myers 1986). The derivation of *ngurra*-jinta from *ngurra* reflects that one's relationships are all *through* and *because of* country, and because one *shares a relationship with* country.

Yapa people identify so closely with country that they 'are' country. This logic means *yapa* are in relationship with everything in country: *warlalja* includes kinship to people, places, and things. Put differently, plants, animals, rocks, and so on, can all have skinnames. *Yapa* do not aim to dominate these other things/beings. Rather, 'emphasis [is] placed on shared identity [through *ngurra*] with others as a basis for social interaction' (Myers 1988; also Dousset 2013). Because one is in relationship with these things and places, one has obligations to them all. This is law.

Ngurra-kurlu is a term that Warlpiri have begun using to explain their holistic ontology: *ngurra-kurlu* is the whole of *ngurra* or *walya* (country), *kuruwarri* (here, meaning the law), *juju* (ceremony), *jaru* (language), and *warlalja* (family or skinname). In this worldview, land is home. It is where you are with your kin, where you have a name, and where plants, animals, and places also have names and have agency (see, e.g., Povinelli 1995). One has kinship with everything in *ngurra*, and this kinship is reflected in the responsibilities that one has in this place and, therefore, in what one (should) do. Elsewhere, Wanta explained *ngurra-kurlu* this way:

> [a]ll these things govern *yapa* lives; this is *ngurra-kurlu*. Everyone in their own way in Australia, in this land, has this. Everybody. These five things. *Yapa* have all of these. Lines joining circles: All of these are connected to each other. If the skin name is not strong, if we don't use it according to our marriage system law, marrying to the wrong skin group, these others will not be strong as well. Even our language; if it is not strong the other four principles will not function well too. This one too, the law; if we become lawless, both the country and *yapa* will become sick. And this one as well, ceremony; if we don't respect our ceremonies and the rituals that belong to skin groups we will become sick and the country will become sick as well. If we disrespect the land we will forget what the land is trying to say. We will disappear as Warlpiri people. (Pawu-Kurlpurlurnu et al. 2008)

These ideas and patterns—interconnectedness, inclusivity, egalitarianism, and relational autonomy—are manifest in Aboriginal law because, of course, law is culture (Mezey 2001).

The Radical Alterity of *Kardiya* Law

When Westerners came to the desert, they did not know how they should be on country and how they should engage with the *yapa*. They did not, and many still do not, do what the law demands. *Yapa* continue to try to explain to *kardiya* about the law and the importance of *ngurra*, but most *kardiya* do not seem to understand.

This may be because *kardiya* have been more affected by 'things'. Since the arrival of Europeans, *yapa* have become more aware that things can alter who you are, how you relate to country and how you can be on country. When people came in from the desert, some were forced and some walked in, but like the Pintubi, 'they did not know that they could not go back' (Myers 1991). The use of houses and Western agricultural foods, for example, meant that they softened and could not live as they used to. These 'things', used much longer in *kardiya* culture, seem to have affected *kardiya* attitudes to *ngurra* and misled *kardiya* to think that one can control country. For example, machines like mining equipment give power over land, and buildings seal us from the effects of country so we do not need to pay attention to country or respond to its demands. As a result, we may become indifferent to country and instead prioritise humans and human relationships.

This indifference to country may explain why *kardiya* law focuses on disputes between humans (or our organisations), has hierarchical power structures, and values individualism. To *yapa*, the orientation is improperly anthropocentric, placing humans superior to and separate from country. Even though *yapa* now use machines and 'things', country remains central. Given these fundamental—and radical—differences between *kardiya* and *yapa* ontology, it is unsurprising that *kardiya*, even those who want to, cannot understand what is Aboriginal law.

Yapa law distributes authority, knowledge, and responsibility. By tradition, the most senior people in the community hold the most sacred ceremonial knowledge. That knowledge is distributed among them based on their complex interrelationships with skin groups, moieties, and clans with country affiliation. Aboriginal law is performed through these relationships. When Wanta draws *ngurra-kurlu* in the sand, one can sense the holism of *yapa* law,

and the broad distribution of authority in *yapa* society (kangaroovindaloo 2008). Put differently, the holistic relationship with country is reflected in the horizontal and layered kinship structures through which the law is deployed.

A simplified way to describe responsibility in Warlpiri law is to describe the roles played in ceremony. Warlpiri kinship structures determine ceremonial roles. For example, group A will direct group B to perform a ceremony and ensure that it is done correctly; group B will direct group C to perform a different ceremony or dance; in turn, they will direct Group C to do their dance properly (see also Pawu-Kurlpurlurnu et al. 2008). This system maintains individual roles, relationships, and obligations in balance. If depicted graphically, it would be horizontal and four cornered, in distinction from, for example, the hierarchical pyramid that depicts a feudal system and elevates an individual at its apex. If one can grasp this horizontal and distributed system of responsibility, then one can understand better the non-individualistic, communal perspective held by *yapa* people, who believe that an individual's skill is exercised for the benefit of all in the group (Altman 2011; Myers 1991, 95ff, 156ff) and that authority cannot culminate in a single tribal leader.

Many Australian Aboriginal peoples are dissimilar in this respect to some other Indigenous systems of law that western European colonisers encountered—a fact that may explain in part why some Europeans claimed there was no system of laws in pre-invasion Australia. When western Europeans moved into the Tanami desert, they imagined the desert as empty or dead. By contrast, *yapa* there had already imagined it, sung its ongoing creation, known it through dreaming, listening to and being part of country. Failing to see this, current *kardiya* perceptions of Aboriginal law are, at best, a crude reduction of a complex system regulated by people and by country. This ignorance and their denunciation of *yapa* punishment is connected to *kardiya* insightless about the violence in the state criminal justice system.

An example of this reduction is the popular use of the English word 'payback' for traditional Aboriginal dispute resolution. 'Payback' has become synonymous with tribal punishment, specifically, spearing of the leg; often it feels as if *kardiya* reduce all of Aboriginal law to this. Yet the term 'payback' and *kardiya* understandings of it overly simplify a complex and considered process that Jerry Jangala Patrick (2014) called '*yaru mani-kujaku*'. *Yaru* means 'peace' and *mani-kujaku* to save or rescue from something (Patrick 2014; Swartz 2012). Used in combination, these words indicate that the process is designed to 'save' the community from 'lawlessness' and to achieve peace.

Yaru mani-kujaku, then, is a process of restoration and balance. It is the whole-of-community response to a disruptive event, taking into account all of

the relationships and their country. It is about individuals meeting obligations and performing responsibilities, about relationship being strengthened, and about community coming together. In its everyday instantiation, *yaru manikujaku* only threatens serious physical punishment. In sum, Aboriginal dispute resolution does not always result in physical violence or specifically in the spearing of the leg—and yet this complex iteration, and reiteration, of Aboriginal law from the everyday to the ceremonial is misrepresented as 'payback' by *kardiya*.

Epistemic Violence in the Suppression of Aboriginal Law and Cultural Practice

The cultural and legal differences between *yapa* and *kardiya* are radical, so one can seem inconceivable to the other. But consider: law exists as a part of the phenomenon of culture. To put it another way, law is an expression of culture. To resolve an aspect of legal difference by crushing it necessarily results in suppression of the culture that produced that law. This is epistemic violence (Spivak 1988, 71): it indiscriminately stigmatises and suppresses sentiments, and ways of being and of knowing.

Now consider this: culture is a way of understanding the pattern and variation of ways of being in a social group, but culture recognises the potential for social groups to influence each other in 'contact zones' (Pratt 1992) or 'interstitial spaces' (Bhabha 1994). Influence on each other is inevitable, and how we treat another influences our own culture and law. For example, suppressing Aboriginal law, offends principles of substantive equality (Bugmy v The Queen 2013), produces racial discrimination, and breaches international law (United Nations Declaration on the Rights of Indigenous Peoples 2007, Articles 3–5, 9, 11, 18, 25, esp. 27). A better response to the differences between *yapa* and *kardiya* law would be to recognise that *kardiya* law/culture has the capacity to change and identify ways to support *yapa* ontology (sentiments, values, and ways of being) within or 'beside' the dominant society's legal framework, that is, find ways to make Aboriginal law commensurable, however unimaginable this may seem now (Povinelli 2001; cf Dennison 2014). Unfortunately, laws that stigmatise Aboriginal difference inhibit *kardiya* policymakers and lawyers from doing this.

An example of *kardiya* suppression of Aboriginal law is a federal legislative provision that prohibits a judicial officer, when sentencing, from taking customary law or cultural practice into account to determine the seriousness of the criminal behaviour (Crimes Act (1914), s.16AA(2A); Northern

Territory National Emergency Response Act (2007), s.91—repealed) ('the provision'). In one superior court case, the judge impliedly determined that despite its racially neutral expression the federal parliament intended the statute to refer to the cultural practice and customary law of Aboriginal people (R v Wunungmurra 2009). That interpretation did not address the conundrum that it generated: every court sentencing is required to make sense of the offending behaviour in light of cultural practice, so ignoring cultural practice should make sentencing impossible. In fact, the judge's uncritical interpretation instantly transformed *kardiya* cultural practice into what is normal or 'right' and indicated that it is legitimate to exclude Aboriginal law and cultural practice when determining the context and, hence, the criminality of behaviour in our society. Effectively, the decision in Wunungmurra confirmed the non-consideration of evidence relevant to a defendant's case and simultaneously reiterated the stigmatisation of Aboriginal law and cultural practice.

Dickenson and Ors (2010)—which may be the first case in the Northern Territory of Australia where part of a process of *yaru mani-kujaku* was prosecuted[6]—demonstrates the contradictions of the federal provision that were not resolved in Wunungmurra. In *Dickenson and Ors*, the family and clan of a young man that had been killed were involved in a large fight, which was part of *yaru mani-kujaku*. Despite being engaged in Aboriginal law and related cultural practices, the participants were prosecuted with charges of 'riot' and 'carrying offensive weapon'. The provision prohibited the judicial officer from taking law and cultural practice into account when trying to make sense of the offending behaviour, regardless of its relevance.

Ignoring the Aboriginal legal and cultural context of the fight would have reduced the defendants' behaviour to irrational and purposeless conduct. To address this potential misinterpretation of the defendants' actions, their lawyer made submissions about the *yaru mani-kujaku* process and about the defendants' belief that the dispute was now settled. He explained that all the defendants had behaved how they believed they were required to behave in accordance with Aboriginal law, and that all were grieving the loss of a young man. Several of the defendants were of middle or advanced age, had no or negligible criminal history, and had good character—considerations that normally would result in a sentence at the lowest end of the range. Instead, the magistrate gave greater weight to the social and political context that the provision expressed, that is, the hardening of attitudes to legal pluralism and cultural relativism. He declared that 'the days of customary punishment are over' and made other remarks denouncing *yapa* processes before sentencing all of the defendants to full-time imprisonment of several months. He took Aboriginal law into account and aggravated the penalty.

The unusually heavy penalty suggests that the magistrate did not give sufficient weight to good character, so that the sentence could be arguably (on appeal) manifestly excessive. Moreover, it appears that, in noncompliance with the provision, the magistrate *did* take the context of Aboriginal law into account because he used it to aggravate the seriousness of the offence. He used it to justify applying principles of general deterrence—that is, ordering a harsher penalty to these defendants (more than they would have received if they had been sentenced for the offence alone) to warn other *yapa* who might commit similar 'crimes' in future that if they did they would be dealt with harshly.

For *yapa*, this prosecution rendered *kardiya* law irrational, offensive, and contrary to their belief that the fight was part of *yaru mani-kujaku* and would restore balance again. They were baffled that the court justified the sentence on the basis that their fighting was 'violence', yet did not acknowledge that ordering the defendants' imprisonment, and removing them from country, clan, and family, was also a form of violence.

'Two Laws Together Under One Law'

In 2011, the law men and women of Lajamanu Kurdiji Law and Justice Committee presented a departing magistrate with a *kurdiji* (shield) depicting the two laws, *kardiya* and *yapa*, side by side under one law. That one law is from *ngurra*, from country—home to both *kardiya* and *yapa*. While we still cannot imagine how much *yapa* law could be commensurable with *kardiya* law, *yapa* (being 'bicultural') can see how in some respects it is possible, and also see how the two laws can coexist.

For example, the law men and women and the *yapa* night patrols keep the peace in many communities. Where there is fighting, the negotiators involve appropriate kin of the troublemakers, reinforce their connection to each other, and remind them of the places through which they are connected. This is startlingly effective; hostile confrontations dissolve into heartfelt reconciliation (Williams forthcoming). But sometimes a troublemaker will not settle down, usually because he or she is drunk. *Yapa* modify their response to achieve their objective of restoration of balance, and to this end sometimes they call upon the police to force the troublemaker to desist. Using police in this situation is not failure of *yapa* law, but is a way to facilitate *yapa* law. While police have power to arrest, and so on, under *kardiya* law (e.g., for violating alcohol prohibitions or for disorderly conduct), this does not mean that *yapa* law is not being upheld—instead, there is a *coincidence* of laws.

This example shows it is possible for the two laws to work adjacent to each other but as well as together, and that in doing so can enhance the strengths of each system, despite being grounded in radically different perspectives. This potential is currently quelled by contemporary *kardiya* law and justice practices that suppress *ngurra-kurlu* (of which *yapa* law is part).

Conclusion: Defatalising the *Kardiya* Gaze

In this chapter, we have attempted to disrupt the *kardiya* foreclosure on the possibility of *ngurra-kurlu* (the Warlpiri 'order of things') and thereby create the possibility to imagine that 'two laws can be under one law'. Using a simple descriptive process, we hope to have made the *kardiya* order of things seem less 'common sense' or 'natural' and given some insight into why *yapa* may find this strange. From a *yapa* perspective, *kardiya* ways of ordering indicate *their* 'radical alterity' (cf Baudrillard and Guillaume 2008) and *kardiya* concepts seem 'inconceivable' (cf Povinelli 2001). These ideas drawn from subaltern studies were created to 'save' the way of being of the Other. In othering *kardiya*, our purpose here is not 'save' the *kardiya* way of being (unlike that of the *yapa*, it is at no risk of annihilation), but rather to challenge the application of *kardiya* law as if this is an 'empty land' and without regard to the epistemic violence that suppression of Aboriginal law can cause.

Kardiya law, like all law, arises from, is responsive to, and affects its social context: law is culture (Mezey 2001). Originally, the human society to which *kardiya* law responded was only that of the coloniser. But the society and culture of late modern Australia is at least that of the coloniser settler *and yapa*. Thus, to the extent that Australia aspires to be a nation of human rights and substantive equality (cf Pratt 2006), the substantively unequal treatment of *yapa* people is increasingly hard for late modern Australians to deny or obscure. This suggests that in Australia we should desist practices that produce colonising effects and instead recognise that the state's responsibility to serve its citizens extends to Indigenous peoples. Application of state law without regard to *ngurra-kurlu* can result in the improper interference with the autonomy, responsibilities, and obligations of *yapa* people. Ignoring *ngurra-kurlu* generates odd justice effects, contrary to both *yapa* and *kardiya* values. Ignoring *ngurra-kurlu*, in effect insisting this place was and is *lexus nullius*, undermines the operation of both *yapa* and *kardiya* law. State law has the capacity to adapt and change, and has the potential to be responsive to social values. If state law actors can come to understand *ngurra-kurlu*, or at least the skin of it, then state law could be emancipatory, rather than oppressive or crudely indifferent to *yapa* sentiment.

Notes

1. Aboriginal people have been on the continent of Australia at least 57,000 years (Thorne et al. 1999).
2. *Kardiya* is a Gurindji word that Warlpiri have adopted that broadly means non-Aboriginal people (Swartz 2012), but can have particular meaning depending on the context; here we mean western European-descended, settler-colonisers in Australia.
3. *Yapa* literally means 'people'; often used to mean only 'Warlpiri people', in context it can mean 'Aboriginal people' in continental Australia. *Cf* '*Kardiya*' above n2.
4. Milpirri is a bi-annual festival held in late October in Lajamanu. This discussion of *pulyaranyi* is drawn from discussions with collaborators in Lajamanu in 2012, when the theme of Milpirri was *Pulyaranyi* (see Patrick 2015). Jerry Jangala Patrick described *pulyaranyi* as a ceremony in which he participated as a young man, before Warlpiri people were forced to move to Hooker Creek 'Native Settlement' (now Lajamanu) around 1952 (personal communication with Williams 2011, 2012).
5. Other dialects call 'country' *ngurrara*. For example the Walmajarri, Wangkajunga, Mangala, and Juwaliny peoples, who painted their *ngurrara* to claim native title (O'Donoghue 2001, ix).
6. There are earlier cases in the Northern Territory courts where defendants claimed 'payback', but were not, in fact, instances of lawful processes of *yaru mani-kujaku*.

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Part III

New Tools and Partnerships

11

Building New Traditions: Drawing Insights from Interactive Legal Culture

Jennifer Hendry and Melissa L. Tatum

Within the legal academy in the United States, there is general agreement that the US legal order does not deliver justice for Indigenous peoples. Criticisms in this regard are plentiful and varied, ranging from charges of colonialism, racism, patriarchy, and entrenched hegemony, to an over-reliance on adversarial structures and processes (Getches 2001–02). It is notable, however, that while these discussions may reference tribal custom and tradition, they tend not to do so in the context of the existing body of literature regarding legal pluralism. Indeed, these discussions usually omit any recognition that the legal orders of the United States and its Native nations exist in circumstances of legal plurality, by which we mean the situation whereby competences and responsibilities are divided across federal, state, and tribal courts, with the ultimate goal of giving effect to local and culturally specific normative practices within what is still a fundamentally centralised legal system. Indeed, this situation is paradigmatic of John Griffiths' definition of legal pluralism as 'the messy compromise [that] the ideology of legal centralism feels itself obliged to make with recalcitrant social reality' (Griffiths 1986, p. 7). It is further worth noticing that, while this 'compromise' situation is *prima facie* successful in its

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_11

operation, not only are tribal jurisdiction and authority both tightly bounded (National Farmers Union Ins. Cos. v Crow Tribe 1985) but that by declaring that the existence and extent of tribal jurisdiction is a federal question, the US Supreme Court has anointed itself as the ultimate arbiter on any dispute arising from Indian Country (18 U.S.C. 1151).

A number of difficulties arise from the combination of this situation of legal plurality and the failure to recognise it as such. First, and despite the decision in *National Farmers Union* that tribal remedies must be exhausted before the dispute is brought to federal court, the Supreme Court still sits at the apex of the US legal order, thus embodying a strong centralising force (Koehn 1997). Importantly, this force has also tended to be a homogenising one, often serving to eliminate vital contextual differences in tribal legal features and practices. This resultant decontextualisation lies at the heart of much of the dissatisfaction in both tribal communities and the legal academy about the quality of justice that tribes receive in federal court (Hendry and Tatum 2016). Second, taking recourse to not only the federal legal order but also its specifically adversarial procedures forces the dispute to be viewed in terms of binary oppositions and as competing claims to the truth. Such polarised debates, however, have the effect of 'distort[ing] the truth, leav[ing] out important information, simplif[ying] complexity, and obfuscat[ing] rather than clarif[ying]' (Menkel-Meadow 1996–97, p. 7), with the result that complex cultural issues are distilled into tropes that are often unrepresentative of lived experiences. Third, while historical experience has done little to reassure Indigenous peoples that justice can and will be delivered by the courts of the conqueror,[1] contemporary critical analysis often proceeds from a premise of deep-seated antipathy to the federal court system in general. Importantly, these critiques are sceptical of the system's operation, with the whole system understood here as innately 'Other'.

Considering that the insights provided by it are so useful, it is therefore curious that a legally pluralist approach garners so little attention within this particular US academic field.[2] We make two related observations in this regard. The first concerns the discrete function of law school in the United States as providing professional legal training. Perhaps unsurprisingly, the focus has traditionally rested less upon legal theoretical approaches and more upon practical considerations centering on the doctrinal detail of the law, the facts of the case, and relevant public policy. With respect to Federal Indian Law more specifically, this disconnect with theory is built into and reinforced by the foundations of the field. The first wave of academics specialising in and even responsible for creating it as a separate area of academic study were public interest lawyers who had left practice to take up academic positions in

universities and who brought their passion with them (Getches et al. 2011, p. v). Whereas the public interest roots of the discipline have always meant strong connections with the Indigenous communities it serves, a corollary is that it has been and remains somewhat atheoretical. And although the past two decades have witnessed a small injection of legal theory into the field, this influence is rooted almost exclusively in critical legal studies and, more specifically, critical race theory (Getches et al. 2011, p. vi, cf). This chapter argues that strong engagement with legal philosophical and sociological theories has the potential to introduce fresh insights into well-rehearsed debates.

Our second observation here is that, in addition to being generally atheoretical, the sub-discipline of Indian and Indigenous Peoples Law is identifiably monist in its outlook. As we will outline, this field's current approaches to Indigenous justice all propose either engagement with the US legal order, notably in terms of rights discourse, or a rejection thereof. Neither, remarkably, employs legal pluralism to argue that tribal legal orders are legal-culturally distinct, in a situation that we believe is a crucial oversight. This chapter, therefore, adopts an unabashedly legally pluralist position, taking the stance, moreover, that such an approach is 'inherently connected to the concept of legal culture due to the potential for multiplicity included in the designation of "legal" as something both conceptually and characteristically variable' (Hendry 2017, p. 188). We employ the concepts of interactive legal culture (Hendry 2017) and jurisgenerativity (Cover 1983) to draw attention to those processes of social learning that result from the necessary interactions of legal cultures under circumstances of legal plurality, and argue that it is only under circumstances of genuine reciprocity between and among legal cultures, both dominant and non-dominant, that effective communication can be achieved in such situations of plurality.

To support this reasoning we outline three case studies whereby Indigenous communities have translated specific culturally normative practices into readily identifiable (i.e. to the US legal order) legal forms. The aim in providing these examples is twofold: first, to highlight the real benefits to be achieved by casting existing tribal normative practices into recognisable legal procedural forms—benefits that have often gone unnoticed by legal pluralists fixated on the normative over the structural or stylistic—and, second, to draw attention to the fact that a lack of reciprocity on the part of the dominant US legal culture means that these benefits have been necessarily limited. Our conclusion, however, is an optimistic one. Interactive legal culture within this context has, we argue, radical conceptual potential, not just to give rise to new communicative practices but also to lay a foundation for discursive approaches capable of underpinning new, mutual traditions.

Contemporary Approaches in Indian and Indigenous Peoples' Law

Current approaches in the field of Indian and Indigenous Peoples' Law can, we argue, be separated into two camps, although it should be noted that, at their core, these are united by the question of whether justice for Indigenous peoples can be achieved through the American courts. Both approaches recognise the asymmetry inherent in the existing legal order, whereby the 'justice' process is administered and controlled by a dominant legal culture with/in which tribal systems and Indigenous individuals must necessarily interact. Yet it is here the two camps begin to diverge, with each presenting different arguments concerning what is perceived as a lack of fairness within the US legal order. In this regard, the first camp prioritises human rights and rights-based approaches, placing emphasis on the innate potential of international and domestic rights to achieve justice by means of currently existing structures. The second camp, by contrast, takes the critical position that the legal system is built upon an irretrievably flawed premise, which is to say, that justice cannot be achieved within a patriarchal (post)colonial order, and advocates either full withdrawal in favour of separate tribal legal orders or a fundamental restructuring of the existing system. Our analysis covers each of these in turn with a view to outlining what we consider to be their shortcomings. First, however, we provide a brief overview of the US Supreme Court's jurisprudence that caused this lack of faith in the system.

Vacillations in the US Supreme Court's Indian Law Jurisprudence

Until 1978, the US Supreme Court was generally protective of tribal sovereignty. Although the Court held that tribal governments had been absorbed into the US political structure, it did, for example, find that tribes retained some degree of sovereignty and governmental authority (Cherokee Nation v Georgia), that only the federal or tribal government could waive a tribe's sovereign immunity (U.S. v U.S. Fidelity & Guaranty Co.), and that non-Indian businesses who come on to the reservation to do business must take grievances to tribal court (Williams v Lee).[3]

In 1978, the US Supreme Court issued two decisions—*Oliphant v Suquamish Indian Tribe* and *United States v Wheeler*—that signalled the start of a two-decade-long roller-coaster ride for those who worked in Indian law. In *Oliphant*, the Supreme Court declared that tribal governments lacked the

ability to prosecute non-Indians who committed crimes in the tribe's territory. *Oliphant* represented a stunning departure from accepted legal principles, with the Court concluding that a non-Indian man who lived on the reservation could not be expected to know that assaulting a tribal police officer and resisting arrest were violations of tribal law. In reaching its conclusion, the Court quoted from its 1883 decision in *Ex Parte Crow Dog*, which held that federal courts lacked criminal jurisdiction over Indians in Indian country, for the reasons that this would effectively:

> [Judge] them by a standard made by others and not for them . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. (435 U.S. at 210–211)

Wheeler was a federal criminal case under the Major Crimes Act (25 U.S.C. 1153), in which the defendant argued that Fifth Amendment's Double Jeopardy Clause barred the federal prosecution because he had already been sentenced for the same conduct in tribal court. The Supreme Court rejected this argument by extending the so-called Dual Sovereignty Doctrine to encompass tribal governments. The Double Jeopardy Clause prohibits multiple prosecutions by one government for the same acts, but the Dual Sovereignty Doctrine holds that since the federal and state governments derive their sovereignty from separate and independent sources, they are not the 'same' government for purposes of Double Jeopardy. *Wheeler* found that tribal governments also derived their sovereignty from a different source than the federal and state governments, and thus tribal governments were also separate governments for purposes of double jeopardy.

Over the next 20 years, the Supreme Court would follow *Wheeler* with cases such as *Oklahoma Tax Commission v Sac & Fox Nation* (upholding tribal taxation authority) and *National Farmers Union Ins. Co. v Crow Tribe* (requiring exhaustion of tribal court remedies). Oliphant was followed by cases such as *Montana v United States* (restricting the ability of tribal governments to regulate non-Indian hunting and fishing) and *Strate v A-1 Contractors* (restricting tribal court jurisdiction over non-Indians). By the late 1990s, a new pattern had emerged, one that revealed a new conception of tribal sovereignty. The Supreme Court's jurisprudence recognised tribal sovereign authority over tribal members and those who otherwise voluntarily associated with tribal governments, but did not recognise tribal sovereignty over those who were not members of the tribe. This new conception of tribal sovereignty, one that views sovereignty as 'membership-based' rather than 'geographically

based' (Dussias 1993), is a very strange and limited view of governmental authority.

The Court's 2001 decision in *Atkinson Trading Co. v Shirley* sharply illustrates how the Court's new approach to tribal sovereignty diverged from its approach to the authority of states and of the federal government. One of the core powers of a government is the ability to levy taxes, and one common tax found throughout the United States is a tax on hotel rooms. When the Navajo Nation imposed such a tax, however, it was challenged by the owners of a hotel located on land within the boundaries of the Navajo Nation but owned by non-Indians. According to precedent, non-Indians who come onto the reservation to do business are subject to tribal law, but the Supreme Court saw fit to narrow the definition of 'doing business' to require a contractual relationship between the non-Indians and the tribe or its citizens, rejecting as insufficient the fact that Navajo Nation fire, police, and paramedics were first responders to incidents at the hotel. This requirement is shown in sharper relief when cases involving the equivalent state taxing powers are scrutinised: notably here there is no inquiry into whether the state or a private party owns the parcel of land in question, nor do they require the existence of a contract before allowing the state to regulate the conduct of noncitizens. This coupled with a rejection of the evidence that the tribal government funded emergency services is a clear demonstration of how this view of tribal sovereignty differs from state governmental authority.

The Court's decisions also clearly signalled that the interests of state governments will supersede those of tribal governments. This pattern is illustrated by the Court's 2001 decision in *Nevada v Hicks*, a case involving state game wardens investigating allegations that a tribal member had shot and killed a protected species off the reservation. The state game wardens twice obtained a state search warrant for the tribal member's house, which was located on trust land within the reservation. Each time, the wardens took the state search warrant to tribal court, obtained a tribal search warrant, and jointly executed the warrants with tribal law enforcement. No evidence of wrongdoing was found during either search, although officers did damage some property in the process of conducting the search. The tribal member filed a civil suit in tribal court, and one of the primary issues was whether the tribal court had jurisdiction to hear the suit against the state game wardens. Under well-established precedent, tribal governments and tribal courts possessed civil jurisdiction over all persons present on trust land within the tribe's reservation. Instead of following that precedent, the Court forged a new test, saying that when the non-Indians in question were state law enforcement investigating off-reservation crime, the Court must balance the state and tribal interests.

Interestingly, the Court never identified a single tribal interest but rather proclaimed that the state interest in law enforcement outweighed any possible tribal interest.

Thus, by 2001, the US Supreme Court had completed its shift from protecting tribal governmental authority to viewing it less as the authority of a sovereign government and more like the authority a private club possesses over its members. This limited conception of tribal sovereignty has continued to dominate the Court's Indian law jurisprudence through to the present day.

Responses to the US Supreme Court's Jurisprudence

As the Supreme Court's erratic and vacillating path through tribal governmental authority coalesced into a steady course of ever-decreasing recognition of tribal sovereignty, many academics and Indian law practitioners began losing faith in the willingness of the Court to deliver justice for Indigenous people. By 1991, noted scholar Rennard Strickland declared that:

> In the field of Indian law, we are witnessing the collapse of twentieth century law as the weapon of preservation and a return to the nineteenth century use of law as the weapon of genocidal homogenization. (Strickland 1991, p. 484)

The preface to the sixth edition of the major textbook traced the changes:

> More than eighty percent of the cases in this volume did not exist when the first edition came out in 1978. . . . The third edition saw several major changes. . . . Most striking . . . was the inclusion of new cases that were apparently out of step with the most venerable and reliable principles in the field. . . . The fourth edition confirmed a continuing trend of Supreme Court decisions that departed from the foundation cases. . . . The fifth edition demonstrated that in many ways, Indian law has reached a crossroads. . . . The sixth edition . . . will be the first edition of the casebook unable to report on a significant advance or defense of tribal interests in the federal courts. (Getches et al. 2011, pp. v–vii)

In response to this shift in Supreme Court jurisprudence, some—such as the newly created Tribal Supreme Court Project—sought to be more strategic in the selection of which cases to prosecute in the federal courts (Labin 2003). Others turned to international human rights as a means through which to put pressure on domestic courts (Williams 1990), while still others abandoned recourse to the courts altogether in favour of seeking administrative or

legislative solutions (Tatum and Shaw 2014). We explore these responses in more detail below.

Rights-Based Responses

Those whose preference is to bring the fight using the language and practice of human rights operated—and continue to operate even in the face of limited success—overwhelmingly within that paradigm. They argue, under the aegis of either the guarantees found in the US Constitution or those enshrined in international human rights documents, that more rights, *better* rights, will serve to bring about justice. More than any other, this approach has characterised the discipline, although, and as discussed above, there was a clear loss of faith in the US Supreme Court after its 2001 decisions in the cases of *Nevada v Hicks* and *Atkinson Trading Co. v Shirley*.

Those focusing on US Constitutional guarantees argue that tribes have been *de facto* incorporated into the US federal structure and the rights guaranteed in the Constitution should guide the development of a new foundation for federal Indian law (Skibine 2014; Frickey 1999). Others look to specific areas such as criminal justice, with its robust rights scheme, to help guide the next wave of tribal self-determination (Washburn 2006).

Other scholars look beyond the domestic options and take the view that international human rights documents provide a more suitable vehicle for articulating and resolving the grievances of Indigenous communities. Importantly, this vehicle provides a viable alternative even for those disillusioned with arguments, promulgated by a reactionary Supreme Court. Williams draws attention to this issue, noting that:

> The principle of exclusive domestic jurisdiction central to European legal discourse on the Indian, has conveniently operated to force tribal nations to litigate their disputes with the conqueror's subjects, or the conqueror itself, under the eurocentric vision of justice dispensed by the conqueror's courts. . . . An unfettered access to international domestic legal forms could provide tribes with the political leverage needed to force their colonizers to defend their abusive, anachronistic and racist vision of Indian status and rights before the world community. (Williams 1986, pp. 293–4)

While a rights-based approach does have inherent appeal, especially for those steeped in the individualistic Anglo-American legal system, they have limited utility and are effective only under particular circumstances. As we have argued previously, such approaches are simply not suited to the task of

achieving justice relative to many of the issues facing Indigenous individuals and communities, on the grounds that they suffer from three key problems: '[they privilege] (the worldview) of the dominant legal culture; . . . artificially restrict . . . the conversation about causes of and solutions to problems of Indigenous justice; and . . . mask . . . the inherent tension between human rights and legal pluralism' (Hendry and Tatum 2016, p. 354). Common to all of these issues, moreover, is the concern that procedure can oftentimes end up serving as a proxy for justice. That is to say, that the formal appearance that there has been a 'day in court' or even a decision ostensibly in favour of the Indian cause according to the rules of the dominant legal culture can hide the fact that the justice they were seeking has not been acknowledged, let alone delivered.

Many of our criticisms of rights-based discourse—specifically that it operates within a legal paradigm that is neither neutral nor impartial but patriarchal and hegemonic, and which nakedly facilitates the perpetuation of existing power asymmetries—are drawn from critical legal studies, critical race theory, and radical feminism. As we explore in the next section, however, while these critical responses are excellent at identifying problems, they oftentimes stop short at identifying viable solutions. After briefly exploring the arguments of the critical camp, we turn to consider how engagement with theoretical work on legal pluralism and legal culture can provide insights useful for achieving workable solutions.

Critical Responses

We use 'critical' here as a term of art; the camp we label 'critical responses' is grounded in the critical legal studies and critical race theory movements. These movements trace their roots to the 1970s and began as an attempt to develop new tools to analyse and understand 'the complex interplay among race, racism, and American law' (Delgado and Stefancic 1993, p. 461). One of the core doctrines of Critical Legal Studies is that no distinction exists between law and politics (Williams 1987, pp. 116–17). It follows, then, for the critical legal scholar, that 'what we regard as "legal doctrine" is actually a collection of dominant and dominating conceptions' (Williams 1987, p. 117). Within the field of Indigenous Peoples' Law, this doctrine manifests itself in declarations that:

> Federal Indian law is the continuation of colonialism. On the basis of a non-sovereign "tribal sovereignty," the United States has built an entire apparatus for

> dispossessing indigenous peoples of their lands, their social organisations, and their original powers of self-determination. The concept of "American Indian sovereignty" is useful to the United States because it denies indigenous power in the name of indigenous sovereignty. (d'Errico 2009, pp. 110–1)

Some scholars, such as Robert Odawi Porter, question the legitimacy of applying American law to tribal governments (Porter 2004), while others, such as Martha Minow, argue that applications of US law must be analysed against the backdrop of history. For example, with reference to the case of *Santa Clara Pueblo v Martinez* (1978), which involved an equal protection claim under the Indian Civil Rights Act (ICRA) that challenged a tribal ordinance whereby children of male tribal members were eligible for tribal citizenship but children of female members were not, Minow submits that:

> The case could be viewed as simply the sacrifice of individual rights in the face of strong pluralism. But the larger pattern of domination and control of tribes throughout United States history must also be part of the analysis. The case reflects a history in which Native American tribal sovereignty has been more often suppressed than respected. Native American tribal sovereignty endures entirely subject to approval by the United States government and the points of autonomy granted by tribes reflect the dominant society's ordering of priorities. Perhaps, then it reflects the larger society's overall values that the tribe is allowed discretion over how much to protect its women from discriminatory treatment; or perhaps the larger society's values are served by allowing the tribe to exclude some candidates from tribal membership. The tribe itself has no genuine autonomy to sort out its own values and preferences in a system in which control over their own affairs has so often been undermined. (Minow 1995, p. 359)

As these quotations make clear, the general position unifying Indian and Indigenous Peoples Law scholars within this critical camp is that the innate biases and lack of understanding within the US legal order serve to compromise any justice it could ever deliver, with the result that justice remains irrevocably Other in its articulation and effect. While some scholars in this camp urge a return to tribal legal systems (Porter 2004), others allege that tribal systems are also tainted:

> Tribal rules and laws are subservient to Federal rules and laws. Tribal leadership is obedient to Federal law—it does not dare challenge it . . . there is no point to trying to decolonize the Navajo government—it was not right for us from the start. Its structure and process is a replica of the American system. . . . (Emerson 2017, pp. 168–9)

The frustration we experience with these approaches, however, is their tendency to prioritise the critique, to take a hammer to the edifice but then to leave us all sitting in the rubble. They are so busy being critical of the US legal order and its shortcomings—albeit validly so—that they fail to recognise the potential that exists. And nowhere is this deconstructionist tendency more apparent than in critical arguments that privilege culturally determined understandings, essentialise Indigenous legal cultures, and preclude the possibility of genuine communication between and among communities and groups bringing justice claims.

At this juncture we submit two major points of argument. The first is that, while the critical camp wrings their hands about the unfairness of the system, Indigenous communities take an altogether different and more pragmatic approach. This difference in approach between the academy and the tribes is very likely because the latter do not have the luxury of disengaging from the US legal order. Although these pragmatic strategies have been hugely variable, both in terms of the means of their effectuation and their relative successes, they are united by their underlying goal, that is, to enable the retention of the substantive normative content of their own legal cultural features through a deliberate strategy of adapting their legal and procedural forms to be recognisable to the dominant legal culture. Second, an interactive conception of legal culture offers the critical camp a way out of their bind, facilitating the bypass of this discourse's pervasive binary of Indigenous/non-Indigenous. Moreover, it allows for context to be maintained while at the same time undermining the type of essentialisation characteristic of those approaches insistent upon asserting 'epistemic closure' (see, e.g. Legrand 1996, pp. 65–6; Glanert and Legrand 2017). This argument will form the basis of our third section; the next, however, provides the foundation for this argument by employing three selected case studies to illustrate this pragmatic adaptation of legal form.

The Benefits of Legal Form

The legal anthropologist Fernanda Pirie has argued in favour of an approach to comparison that includes consideration of the legal form exhibited by the 'explicit rules and legal categories [used] to organize and describe the social world' (2014, p. 72). Pirie makes the case that studying the forms of law, its legalism,[4] can provide fresh insights into the role and function of law within different societies (see also, generally, Fuller 1969, pp. 37–94).

It is our contention here that while the focus of legal pluralists—and legal comparatists more generally—has tended to rest upon the substance of legal

norms, this comes at the arguable expense of the structural and stylistic, with the result that this has caused important issues to be overlooked. This is perhaps not surprising, considering both the anthropological and functionalist influences legal comparison has been subject to, but this omission seems to be a glaring one. While changes in normative content can be problematic, some legal and procedural forms are more malleable. As our case studies will exemplify, this can be explained by how alterations in form need not necessitate variations in the content, with the result that there can be little cost in terms of actual practice but oftentimes substantial benefit. Such benefits will depend on context, of course, but we will argue that paramount among these is the increased *de facto* legitimacy that can be afforded to a legal culture that opts to alter the form of a legal feature or practice in a way that makes that feature or practice more readily understandable to a dominant legal culture. This speaks to increased efficiency in communication, arguably a significant benefit for the small price of changing something which can be[5] of limited cultural significance.

Before continuing, however, this innate interactivity requires some more attention. Here we foreground this chapter's core argument, namely that interactivity, while important, is only so useful in and of itself. Without a requirement of *mutuality*, the accommodations in terms of augmenting or altering legal forms rest entirely with the minority legal culture, which is to say, with the tribes. These three case studies—all drawn from tribes in the United States—collectively illustrate the point that the current burden of adaptation rests with Native peoples and with tribal governments, including tribal courts.

Navajo Nation: Tribal Common Law

The idea of tribal dispute resolution mechanisms is not new. Tribes, like any formal community or government structure, have always had methods of settling grievances and dealing with those who violate community norms (Koehn 1997, p. 708). As part of their assimilation into the United States, however, most tribes were required to create Anglo-style adversarial court systems (Koehn 1997, pp. 709–19). Those courts were originally a mechanism for enforcing the federal Code of Indian Offenses, but over time, as federal Indian policy changed, those courts were handed over to the tribal governments to operate.

While those courts may now be 'tribal' courts, they operate under the watchful eye of the federal court system and the threat that any perceived

unfairness, injustice, or over-reaching will be cause for reducing the jurisdiction of all tribal courts (Tatum 2007). In the words of Justice Tom Tso of the Navajo Supreme Court, 'the Anglo world has essentially said to tribes, "Be like us. Have the same laws and institutions we have. When you have these things maybe we will leave you alone"' (1989, pp. 11–2). To be effective, however, tribal courts must be viewed as legitimate by the community they serve. This is a difficult balance to strike, and the solution has rested within the concept of common law. In explaining the process of decision-making in Navajo courts, Justice Tso has stated:

> The law the Navajo courts must use consists of any applicable federal laws and tribal laws and customs. The structure of our courts is based upon the Anglo court system, but generally the law we apply is our own. . . . In 1985 the Tribal Code sections regarding applicable law were amended. Now the courts are required to apply the law of the United States which is applicable and laws or customs of the Navajo Nation which are not prohibited by federal law. . . . It is easy to understand that the Navajo Tribal Code contains the written law of the Navajo Nation and that this law is available to anyone. When we speak of Navajo customary law, however, many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called 'common law'. (Tso 1989, pp. 8–9)

The Navajo Supreme Court thus embarked on a systematic effort to identify, explain, and use Navajo common law as the basis of its decisions whenever possible; this has been dubbed the Navajo Common Law Project. To date, Navajo common law has been used in a wide variety of cases, ranging from calculating tort damages to resolving disputes over grazing leases. Navajo Supreme Court justices also made a point of speaking at conferences, writing papers, and generally taking every opportunity to explain their process, methods, and goals (Tso 1989; Yazzie 1994; Austin 2009). Many tribes and tribal courts have followed the pattern established by the Navajo Supreme Court,[6] as it has been very successful in allowing court to use tribal substantive standards but—and for our purposes, all importantly—comes wrapped in a *form* that is recognisable and acceptable to federal courts. In the words of Professor Pat Sekaquaptewa, 'In tribal communities, development of the common law is the key to ensuring tribal ownership over once imposed justice systems and often imported foreign legal standards' (2000, p. 762).

Muscogee (Creek) Nation: Tribal Court Reporters

The Muscogee (Creek) Nation originally occupied a large territory in the southeastern United States but was one of the tribes removed to what is now Oklahoma. Within a few years of removal, the tribe had reconstituted its government system, which included district courts and a supreme court. Each court had a court clerk who made a written account of every proceeding. Over time, these records ended up scattered in federal archives around the United States but, in 2001–02, the Muscogee (Creek) Nation tribal court, as part of a larger project to create and publish a formal court reporter for the tribe, secured funding to locate these early court records. The project was coordinated by Judge Patrick Moore, a judge who sat on district court bench and who had concerns that attorneys with little to no Indian law experience were being called on to practice in tribal courts. Many of these attorneys lacked a proper understanding of tribal courts, and this situation was exacerbated by the dearth of any published court decisions and related rulings, as this made it difficult for attorneys to locate relevant cases.

State and federal courts publish their decisions in multivolume series called reporters. Each case is summarised and indexed so that it is easy to locate cases containing specific principles. These indexing and digesting systems were not, however, built with tribal courts in mind, so the topics they used were both under- and over-inclusive for tribal courts. What was needed was a separate, *tribally appropriate* method of indexing and digesting court opinions that used similar methods and functionality as the state and federal court reporters but whose content was tailored for tribal courts in general and the Muscogee (Creek) Nation in particular. With the help of some consultants[7] that was accomplished in 2006 when the eight-volume Mvskoke Law Reporter was published. The Reporter, which contained all the tribe's court decisions from 1832 to 2005, used a newly created indexing and digesting system that was customised for the tribal court but used a sufficiently familiar format to convey to attorneys that this was the work of a legitimate court. Once again, we can observe that it is the *form* that is important, not the content.

Pascua Yaqui: Speaking on Behalf of the Accused

Our third example arises from a particular set of circumstances, namely the selection of the Pascua Yaqui Tribe as one of the initial three tribes to participate in the pilot project to exercise special domestic violence criminal jurisdiction under the Violence Against Women Act (VAWA) of 2013, and the

intersection of this jurisdiction with the rights guaranteed to defendants in criminal trials.

Consideration of this issue requires some background on these guaranteed rights. The US Constitution was presented for ratification simultaneously with its first ten amendments (collectively known as the Bill of Rights). The first eight of the amendments focus on individual rights and were drafted to respond to the concern that the stronger central government created in the Constitution might trample on the individual rights the new country had just fought a war to secure. A significant portion of those individual rights related to criminal trials, and included the right to indigent defense counsel. One of the early questions, resolved by the US Supreme Court in its 1833 decision in the case of *Barron v City of Baltimore*, was whether the rights secured by the Bill of Rights were protections against the state governments or only against the federal government. The Supreme Court ruled that the rights listed in the US Constitution restricted only the federal government, and so any rights against the state governments were to be found in the state constitutions. In 1898, in *Talton v Mayes*, the US Supreme Court used the same reasoning to hold that tribal governments are also not bound by the individual rights guaranteed in the US Constitution.

In the decades after the US Civil War, the Supreme Court would use the Fourteenth Amendment's Due Process Clause to incorporate most (although not all) of the individual rights in the first eight amendments against the states. The key question in deciding which ones applied and which ones did not was whether the Court considered the right 'fundamental to ordered liberty'. Because this process took place through the Fourteenth Amendment's Due Process Clause, which provides that 'no *state* shall deprive any person of life, liberty, or property without due process of law' (emphasis added), the process could not be used with respect to tribes. Instead, in 1968, Congress enacted the ICRA, which imposed most of the same restrictions on tribal governments. One of the primary differences, however, is the absence of indigent defense counsel: ICRA provides that a tribe cannot prohibit a defendant from providing counsel at his own expense, but does not mandate that tribes provide counsel to those who cannot afford one (25 U.S.C. 1302(a)(6)).

While this has been a key reason behind many US Supreme Court decisions restricting tribal jurisdiction over non-Indians, it is much less significant than it appears at first glance. First, states are required to provide indigent defense counsel only when the potential sentence is greater than one year and, in cases involving lesser sentences, when a convicted defendant is sentenced to actual jail time. ICRA limits the sentences tribal courts can impose so that the first condition never applies.[8] Many tribes use alternative sentencing and do

not sentence convicted defendants to jail time. This leaves a small set of cases in which state courts would be required to provide an attorney and tribes would not be so required, as most of those cases would be covered by a tribally guaranteed right to counsel. The US Supreme Court's cases discussing ICRA's failure to require indigent defense counsel in tribal courts never to mention, however, that many tribal governments moved to fill the gap themselves. The Pascua Yaqui is one such tribe, and, indeed, the tribe has a long tradition of providing someone to speak on behalf of the accused. In creating its modern criminal justice system, the tribe incorporated this traditional provision but also paid lip service to a requirement *with which they already complied* by calling this new office *the public defenders' office*, a label that is overtly recognisable to the federal government, including the federal courts. Existing tribal practice was thus repackaged and reframed for the specific purpose of being acknowledged by the dominant legal culture. Although the US Supreme Court had ignored the fact that many tribal governments were providing indigent defense counsel in criminal cases, that fact did not go unnoticed by the US Department of Justice, and indeed was one factor in the selection of which tribes would participate in the pilot project to expand tribal criminal jurisdiction under VAWA 2013.

It is important to note here that we are not talking about acknowledgment or recognition in the identity politics sense of the latter term—in this regard we acknowledge that 'the act of recognition repeats the colonial hierarchy that gave rise to oppression in the first place' (Anker 2017, p. 137). Similarly, we reject the notion, put forward by Carpenter and Riley, that such instances of 'emulation' or 'mirroring' are examples of colonisation (2014, p. 203). What instead is evident from these case studies is the manner by which tribal legal orders have adapted the *form* of legal features or practices for the particular end of an increased understanding of this feature or practice *by* the federal legal order. The corollaries of such heightened understandings may vary, of course, but among these is greater legitimacy for the minority legal culture going forward. Indeed, this is more often than not the reason underpinning this pragmatic action of translating normative cultural practices into identifiable legal forms in the very first place. We point to this as an example of all-important social learning, but stipulate that if this is to be genuinely successful, this burden has to be shared. Mutuality is not simply a desire but rather a requirement: put simply, it has to be a two-way street.

The next section will articulate the importance of an interactive conception of legal culture in circumstances of legal plurality, specifically in terms of how it bypasses the epistemic closure that the critical voices in the field get caught up in.

Interactive Legal Culture

At the heart of this endeavour lies the dilemma, outlined by Frankenberg, of 'accepting the otherness of the "Other" without *othering* it' (2016, p. 71). We argue that the critical approaches discussed earlier are flawed in this very regard—they start from a premise of innate misunderstanding and unknowability, with the effect that legal cultures are treated effectively as billiard balls: self-contained, impermeable, unchanging. Similar arguments have been raised within the field of comparative legal studies—Glanert and Legrand, for example, discuss the epistemic closure of legal cultures and the 'untranslatability' of law (2017; see also Legrand 2011, 1996). Our accounts of tribal common law, tribal court reporters, and tribal public defender provisions stand as rebuttals to this Derridean insistence on untranslatability—in each of these examples there is clear effort on the part of the weaker legal culture to articulate its practices in forms familiar to the dominant one. And although these examples are all ones where the changes have been deliberate, this need not be the case: unsteered and contingent adaptations are just as important.

We should be clear at this point that we are not talking about a collapsing of legal cultures or a loss of legal-cultural distinctiveness on the part of any one within this plural relationship. On the contrary, we are fully aware of the rich variety of normative practices across legal cultures in the United States, both Indigenous and non-Indigenous, and are strongly in favour of their maintenance and flourishing. We submit, rather, that what are often presented as irresolvable epistemic differences and barriers to genuine understanding are actually nothing of the sort. This position stems from our understanding of legal culture not only as a unit but also as a process, specifically as an 'ongoing, open-ended, interactive process of socio-legal learning' (Hendry 2017, p. 180). Just as interactions within society are unavoidable, so too are the knock-on effects and influences to which these give rise, leading ultimately to adaptations. This temporally sensitive understanding of legal culture as an inherently interactive process is insightful in that it precludes this billiard ball conceptualisation of legal cultures as always already formed units ricocheting off each other, always conflicting, never engaging. By embedding the idea of a process of adaptation right at the heart of the concept of legal culture, the interactive dimension comes more readily to the fore—such legal cultures, after all, do not exist in a vacuum. More importantly, it undermines this notion, prevalent in some discussions (see, e.g. Legrand 1996) that there are essential, fundamental, original elements to legal cultures—if everything is the result of interaction, then this simply cannot be the case. Legal

cultures are constantly in flux, constantly interacting and adapting, constantly negotiating and reaffirming their features and operations on the basis of internal stimuli and external information.

The radical conceptual potential of interactive legal culture lies, we submit, with its capacity to lay a foundation for discursive approaches capable of giving rise to new, *mutual* traditions. We point here to Robert Cover's observation that a legal tradition is 'part and parcel of a complex normative world. The tradition includes not only a *corpus juris*, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it' (1983, p. 9). To the notion of interactivity, therefore, we connect that of jurisgenerativity (Cover 1983), which is to say, acknowledgement of the continual development of norms and laws (*nomoi*) by autonomous interpretive communities (1983, p. 14). As we have seen in the case study examples, the alterations in legal form undertaken by tribes have contributed to there being fewer epistemic barriers, and there is nothing to say that this state of affairs could not be replicated; indeed, Carpenter and Riley argue that evidence of such jurisgenerative processes can already be observed at domestic and international levels (2014, p. 215). In conditions of legal plurality, an approach that not only recognises the normative validity of all legal cultures but also facilitates their genuinely reciprocal interaction must be welcomed.

How then to bring about such an interactive relational approach? We submit that legal scholars within the field of Indian and Indigenous Peoples Law have a particularly important role to play in this regard. Instead of stepping back, they—we—ought to step up. As discussed, tribal legal cultures have historically been open to such interactions—the Navajo Common Law Project encapsulates this position well in its statement that 'We can learn the western form of laws and governance to enrich and enhance our traditional way of life and our sovereign nation. We do not have to lose our traditional values and universal principles but only to strengthen it' (2002, p. 3). As tribal legal cultures do this, so too should dominant legal cultures, which can be achieved by means of recognising the Other *in its own right*, by means of 'operat[ing] and observ[ing] within the bounds of a *particular* context, and interpret[ing] what [is seen] within a *particular* matrix provided by the specific cultural context that constitutes the law and is also constituted by law' (Frankenberg 2016, p. 72). Justice for Indigenous groups in the United States will only ever be achievable under circumstances of genuine understanding and reciprocity between and among its diverse legal cultures.

Notes

1. 'A generally accepted maxim is that the way to win an Indian law case is to keep it out of the Supreme Court' (Hendry and Tatum 2016, p. 365; see also Labin 2003).
2. An exception here is N. Bruce Duthu, who notes that 'the challenge for Indian tribes, and indigenous peoples generally, is to confront and overcome this ideology of *legal centralism*, and the overriding institutional supremacy of the nation-state' (2013, p. 3, emphasis in original). He also notes that through 'the lens of classical legal pluralism, we can see that the contemporary relationship between Indian tribes and the federal government reflects a palpable structural imbalance of power, the product of the colonial experience and the United States' own imperialism into Indian country. . .' (2013, p. 19).
3. These are intended to be illustrative examples, rather than an exhaustive list. In addition, as we have argued elsewhere, not all decisions that favoured tribes were the victories they might appear to be at first glance (Hendry and Tatum 2016, pp. 364–365ff).
4. Pirie is clear that her use of the term is to denote legal form, and is not intended to contribute to the discussion of 'legalism' initiated by Judith Shklar (1964).
5. This is, of course, not to say that all legal and procedural forms are easy to change and lack cultural specificity or embeddedness. This is, however, the case for each of the case studies selected for inclusion and discussion here.
6. Given that more than 550 federally recognised tribes exist in the United States, it is impossible to provide an exhaustive list. Examples of tribes in addition to the Navajo Nation that use tribal common law in judicial decisions include the Muscogee (Creek) Nation (see the Mvskoke Law Reporter); the Hopi Tribe (see Sekaquaptewa 2000); and the Winnebago Tribe (see *Rave v Reynolds*). See also Richland and Deer 2010, pp. 36–58.
7. Including, in the interests of full disclosure, Melissa L. Tatum, one of the authors of this chapter.
8. At least not until the enactment of the 2010 Tribal Law and Order Act (TLOA), which restores to tribes the ability to sentence a convicted defendant to a maximum of three years for each offence. TLOA requires that any tribe choosing to exercise this enhanced sentencing authority must provide defendants with indigent defense counsel.

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12

Contestations of Space: Developing a Twenty-First Century Indigenous Cartographic Practice

Gina D. Stuart-Richard

Although technology is changing the way maps are made and viewed, maps themselves are not a new invention. Throughout history, communities have made maps for a variety of purposes. For western cultures, the process of creating a map is primarily a political act, as maps are used to set boundaries and limits of governmental authority. In fact, mapping was one of the colonial tools used to establish European hegemony over the 'New' World and to systematically move land from Indigenous to European hands.

For Indigenous people, however, land is more than political power. Land is crucial to the creation and continuation of Indigenous and Native identity (Basso 1996 quoting Scott Momaday, p. 35). Today, many Native Nations and Indigenous communities are turning to the field of cartography and re-examining ways in which a distinctly Indigenous cartography can reinforce, reassert, or even expand Indigenous rights to land in North America, Canada, Australia, and New Zealand. This chapter explores ways Indigenous people, primarily in the United States, can and are using modern digital technology to record and communicate the history of these landscapes, drawing on stories, songs, and other traditional ways of transmitting this information. By drawing on traditional methods and adapting new technologies, Indigenous people are using the tools created by European colonisers to carve a new space for transmitting Indigenous knowledge.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_12

The Art, Science, and Uses of Map-making

Maps are more than a tool for providing directions, although that is a common purpose that crosses cultures, as is illustrated by Map Rock, an ancient petroglyph rock in the Owyhee Mountains of Idaho (Merrell 2013, p. 9). Situated along the Snake River, Map Rock's landscape details are so precise that they present a navigable map even today. In a letter to John Wesley Powell in 1897, geologist E.T. Perkins, Jr noted that his interpretation of Map Rock was that

> The principal motif seems to be a mapping of the Snake River Valley. The most conspicuous line being the course of the Snake River, and is readily recognizable and quite accurate, compared to the Land Office and other maps… One branch rises from a spring, and the other flow from a large lake, the Henry Lake of our maps… At the third turn of the stream [Snake River] is a branch from the east…which is probably intended for the Black Foot River… The locations of the various groups of circles to the south of the river correspond quite closely to the locations of the ranges of hills which do lie to the south of Snake River. (Perkins Jr. 1897)

Indigenous cartography, however, is not limited to this type of two-dimensional representation of geographic directions. Rather, Indigenous cartography brings to life a place where mapping and geography cease to be Cartesian coordinates on a Euclidean plan and instead become a place that is both larger and with more time depth than the human experience of the known world. Indigenous cartography works within a system where concepts of place that utilise traditional ways of knowing are intimately tied to notions of kinship, neighbouring tribes' shared space, and traditional ecological knowledge acquired over the millennia (Pearce and Louis 2008). Thus, Indigenous cartography more resembles storytelling than map-making because 'places do not have locations but histories' (Ingold 2000, p. 218). For example, Nimiipuu storied relationships between salmon and creation stories (Colombi and Brooks 2012, p. 189), and ideas of kinship and clanship (Thom 2009) can become a part of the fabric on which these cognitive boundaries lie, transcending the sum of the human experience on the land to become a world larger than the sum of its parts.

In the Zuni Pueblo tradition, Zuni artists in Northern New Mexico have created visual representations of oral traditions about their storied landscapes that at once encapsulate creation stories, migrations of people across the land and places of cultural significance in a single work (Enote and McLerran

2011). Emerging out of the 1995 Zuni Map Art Project, 'A:shiwi A:wan Ulohnanne – The Zuni World,' map art exhibit consists of 31 map art paintings that represent Zuni history on their ancestral landscapes in a way that is unique to Zuni cosmology. In one particularly stunning example, *Chimik'yana 'kya dey'a* by Zuni artist Geddy Epaloose, not only are ancient and contemporary landscapes co-represented, but the Zuni creation story, the Zuni sacred place of origin, clan migrations, and important deities are shown in a single panel. Although outsiders might view this work as a beautiful example of Zuni art, from a Zuni perspective there is much more cultural depth and knowledge represented—much of it only completely understood by Zuni people and created as a counter-map independent of the non-Zuni perspective (Enote and McLerran 2011).

Although, as at Zuni, some traditional maps are still being created today, the maps made by most Native Nations are often driven by governmental necessities such as locating water and gas lines, establishing a 911 emergency locator system, and locating places where natural resources, archaeological sites, and protected species may be found. Tribes are, however, beginning to explore map-making as part of legal strategies. The potential legal uses of mapping are wide and varied, with perhaps the most obvious involving treaty rights, land claims, and environmental issues. Treaties, for example, often reserve (or are interpreted as reserving) the right to hunt and fish 'at all the usual and accustomed places' (Cohen's Handbook 2012, p. 18). It thus becomes important to establish where those 'usual and accustomed places' are located (U.S. v Winans 1905; Menominee Tribe of Indians v U.S. 1968; U.S. v Washington 1975).

Gathering generational information about tribal land use is an important piece of this process in order to prove a deep and longstanding use of and connection to ancestral lands. This is true for First Nations in Canada and Aboriginal and Torres Strait Islander People in Australia, as well as for Native Nations in the United States. Grand Chief Stewart Phillip, president of the Union of British Columbia Indian Chiefs, remarked that it is now crucial for First Nations people to use mapping to assert these ancestral connections as well as preserve them in tribal histories:

> With the continuing exploitation of the many resources of our territories come relentless, ongoing attempts to negotiate by government and/or industry. When those attempts fail, it often leads to litigation whereby we bear the burden in court to demonstrate the harmful impacts to our territory, our culture and to our communities. Land use-and-occupancy mapping is a method that allows us to catalogue, safeguard, and convey the collective knowledge of our communities.

> It is this collective knowledge that compels us to defend our Aboriginal Title and Rights through negotiation, litigation and at times, confrontation on the land itself. (Tobias 2009, p. 7)

As part of their Native Title claim, the Ngurrara people of Australia undertook a massive project in 1997 whereby 30 traditional landowners created an immense canvas over 32 feet across detailing their traditional landscapes and their relationships with the land for a dramatic court case verifying their claims to over 76,000 km^2 of land in the Kimberly region.

> Its colossal size (measuring eight by ten metres) is the first thing one notices. The eye sweeps across the vast canvas like a wind across a landscape, drawn by the thick horizontal lines. It is then that our focus can rest on the ten careful, colourful harmonized patchworks, each denoting a different story, a different place, a different piece of evidence of connection and attachment to land. With a bird's eye view, the canvas makes the viewer feel as though they are floating across the country. The waterholes, trees, salt lakes and people are visible. It shows the path of serpents and ancestors. It tells a panoramic story of ceremonies being performed, creation stories, of spirits, of snoring fathers. (Behrendt 2008)

Because Aboriginal law's focus is on oral tradition, the stories and places represented on this map are communally owned knowledge. These traditional landowners collaborated to create a canvas that would demonstrate these connections to homelands that language could not adequately address. And, in a landmark court decision, Justice Gilmour of the Native Title Tribunal remarked '… the Court does not give you native title. Rather, the Court determines that native title already exists …and that it has always been your land' (Behrendt 2008).

In the United States, the Zuni Pueblo used mapping technology to create an overlay map which was used in their successful land claims case in the US Claims Court (Zuni Tribe v U.S. 2006) as well as its federal district case in Arizona (U.S. v Platt 1990). Instrumental to the tribal production of this map was the Zuni's religious pilgrimage knowledge and histories upon this landscape that extend back before the first western foot stepped on this land (Hart 2000).

Another application of mapping to a tribal legal strategy can be found in the regulations governing the process of federal recognition (the acknowledgement process that creates the government-to-government relationship between the US government and a tribal government) and for claiming human remains and culturally important material under the Native American

Graves Protection and Repatriation Act of 1990 (NAGPRA). The regulations governing the federal acknowledgement of American Indian Tribes require a tribe to establish cultural affiliation to a historic tribe (25 CFR Part 83). NAGPRA requires the repatriation of many Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to federally recognised Native American tribes who have a cultural affiliation to these remains or objects. The key to the implementation of NAGPRA is the assignment of cultural affiliation under NAGPRA's regulations and is defined as 'a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe … and an identifiable earlier group' (NAGPRA 1990, s.2). Allowable evidence in order to prove this affiliation is the following: 'Geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion' (NAGPRA 1990, s.7).

The problem with these cultural affiliation requirements is that the 'expert opinion' required to fulfil them, as well as nearly all of the other allowable evidence, usually come from non-Indigenous sources or from western archaeological viewpoints. It is common practice for archaeologists to rely on a single cartographic source called the 'Indian Land Areas Judicially Established' (National Park Service 1978) in order to make claims with respect to cultural affiliation. This map, however, contains only judicially settled land claim disputes between the United States and federally recognised tribes who filed claims between 1946 and 1951. If a tribe did not file a land claim during that time, or if the tribe has not been federally recognised, it does not appear on this map. The result could be potential exclusion of tribes from participation in the repatriation process.

The emergence of a tribal mapping discipline could change all this. As stated, the usual 'expert opinions' used in the assignment of cultural affiliation are non-Native. But if more tribes participated in providing their own geographic evidence in the format that mapped their own customs, traditions, and oral histories in a way that dovetails with other allowable forms of evidence under NAGPRA (*tribal* kinship, *tribal* archaeological, *tribal* linguistic, *tribal* folklore, *tribal* oral tradition, and *tribal* histories), tribes could establish themselves as *the recognized* experts and could proactively assert evidence of cultural affiliation. The result would be a change in the implementation of NAGPRA, resulting in a repatriation process that is much more satisfying to tribes than the current status quo. Indeed, the results could be even more far-reaching. Indigenous cognitive constructs of land rights and permeable boundaries, when applied through a tribal cartographic model, could have a significant impact on the field of federal Indian law thus 'transform[ing] their

social and spatial relations in ways that may transcend the concepts "territory" and "property"' (Wainwright and Bryan 2009, p. 170) as it has in other parts of the globe (Peluso 1995; Pigliasco 2009; Roth 2009; Tobias 2000, 2009).

Towards an Emerging Indigenous Cartography: Modern Mapping Tools

The critical question, then, is how to develop a tribal mapping protocol and process. Answering this question requires evaluating the different existing mapping tools to make a selection based on tribal needs and practices. The modern, technologically aided act of map-making can take many forms and use many different approaches, ranging from using computers and graphic design programs to make paper maps to using sophisticated computer map datasets commonly called Geographic Information Systems (GIS) to using coordinate systems such as Global Positioning Systems (GPS).

Any discussion of tribal mapping must include a precautionary statement because a misuse of mapping technology, whether for 'cultural mapping', 'land-use-and-occupancy mapping', or 'ethnographic mapping', has the potential to be damaging to the very people it is intended to assist. Currently, 'cultural mapping', as it is called among anthropologists and geographers, is a technology that many flock to but that few are theoretically or methodologically trained to use. It is instead in danger of becoming yet another tool used to exploit, commodify, and commercialise Native cultures especially through for-profit information mapping outlets. (Wainwright and Bryan 2009, p. 170; MacChapin et al. 2005). In the words of Karl E. Francis, an early visionary of the use-and-occupancy map discipline,

> Land-use data is essential if the rights of usufruct, which have been recognized throughout history and in virtually every legal system, are to be respected and enjoyed. It should not be surprising then that more and more people are attempting to document land use. Yet I am concerned that so many so unprepared are setting out boldly to make land-use maps. There are so few kinds of research which carry with them such tremendous social responsibility and which are so thoroughly difficult to perform effectively. Much can be lost with poorly conceived and poorly executed work. The problem in this case is that the maps, once drawn, tend to last forever. They appear very substantial even when every line on them is wrong or meaningless. When these lines reflect on people's rights and property for generations they clearly should be most carefully and professionally prepared. (quoted in Tobias 2009, p. 1)

Tribes who wish to undertake mapping projects should first consider the long- and short-range objectives and consequences that might result. Tribes should be asking 'who should control, have access to, or benefit from cultural heritage, past and present?' (Nicholas et al. 2010, p. 11). Many tribes understand that any information gathered has the potential to be misused if it should fall into the wrong hands, and map-making is no exception. Obviously, sacred site and archaeological site locations should be kept under the tightest restrictions possible. But other concerns may not be so obvious. 'The specter of scientific colonialism emerges when, for example, benefits go primarily to outsiders rather than the community, as in bioprospecting and cultural tourism' (Nicholas et al. 2010, p. 11). The fact remains that once protected cultural information is made public, it is at risk. Outsiders have appropriated and commoditised images of artefacts, sites, rock art, and other iconography. The costs to individuals, clans, and communities may be very high: loss of control over proper care of heritage, diminished respect for the sacred, the commercialisation of cultural distinctiveness, and improper or dangerous uses of special or sacred symbols by the uninitiated (Nicholas et al. 2010, p. 11). Although a theory and methodology of Indigenous cartographic practice is in use among some First Nations in British Columbia (Tobias 2000, 2009) and has spurred worldwide interest, no 'best practices' yet exist for the Indigenous use and mapping discipline.

As part of a larger bureaucratic and political process, '[m]ost American Indian tribal governments located in the lower forty-eight states adopted GIS through top-down federal government processes' (Palmer 2012, p. 77). Tribes have found it necessary to utilise the GIS format for mapping in order to interact with the federal processes of land and resource administration. While many US tribes now use GIS for purposes of managing natural and extractive resources (Bailey et al. 2001; Seagle and Bagwell 2001; Taylor et al. 2012; Weber and Dunno 2001; Williamson and Goes In Center 2001), the work dealing with sacred sites and cultural resources is often contracted out to non-Native mapping specialists. Ironically, then, in real-world practice, mapping of cultural resources and sacred sites is largely left to those outside the tribe as tribal or government contractors. Citing this 'digital divide' between tribes and the lack of infrastructure necessary to fully implement GIS technology and train users in a tribal setting, some researchers believe that tribal stakeholders will continue to be technologically disadvantaged and at risk for further governmental assimilation unless they effect a bottom-up approach to tribal mapping and sovereignty (Bailey et al. 2001; Brown and Nicolas 2012).

These things might not be of initial concern to a tribal entity seeking to exercise treaty-based fishing rights but could become a part of the high cost of that assertion. Geographer Robin Roth casts an even gloomier forecast for groups who initially set out to use mapping to defend aboriginal territory without an effective strategy for managing the security of the data collected. Roth documents what she calls an 'ironic' effect of this protection in the form of 'increased conflict, increased privatization of land, loss of indigenous conceptions of space and increased regulation by the state' as well as 'potential epistemic violence associated with counter-mapping and the entanglements of power that can shape mapping projects in unfortunate ways' (Roth 2009, p. 207). Roth warns that this sort of 'counter-mapping' tends to place people on the landscape in an historic way rather than one with a fluid, moveable relationship to the land thus 'fitting "indigenous people into the spatial configurations of modern politics"' (Roth 2009, p. 208).

In another critique of this participatory mapping process, Jason Farman of Washington State University is especially critical of the role of for-profit mapping outlets such as Google Earth. Farman warns that the history of map-making and colonialism should not be ignored in what is seen as the 'neutral' technology of Google (Farman 2010, p. 870). While cautioning about the politics and ideologies that control a map's projection (making some areas seem larger or more important pulling them out of scale with other areas), Farman alerts potential map-makers to the reality that outlets such as Google deliberately apply distortions just as any map-maker has the power to do (Farman 2010). From detailing disputes with Google over national borders to the proper labelling of Taiwan and the mysterious disappearance of Tibet (presumably due to China's financial influences with Google), Farman makes a good point when he argues that 'if Google Earth's ancestry is colonial cartography and the tools it utilizes (aerial and satellite imagery) are rooted in militaristic uses, what if anything, is the empire mapped by this GIS?' (Farman 2010, p. 876).

Maps have always represented power, and indeed, map-making has been called the science of princes. While maps carry an expression of authenticity, they can be manipulated (Monmonier 1996). Therefore, 'rather than a neutral application of value-free technologies, map-making is entangled in the webs of power that shape indigenous landscapes, informed by contentious productions of indigenous identities, implicated in the socially contingent nature of knowledge systems, and shaped by the positionality of the (most typically western) scientists who direct indigenous mapping projects' (Sletto 2009a, b, p. 148). The participation of tribes in the mapping process is, therefore, crucial and far more effective than if the mapping process is directed by

or overseen by outsiders. 'The mapping process is thus of utmost importance for indigenous leaders, theorists, development practitioners and others who share a commitment to indigenous rights, but who also assume a critical perspective on the possibilities and pitfalls of map-making in and for indigenous communities' (Sletto 2009a, b, p. 147). This perspective argues that as powerful information resources, maps carry considerable weight when an Indigenous relational epistemology is the source of these maps. Tribes can build capacity to use GIS but it has to be done with respect to tribal traditions and customs and with the support of tribal officials in order to produce the best results. Tribal GIS is not a one-size-fits-all solution but when carefully built can be a customised solution to many of the problems which tribal entities encounter when dealing with an essentially colonial framework of land management.

Conclusion

In Vancouver, British Columbia, the Tsleil-Waututh Nation asked for and received grant funds to conduct a tribal land-use and mapping survey. By engaging over 90 community members in 44 different use-and-occupancy mapping activities, the Tsleil-Waututh produced a digital GIS database which contained over 10,000 individual sites from which they produced over 500 actual map sheets. These tribally produced maps when incorporated with written research containing biophysical and cultural information resulted in the 'broadest compendium of information on Tsleil-Waututh territory and culture ever produced' (Tobias 2000). This research was (1) community-based, (2) comprehensive, (3) informed by experts, (4) informed by other First Nations, (5) methodologically sound, and (6) trust-based (Tobias 2000, p. 18). The significance of the Tsleil-Waututh project could have lasting impacts for US tribes who choose to use a similar methodology for the rights to access and fully utilise off-reservation treaty-based hunting and fishing lands by showing lasting connections to 'all the usual and accustomed places'.

Opportunities for the application of GIS technologies as a legal strategy for tribes are timely and extremely relevant in today's political landscape. Whether in land claims cases, assertions and reassertions of treaty rights, promotion of access to sacred sites, management of cultural resources, the federal recognition process, or in NAGPRA claims, for instance, mapping can be *the* crucial piece of evidence in a tribal strategy. 'In such cartographic contests between various state and indigenous representations of space, boundary-making assumes a particularly significant role as an arbiter of relations of power' (Sletto 2009a, b, p. 254). This boundary-making takes place as Indigenous

peoples shift the narrative from an exclusively western colonial framework to an Indigenous relational understanding of the land. Just as colonialism worked to achieve 'hegemony' through the making of political and cultural boundaries, an Indigenous 'ethnocartography' can work to dismantle these same colonial boundaries (Sletto 2009a, b). If tribes wish to successfully utilise GIS technologies as legal strategies, then they must develop the infrastructure necessary and train GIS specialists from within whose positions can then be isolated from the tribal political process for the benefit of the tribal nation.

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13

Googling Indigenous Kamchatka: Mapping New Collaborations

Benedict J. Colombi, Brian Thom, and Tatiana Degai

In 2013, the University of Arizona hosted an innovative workshop.[1] Unlike many academic workshops, this was not a forum for academics to pontificate on their latest theory. Instead, it was a collaboration between academics and members of the Itelmen community of Russia's Kamchatka Peninsula. The workshop was a direct result of actions by members of the Itelmen community, who were seeking ways to preserve their critically endangered language and related cultural information. This is the story of how that workshop came to be and of what happened after the workshop. It is our hope that this story will provide a model for future collaborations between academics and Indigenous communities.[2]

The Itelmen Community

The Itelmen are an Indigenous group who live in several villages on Russia's Kamchatka Peninsula. As is true for many Indigenous communities around the world, the passage of time and changes in political boundaries have resulted in major impacts on the Itelmen way of life and in the number of native speakers of their language. Today, Itelmen, like many Indigenous

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_13

languages, is critically endangered (UNESCO 2016). In 2016 only five fluent speakers remained, all of whom were over 70 years of age. An additional 10–15 individuals were raised hearing the language spoken and can understand the language, but do not consider themselves fluent speakers (Degai 2016).

Many of the Itelmen's younger generation are familiar with and enthusiastic about emerging technology, including cell phones, computers, and portable tablets, despite living in modest conditions in villages with limited infrastructure and which are reachable only by airplane. The older generation of Itelmen, seeking a way to preserve their history and language in a way that would connect with the youth, came up with the idea of a digital dictionary that also connected language with place. Similar projects are being pursued by other Indigenous groups around the world (Bryan and Woods 2015; Chapin et al. 2005; Eades 2015).

One of the project's objectives is to engage school-aged youth in conversations with elders about Indigenous language, tradition, and cultural heritage. In turn, goals of documenting and celebrating Indigenous cultural heritage knowledge for use in village schools and throughout the broader public benefits all Kamchatka residents, and most especially Kamchatka youth who are engaged in the contemporary resurgence of Indigenous cultures. By showcasing and translating places like historic and contemporary villages, fishing camps, hunting and gathering areas, reindeer migration paths, sacred sites, and place names, Indigenous language practices are anchored to the land. Moreover, it is well established that emplaced language practices can serve an important mnemonic function in reinvigorating and revitalising Indigenous language and cultural practice (Afable and Beeler 1997; Moore and Tlen 2007). Sometime after 2010, members of the Itelmen community saw the remarkable virtual globe of Google Earth in action. While the satellite images for the western coast of Kamchatka were then of fairly low resolution, local people hoped to reach out to Google to get improved high-resolution satellite imagery for their own Kamchatka region, as well as training in how to use this free and easy-to-use software to leverage this powerful tool for their community's benefit.

The Academic Community

Colombi, one of the co-authors of this chapter, is a lifelong angler with an obsession for trout and salmon fishing. That obsession carried over into his academic work, which included dissertation fieldwork in anthropology and in

the Pacific Northwest with the Nez Perce Tribe along the Snake and Colombia rivers. His goal was to document the political ecology of dam building, Indigenous history and interaction with salmon, and the challenges to local and regional sustainability. Once he received his PhD, Colombi sought to expand his work to include Indigenous peoples and salmon geographies across the North Pacific as well as the North Atlantic. The result was an edited collection entitled *Keystone Nations: Indigenous Peoples and Salmon Across the North Pacific* (Colombi and Brooks 2012). The book served as a first ever look at salmon cultures, including both histories and futures. The chapters in the book covered the North Pacific, linking Japan and the Russian Far East with Alaska, coastal British Colombia, and the Pacific Northwest US, including Oregon, Washington, and Idaho.

In putting the book together, Colombi made certain to invite scholars who had substantial experience working in Kamchatka, Russia. As part of his obsession with salmon and trout, Colombi had always heard about the Kamchatka Peninsula. According to the stories circulating in the angling community, Kamchatka is the last great place on earth for trout and salmon fishing—it does not have a single dam, the peninsula is roughly the size of California, and the fishing is supposedly as good as God made it. Among those invited to contribute to the edited collection were the anthropologists David Koester and Erich Kasten. Koester works largely with the Itelmen of Kamchatka, and Kasten works primarily with the Koryak, the neighbours of the Itelmen to the north and also in Kamchatka.

Koester has worked in Kamchatka since 1992 and has long-standing relationships with the Itelmen, including Tatiana Degai, one of the co-authors of this chapter (Koester 2003, 2005). Degai was about nine or ten years of age when Koester and her grandmother, Victoria (Vika) Petrasheva, travelled from Esso in Kamchatka to the village of Kovran across the mid-section of the peninsula by horseback. The trip lasted roughly a week and Degai, who was always gifted with languages, served as Koester's interpreter. Koester had been working with Petrasheva on Itelmen ethnographies and as the years passed it became clear that Degai showed promise in anthropology as well as linguistics. Degai eventually matriculated at Koester's home institution, the Department of Anthropology at the University of Alaska Fairbanks to pursue a master's degree. Once she completed her degree, which included an examination of sacred geographies and ethnographic significance for the Itelmen people, Koester advised Degai to get a doctoral degree but to move into the area of Indigenous studies and linguistics where she could focus on language preservation and revitalisation topics for the Itelmen. Koester put Degai in touch with Colombi, who, after reviewing her impressive credentials, secured

funding for her for doctoral work at the University of Arizona. Degai majored in American Indian Studies (i.e., Indigenous studies) and minored in linguistics and received her doctorate in the spring of 2016.

About two to three years into her doctoral programme, Degai came to Colombi's office and said that she was interested in doing mapping work back home. When Colombi inquired about what kind of mapping, Degai responded that she wanted to map linguistic place names, areas of significance for the Itelmen people. Together, Colombi and Degai began to research who else was doing similar work, and in the course of that research, came across the work that Google Earth Outreach does with Indigenous partners. One of those partnerships was a project with the Surui of Brazil, and Degai noted that the partnership was initiated by one of the Surui leaders. Degai was impressed with Google's support for the Surui's proposed project (Google Earth Outreach 2016).

Colombi and Degai then began seeking contact information for the relevant project managers at Google, but were unsuccessful until Degai reached out to a colleague who was acquainted with the Surui leader who had worked with Google. Degai's colleague was able to put Degai and Colombi in touch with the Surui leader, who was in turn able to put Degai and Colombi in touch with Google Earth Outreach. Google responded immediately with a request for more information about the proposed project. Colombi and Degai explained the grave problem of Itelmen language endangerment, and also talked with Google Earth about the high biodiversity of the region, the importance it holds to world conservationists, and to Indigenous history and presence. In a very short period of time, Degai and Colombi forged a partnership with Google.

The Collaborative Process and Its Mutual Benefits

That partnership led, in 2013, to the first ever Indigenous mapping workshop at the University of Arizona, with two trainers from Google, one of whom was Brian Thom, a co-author on this chapter and an anthropologist at the University of Victoria, who is an expert in the Indigenous mapping methodology. Colombi also received funding from the National Science Foundation, Arctic Social Science Program to bring a delegation of Itelmen elders as well as the anthropologist David Koester to the workshop. The attendees spent several days planning how to proceed. As part of that planning, they learned the basics of how to use the software for the purposes of mapping Indigenous language as well as history and places of cultural significance, and they also

discussed any traps or concerns of doing mapping with Indigenous communities, with a particular concern of doing mapping with Indigenous communities in Russia. The final topic on the agenda was a discussion of intellectual property issues, including confidentiality of historic places, sacred sites, and hunting and fishing areas. By the end of the workshop, most of the preparations had been completed for field-based work in Kamchatka in 2014.

Early in 2014, Colombi received notice that he was being given a Fulbright Scholar Award to support his ethnographic work in Kamchatka and to help support the Google mapping work. Thus, in early September 2014, when Google sent Brian Thom to Kamchatka, Colombi was already there for his Fulbright exchange. Colombi and Thom held two workshops in September of 2014 in Kamchatka, one in the capital city of Petropavlovsk and the other in the remote Indigenous village of Kovran. Petropavlovsk is the only urban centre in Kamchatka and many people of Indigenous origin live there. The workshop was held at the public library, largely because it was one of few places that had internet accessibility. The Petropavlovsk workshop pairs Indigenous elders from the city with youth and they begin to learn how to work with the Google Earth software. The workshop successfully introduced urban Itelmen and several Koryak participants to the possibility of utilising the software for documenting and recording Indigenous heritage, including language, subsistence practices, history, and related topics.

After the workshop in Petropavlovsk, Colombi and Thom took a three-hour flight from the capital city via small aircraft to the coastal village of Kovran, located near the Sea of Okhotsk, along the west coast of the peninsula. Kovran is the cultural centre of Itelmen traditions. It also is the place where Koester and Kasten had conducted previous research. Moreover, Degai, who was present during the workshop, was living with her family in Kovran and conducting dissertation fieldwork. The Kovran workshops were focused on pairing elder knowledge holders with village youth and were held at the village school. The workshop included several excursions with the youth and elders to places of significance in Kovran and nearby areas, including Ust Kovran, the mouth of the Kovran river on the Sea of Okhotsk. Vika Petrasheva, Degai's grandmother, told a story during this outing of Elvel, the sacred volcano of Itelmen origin, which loomed in the background. The importance of these outings was to document those interactions by video and audio and then to populate the maps with those stories in Google Earth. The week-long workshop was followed by a reception in the school and the youth shared the maps they created with the elders. The maps were in both Itelmen and Russian and the training website was also in Russian and Itelmen, as well as English.

The two workshops in the fall of 2014 were the first ever attempt to digitise ethnographic and linguistic Itelmen heritage using mapping software. The goal is to continue to do more mapping work in the areas of linguistic place name mapping and also to articulate places of significance throughout the Itelmen homeland. Moreover, Degai, now with her PhD in hand, is back in Kovran and working with the community as the director of Kovran's Culture House. She is working with the school age children and teenagers on maintaining and populating the maps.

The goal is for Colombi to return to Kamchatka in the fall of 2017 and in 2018 to continue the mapping work and to initiate a new project that will focus on the importance of historic villages where the Itelmen once lived. As part of his Fulbright trip, Colombi travelled for five months expeditionary style along most of the west coast of the Kamchatka peninsula visiting historic Itelmen villages. Shut down after WWII, the historic villages were once places of great antiquity and in places that Indigenous peoples have always lived (Slezkine 1994). During the trip both his travel partner Vika Petrasheva and Itelmen elders remarked on the importance of these villages to Indigenous identity and history. For example, Petrasheva was born in the village of Utkholok and lived there until her family was relocated to Kovran when she was approximately 12 years of age. Today, Petrasheva is 75 and many elders of her generation have strong attachments to historic villages; it is where they were born and spent their childhood. They long to tell stories about those experiences and to share with the younger generations the significance of these places. Thus, the initial step of the historic village project will be to conduct survey work of two or three historic villages in reasonable proximity of Kovran. Colombi has been to all three of these historic villages during his Fulbright exchange, including visiting the historic village of Utkholok with Petrasheva, a memorable and emotional experience for her and Colombi.

The elders not only supported and saw value in the mapping project and workshops but had asked Colombi repeatedly to find researchers who could support the historic village collaborative research project. The project will be multiyear and multidisciplinary and include investigations in archaeology (i.e., non-invasive techniques), ethnography, mapping, and linguistics. The first phase is to conduct the ground penetrating radar survey to ascertain the extent of the three villages and to take core samples to investigate the chronological history of the area as well as cultural use. The ultimate plan is to conduct several years of fieldwork in these villages to reconstruct the past and to do so carefully and ethically with local Indigenous partners. What is important is that this project addresses the needs and recommendations of the Itelmen knowledge holders and leaders. It will document and record a valued

part of the Itelmen experience and the recent history of relocation and removal. It will also systematically collect data to support Itelmen use and occupancy of the area, which some claim goes back well into the past, possibly thousands of years of continued use and occupation in the region.

During Colombi's Fulbright travels, the elders commented on the importance of seeing the collections of Itelmen items housed in the museums of Saint Petersburg. Thus, Colombi sought and received funding from the University of Arizona and the National Science Foundation, Arctic Social Sciences Program to bring four fluent Itelmen speakers to Saint Petersburg to visit archived collections at two world renowned ethnographic museums: The Peter the Great Museum of Anthropology (also known as the Kunstkamera) and the National Museum of Ethnography. The Itelmen collections housed at both museums include material items of great cultural and historic significance, including Indigenous Kamchatkan items collected during the Bering I and II expeditions to Kamchatka and the Russian Far East during the first half of the eighteenth century. The museums also house extensive field notes and photographs from earlier ethnographies, such as those of the 1920s Russian Itelmen scholar Elizaveta Orlova and the late nineteenth- and early twentieth-century Russian ethnographers, Vladimr Jochelson and Vladimer Bogoraz, who worked in the Russian Far East and in Kamchatka under the direction of the anthropologist, Franz Boas.

Joining the elders were Colombi and two linguists, Jonathan Bobaljik from the United States and Chikako Ono from Japan. Koester helped Colombi with the planning of the grant but was unable to make the trip to Saint Petersburg for the museum work. The linguists, along with Koester, are constructing a detailed dictionary of the highly endangered Itelmen language, in both written and digital form. The point of the museum project was to facilitate connecting the elder speakers with the collections and to have the elders not only interact with the collections but to speak about those collections and their significance in the Itelmen language. Those exchanges occurred over a period of two weeks and were recorded digitally and with audio and video; the linguists remarked on how valuable the exchange was in terms of adding much needed cultural content to the dictionary. They also remarked on how rare it was not only to have the elders speak about the items in Itelmen but to do so between each other. In addition, the exchange was the first of its kind for the Itelmen and helps to initiate a reconnecting of those items with Itelmen knowledge holders.

Other outputs of the grant include a webinar that Colombi produced in mp3 format, including material about the museum exchange and the earlier mapping work and Fulbright exchange, for dissemination in Kamchatka with

Itelmen communities. Colombi also received funding to print and distribute 1500 copies of a book, with an accompanying DVD, authored by Colombi, Degai, and Petrasheva entitled *Remembering Lesnaya: Language, Culture, and History*. Copies of the book are being distributed throughout several Indigenous Itelmen and Koryak communities in Kamchatka.

The collaborative work between western researchers and Indigenous knowledge holders of Kamchatka is unique in that the research aims and objectives are largely driven by the community. They see the value in collecting the data for two reasons: to document, record, and celebrate Indigenous heritage; and to systematically collect data to support Indigenous claims to land and other resources in the future. Thus, what began with a question about a mapping project for the Itelmen community has already resulted in several additional projects benefiting both the Indigenous and academic communities.

Notes

1. The project described in this chapter is part of the Innovations in Ethnographic Mapping and Indigenous Cartographies project, funded by a Google Research Grant, and the Social Sciences and Humanities Research Council Insight Development Grant, with additional funding from the National Science Foundation, the Arctic Social Sciences Program, and the US Fulbright Scholar Program.
2. This chapter focuses on how the team was built and how the collaborative aspects of the project were built. We have previously published an article focusing on the methodological aspects of the project. (Thom et al. 2016).

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14

Mana Wahine: Decolonising Governance?

Sharon Toi

Te Wheiao: The Dawn

The Māori phrase '*Tihei mauri ora ki te wheiao*, *ki te ao mārama*' means 'the glimmer of dawn (the promise of a new day), the bright light of day'. In Māori belief, the time just before dawn is the time when new ventures are started and a time for celebrating the promise of the new day. Cleve Barlow recounts this as the transitional or liminal state:

> When a carved house is completed, the dedication takes place in the early morning before sunrise. This is the time between night and day that is referred to as *wheiao*. Most of the Māori rituals are conducted at this time of day in the belief that the ritual is performed in the presence of the gods and the spirits of ancestors that have passed on. At this particular time there is no disturbance from the outside world, and the gods and spirits take leave of this world before the rising of the sun. (Barlow 1991, pp. 184–185)

So it was that at 6.00 am on 21 November 2014, Ngāti Waewae of Arahura ki Hokitika, a Māori settlement on the West Coast of the South Island of New Zealand (also known as Greymouth), hailed the sun for the opening of their

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_14

new *whare tupuna* (ancestral meeting house) powerfully named Tūhuru after the eponymous ancestor of this subtribe of Ngāi Tahu. Tribal history records the arrival of the great chief Tūhuru and accompanied by his warrior wife Papakura and equally fierce sister, Moroiti, around 1820.[1] They defeated the people already living there and decided to remain, claiming through *mana whenua* (conquest of land) the area as their own and guardianship of the precious pounamu (greenstone) that is found in abundance there.

Today's Ngāti Waewae descendants proudly trace their customs and traditions back to these warrior *tupuna* (ancestors). At the *pōwhiri* (welcoming ceremony) for visitors to the *marae* (communal/sacred space), young women are observed participating in the traditional *wero* (challenge) alongside the warrior men of the tribe. The practice of *wero* harkens back to a pre-colonial time when Māori were still in the process of defining their boundaries, and according to Barlow, it was a necessary practice to ensure the safety of the clan (Barlow 1991, p. 164).

The young woman advances towards the gate, her eyes firmly fixed on this important guest. She has come to this point moving like *weka* (woodhen) and *pūkeko* (purple swamp hen) from the vantage point of her *whare tupuna* (ancestral meeting house). She is one of a group of warrior men and women taking part in this customary ritual of encounter, *te wero* (challenge). Significantly, she is the lead of the best three warriors on this day, chosen for their prowess with *mau taiaha* (Māori weaponry) to offer the challenge on behalf of her people, descendants of Tūhuru and his warrior wife Papakura.

She crouches with deliberation to lay the *taki* (enticement) on the ground before him. She doesn't look away, not for a second. In fact, she daren't. *Tikanga* (Māori custom/law) dictates that she must remain steadfast or appear weak placing herself and her people in danger. This is not a process of welcome—it is a test to determine if this *ope* (group) comes to parlay a peaceful settlement or if their intent is war. She is vigilant and rises in preparedness, ready to attack. By taking two measured steps backward, she stands grounded ready to strike. Her shrill voice pierces the air, not with words but with an expulsion of breath from deep within. This is *pukana* that can only be translated as the expression of one's *wairua* (spiritual essence). She motions for him to pick up the *taki*, back-footed, ready, steadfast.

The Minister for Treaty Settlements stoops to retrieve the offering. He is accompanied by a Māori advisor who ensures that he does things properly, that the customs are not transgressed in any way. After all, he is present in his capacity as the Crown representative to apologise to these people of *Ngāti Waewae*, the *tangata whenua* (original inhabitants) for the infliction of 175 years of wrongs and misdeeds. She motions again. Creeping forward her

intentions are clear 'make haste', our people have waited long enough. Without losing eye contact, the Minister rises, back straight, eyes ahead as he holds the *taki* up for everyone present to witness. The emotion of this moment is palpable. His peaceful intentions are clear, and he is composed, ready to continue. She retreats, slowly and deliberately, looking askance often to ensure there is no indication of treachery. The war party then retreats to the bosom of their *whare tupuna* (ancestral meeting house). They slowly but determinedly move across the *marae ātea* (forecourt) for this is the pavilion of war. In the metaphysical sense, the *marae ātea* is the arena of *Tūmatauenga* (god of war) where transgression can have lasting consequences.

Simultaneously, the *karanga* (call of welcome) rains out across the *ātea*. This is the women's voice and is also the first voice heard on the occasion of *pōwhiri* (welcome ceremony) which can now proceed in earnest. The *karanga* signifies that the visitors are in fact *tapu* (sacred). It is a state that allows for the sanctity of the process until the sharing of food at the *kai hākari* (feast) that will render the visitors *noa* (free of sacredness).

* * *

This opening narrative is situated at the intersections of the old and new, traditional and modern, time and space. It provides an insight into the potential for change in Māori customary practices (*tikanga Māori*). Given its perspective, the narrative also allows us to see and raise questions regarding the current role of the *wero* and the role of women in the *wero*.

The *karanga* is often quoted as the traditional role that affords Māori women some status on the *marae*. The woman's *karanga* (call) is intended to arouse the spirits of those who have passed over into the spiritual realm. It is a high-pitched cry that is projected to pass beyond the boundaries of the physical world into the metaphysical. The role, however, is reserved only for women that are past childbearing age. It has been argued that the *karanga* reflects a gender bias, with the implicit presumption that this is the only role for senior women. Ngahuia Te Awekotuku states that the apparent gender division has arisen as a consequence of colonisation and Christianity which have eroded the spiritual power of women.

> There is another part to our natures, however, which I believe Christianity and colonization effectively undermined and certainly damaged, and that is the warrior, the shaman, the initiator, the visionary, the groundbreaker – the women at

> the front.…What I believe has happened over the last 200 years, is the reduction of the female voice. (Ngahuia Te Awekotuku 1994, p.80)

But is the *wero* even appropriate in a modern context? Some would say not. Māori academic Poia Rewi has questioned the relevance of the practice in modern times. 'Now that physical conflict is unlikely, one might easily assert that it is redundant and its purpose, at least in assessing the intentions of the visit, is little more than ritual' (Rewi 2010, p. 59). If so, what purpose does observance of these rituals have?

In Māori custom, the metaphysical is invoked to connect with the living and the natural world. Māori custom law (*tikanga Māori*) remains the cultural fabric of tribal institutions, but it is increasingly coming in for criticism from Māori women that question and resist the male-dominated, male-centred, and male-identified system of tribal governance. The call for gender-balanced decision-making is gaining momentum as Māori tribes (*Iwi*) progress the settlement of Treaty of Waitangi grievances through a government-driven treaty settlement process ostensibly designed to provide for self-determination.

Tikanga Māori is imbued with pre-colonial perceptions of authenticity as well as practical post-colonial adaptations. Ani Mikaere argues that gender bias became evident in the rewriting of Māori cosmology stories that elevated the exploits of Māori men over Māori women (Mikaere 2011). Justice Joseph Williams has also commented that *Mana Wahine* was purposefully diminished in official writings during early contact (Williams 2013). One of the foremost proponents of *tikanga Māori*, Professor Hirini Moko Mead cautions us, is that *tikanga* should not be seen as fixed from time immemorial. He explains that being principles-based allows for on-going review in relation to a continuous dialogue between the past and the present:

> There are some citizens who go so far as to say that *tikanga Māori* should remain in the pre-Treaty era and stay there. To them *tikanga Māori* has no relevance in the lives of contemporary Māori. That body of knowledge belongs to the not so noble past of the Māori. Individuals who think this way really have no understanding of what *tikanga* are and the role *tikanga* have in our ceremonials and in our daily lives. It is true, however, that *tikanga* are linked to the past and that is one of the reasons why they are valued so highly by the people. They do link us to the ancestors, to their knowledge base and to their wisdom. What we have today is a rich heritage that requires nurturing, awakening sometimes, adapting to our world and developing further for the next generations. (Mead 2016, p.26)

If we can accept that *tikanga Māori* is principles-based and that a Māori world view is the essential foundation, then the door is open to discovering

the transformative potential which the *Ngati Waewae* example represents. I argue that the impediments to transformation exist more in our colonised ways of knowing than in a strict adherence to principles of *tikanga* from a time past. The tools of discovery are at our fingertips. As is our custom, I begin by looking back in order to move forward with confidence. '*Titiro ki muri*' literally means to 'look back or behind'. '*Haere whakamua*' means back into the future. Taken together the sayings reveal a significant concept in the Māori world view that of walking backward into the future with one's gaze set steadfastly on the past. Therefore, it is only by knowing our past that we can properly navigate our future.

Te Ao Hurihuri: The Changing World

The international movement for Indigenous self-determination gained momentum with the adoption of the UN Declaration on the Rights of Indigenous Peoples. As part of this movement, Indigenous groups have looked to their own customs and traditions to articulate theories of self-determination appropriate for each community. For the Māori, part of this examination has occurred through the lens of *Kaupapa Māori*.

Kaupapa Māori is a vehicle for theorising Indigenous struggle. Indeed, I am creatively inspired to engage in this work by Māori scholars, researchers, and academics such as Linda Tuhiwai Smith, Graham Smith, Leonie Pihama, and others who created the impetus for *Kaupapa Māori* theory and then challenged us to get our 'hands dirty' in the academy (Smith et al. 2012). *Kaupapa Māori* theory and its related term *Kaupapa Māori* methodology were coined by Māori academics as a strategy to open up powerful spaces within the academy to theorise and shape forms of academic inquiry. *Kaupapa Māori* validates and legitimises Māori language, knowledge, and culture. It 'provides a space for thinking and researching differently, to centre Māori interests and desires, and to speak back to the dominant existing theories in education' (Smith et al. 2012, p.13). *Kaupapa Māori* methodology has been a successful decolonising approach to addressing the lack of *te reo Māori* (Māori language) in mainstream education and to fuel the organic *kohanga reo* (Māori language nests) initiative to halt further language loss.[2] The key aspects of *Kaupapa Māori* theory is its radical potential founded as it is in critical theory as a set of ideas requiring both action and theory, that is, as Māori we need to realise that only transformative action can result in social justice. Additionally, such action needs to be accompanied by critical political thought and engagement with structuralism or, in other words, 'praxis'.[3]

While there has been rapid growth in the literature on Indigenous self-determination, sovereignty, and nation-building, research into a gendered perspective of the effects of colonisation on Indigenous women and governance has been noticeably absent from the self-determination discourse. What little literature that does exist provides compelling evidence for further in-depth research (see, e.g. Monture-Angus and Turpel 1995; Napoleon 2007; Sayers et al. 2001). Some Indigenous feminists have asked whether there can be Indigenous self-determination or self-government without addressing the internal oppression of Indigenous women and how it is maintained in Indigenous systems (Green 2007).

To what extent can Indigenous tribal governance be characterised as preserving traditional cultural practices that reinforce the authority of Indigenous men at the expense of Indigenous women? Purely capitalist pursuits, captured by neoliberal logic, are undermining Indigenous organisations. As a result, Indigenous women continue to be greyscaled in the formal institutions of tribal governance while being paid lip service as informal but not essential tribal decision-makers. I introduce this theme of grey scaling or invisibility to reflect the idea that while Indigenous women are present and active within their nations, tribes, and communities, fewer women than men can be observed in senior leadership roles as tribal chairperson or tribal chief.

I submit that the self-determination discourse has largely pushed Indigenous women's issues to the side. Consequently, the resultant need for social justice requires a dual 'decolonising' approach that encompasses both a gendered or feminist analysis of the broader political issues and the contextualisation of 'Indigenous women's issues' in a broader analytical political frame. In other words, at both a practical and theoretical level, the work of each approach must inform the other. Without such a dual political strategy, the appalling disconnect between the political rhetoric and the lives of Indigenous women will persist.

I contend that given the prevailing political, economic, social, and cultural context within which we find ourselves as Māori, a theory is needed that is able to engage the complexities of Māori women's experiences. This is because the experiences of Māori women are influenced by our experiences of oppression and colonisation, as well as the suppression of our language and culture—*te reo me ōna tikanga Māori*. Theories of governance cannot successfully demonstrate the concept that Māori women theorise their own experiences with a focus on both being Māori and being female. These can only be examined through Māori frameworks that validate and incorporate a Māori (woman's) worldview. My goal is to progress the process referred to by Kathie Irwin as moving towards Māori women's theories and in so doing engage issues from Māori women's perspectives (Irwin 1992).

Thus, two streams of consciousness pervade this writing. First, as a Māori woman and Kaupapa Māori theorist, I am engaged in writing at the intersections within the micro spaces of *tikanga Māori*, *Mana Wahine* (Māori feminism), and *Kaupapa Māori* (Māori decolonising theory and methodology) (Smith 1997; Denzin et al. 2008; Smith 1997; Smith et al. 2012; Pihama 2001; Pihama et al. 2002). I am equally confronted by the macro realities including the damaging legacy of colonisation, globalisation, and the neoliberal policies of the settler state of New Zealand. These streams of consciousness are not dichotomous but rather form a nebulous 'mash up' of entangled agendas and competing discourses. This chapter seeks to make sense of this entanglement as it relates to Indigenous theories of justice within the contested spaces of Indigenous tribal governance and competing Indigenous gender leadership relations.

Like many other Indigenous men and women, writing is an important vehicle for my own participation in the struggle to visibility. It is my attempt to 'centre' a Māori woman's voice and is not intended as a plea for inclusion. Writing from the margins is a cathartic exercise. Linda Smith refers to this as 'writing back', a project with emancipatory potential through resistance and reclamation simultaneously (Smith 1997). In the same way, I compare and contrast the perspective of other Indigenous women and men that honour their struggle in their writings. Collectively the themes cause me to reflect on how the intersections of race, gender, and class position us in conflicted spaces and require us to be vigilant.

First among these themes is the rejection of white feminism. The literature is clear that white feminism cannot articulate an Indigenous agenda which is simultaneously collective and individual, colonial and anti-colonial, colonised and decolonised. As Monture-Angus makes clear, white feminism is premised on the construction of women as 'Other', and that equality is prefaced on sameness. She cautions that this only serves to perpetuate race and gender oppression and reinforces the notion of Indigenous women as deficient.[4]

In addition, white feminism does not have a place to factor in individual and collective agency. Indeed, the two concepts often trigger cognitive dissonance—the inability of the mind to accept opposite concepts simultaneously. As a result, one concept seems to eclipse the other. For example, when describing the multiple oppressions experienced by Indigenous women, there is a natural tendency to focus on Indigenous women as victims. The issue is how to validate the oppression experienced by women while at the same time appreciating the agency of aboriginal women, as demonstrated by the many ways in which they have survived and continue to survive.

For theories to be useful, they must be relevant to the individuals and communities they seek to describe. That in turn requires correctly identifying and defining the relevant persons or groups. Neither the term 'Indigenous' nor the term 'Māori' are our own. They are derived from a legacy of colonialism that supported a reframing typology inherent in nineteenth century anthropological studies of race and culture. I am an Indigenous woman from *Aotearoa* (New Zealand). I am *Ngāpuhi* first and foremost, and I am capable of tracing my genealogy back 170 generations to my ancestor Toi, a Hawaikian, a Pacific navigator. Thus my indigeneity merely frames my *Ngāpuhi* identity. I am also Māori, and while this too is a generic term, it is less homogenising in its origins. What is needed, then, is a theory of Indigenous feminism.

Indigenous feminist scholarship is expanding the critical importance of the Indigenous justice debate. Indigenous women's oral histories, narratives, and experiences of colonialism are inherent in the gendering of issues arising from the contemporary gender relations between Indigenous men and women. As Makere Stewart-Harawira has stated, in today's post-colonial society, Indigenous women's roles are frequently misrepresented to be secondary to those of Indigenous men despite the knowledge that Indigenous women held powerful leadership roles in traditional tribal societies (Stewart-Harawira 2005), Examining the intersection of domination between Indigenous men and women reveals the destructive impact that colonisation has had, and continues to have, on contemporary Indigenous gender relations.

As Linda Smith reminds us, colonialism was and is a gendered process and 'has had very real consequences for Indigenous women in that the ways in which Indigenous women were described, objectified and represented by Europeans in the nineteenth century has left a legacy of marginalization within Indigenous societies as much as within the colonizing society' (Smith 1997, p.48). Indigenous feminism challenges the effects of colonialism, patriarchy, and inequality. Cynthia Wesley-Esquimaux clarifies how patriarchal values were instilled through Christian missionisation that became internalised within native communities through white and then Indigenous religious functionaries (Wesley-Esquimaux 2009, p.13). In addition, Kim Anderson explains how the Indian Act supplanted traditional roles for women in tribal governance with electoral systems that prevented women from seeking voting or seeking office (Anderson 2009, p.98).

Haunani-Kay Trask describes the impact of colonialism and military overthrow on Indigenous Hawaiians stating that American feminism is out of place in Hawaii geographically, culturally, and historically. Self-determination has therefore never been the goal of feminism. In contrast, the Hawaiian feminist movement is based wholly on ameliorating their historical subjugation

and loss of sovereignty (Trask 1999, p.910). For Indigenous women the discourse and language of decolonisation is about social justice, healing, and reclamation.

Colonial ideologies of race, gender, and class have constructed discourses about Indigenous women that have served to negate the role and status of women in western and Indigenous societies. The infliction of colonial belief systems and practices arising from colonisation has served to marginalise, ignore, and redefine Māori women, their values, beliefs, practices, and stories. Linda Tuhiwai Smith clarifies:

> Māori women belong to a group of women in the world who have been historically constructed as 'Other' by white patriarchies and white feminisms. As women, we have been defined in terms of our differences to men. As Māori, we have been defined in terms of our difference to our colonisers. As both, we have been defined by our difference to Māori men, Pākehā men and Pākehā women. The socioeconomic class in which most Māori women are located makes the category of 'Other' an even more complex problematic. (Smith 1997, p.33)

Within *Te Ao Māori* (the Māori world), the words '*Mana*' and '*Wahine*' are difficult to translate. This is because they are imbued with cultural, relational, and spatial understanding that belies English translation (Pihama 2001). *Mana Wahine* and *Mana Tane* are premised on the pre-colonisation knowledge that the roles of men and women were complementary, and where hierarchy existed, it was based on *whakapapa* (descent) rather than gender (Mikaere 2011; Yates-Smith 1998).

Ngahuia Te Awekotuku defines *Mana Wahine* as an umbrella term under which Māori women's theories can be located. *Mana Wahine*, she states, is also broadly used to describe Māori women that display a multitude of characteristics from leadership, business acumen, strength, agility, skill, and talent in a variety of spheres of life. It is understood intrinsically as meaning 'a woman of strength', potentially spiritually, culturally, academically, or even politically. Te Awekotuku states that the term is not reactionary, it is more than just a label, and it is also a process by which Māori women can rediscover the strengths of Māori relationships, that is, *whanaungatanga* (kinship). It is by engaging in this rediscovery that the proactive work that is necessary for Māori can be progressed. That work involves the reclamation of Māori women's knowledge and is a powerful challenge to dominant and prevailing beliefs about Māori women. Women have always held status and central roles in Māori society (*whanau*, *hapū*, and *iwi*), and it is the stories of *tupuna wahine* which, when told, remind us that Māori women are integral to the *mana* (prestige) of Māori (Ngahuia Te Awekotuku 1991).

Justice: Comparatively Speaking

'*Ka whawhai tonu mātou*, *ake ake ake*' literally means 'The struggle without end' and is attributed to the nineteenth century Māori leader, Rewi Maniapoto who prophesied that Māori people would struggle forever against colonialism (Walker 1990). In this day and age, his words have a different meaning and are viewed as a challenge for Māori to strive for social justice. In short, struggle is synonymous with Indigenous reclamations of space in traditional and contemporary political, social, and legal contexts.

Traditional Indigenous governance systems have been seriously undermined as a result of colonisation, and today the prospects of practising those systems of governance, based as they were on traditional concepts of law, economies, and governance, are seriously limited. It is within traditional concepts of law, such as *tikanga Māori*, that Māori women have an expectation of participation in tribal governance, just like other Indigenous women. Our traditions tell us that Indigenous women governed.

This chapter is not a call for a return to a pre-colonial idealistic state of harmony. Such fundamentalism is ill considered at best, as it has been used to support patriarchal and paternalistic practices that serve to discriminate against and oppress Indigenous women. What this chapter espouses is the notion that contemporary Indigenous governance models do little to reflect traditional systems where women were included as essential decision-makers and/or leaders. And while it is true that contemporary Indigenous governance models differ widely, there is enough evidence to suggest that the premise stands and that Indigenous women have been and continue to be 'grayscaled' from modern tribal institutions of leadership. Thus the issue is one of 'positioning' or, indeed, the lack thereof.

Aotearoa New Zealand is a unique political, social, and cultural landscape, and Māori tribes reflect this. A growing concern for many Māori women is the positioning of *tikanga Māori* (Māori law) within the post settlement governance framework and whether or not *tikanga Māori* adherence in a corporatised and capitalist-driven structure takes account of Māori women who were traditionally considered essential decision-makers. The struggle for self-determination is not one for Māori men to confront alone or to determine the outcomes for and on behalf of Māori women. It goes without saying that Māori women have always and continue to deal with the problems arising from colonisation. Māori women expect to be deciding on the solutions. Māori and Indigenous women's struggle continue within our own cultural spaces. If not now, when will be the right time to decolonise our spaces? There is nothing sustainable about our current trajectory.

Notes

1. Moroiti was a tohunga (spiritual leader) who would advise according to signs she would read, http://ngaitahu.iwi.nz/our_stories/wahine-toa/, date accessed 23/10/2016.
2. Kaupapa Māori originated in 1987 as a philosophy underpinning the Kura Kaupapa Māori schooling initiative. Māori parents, teachers, and academics of that time were pushing for the Ministry of Education to provide funding and space for a total immersion schooling experience for children heading into mainstream schooling from *kohanga reo* (Māori language nest).
3. Friere's use of the term 'praxis' refers to the inseparability of action and analysis (Freire 1986).
4. See Monture-Angus and Turpel 1995, p.220, 'The experience of Aboriginal women is that of 'double disadvantage', exposes the consequences of resistance in even more fundamental terms. If only because it is more extreme and more obvious. The goal that we set ourselves should be to eliminate the disadvantage that Aboriginal women face because it is more startling than the experience of either race or gender alone. Eliminating this disadvantage is the greatest of the challenges that face Aboriginal people. By confronting the disadvantage that women face as both women and as Aboriginal, we will also be confronting discrimination, disadvantage, oppression, and dependency faced by our fathers, uncles, brothers, sons, and husbands. We must also accept that in some circumstances it is no longer the descendants of the European settlers that oppress us, but it is Aboriginal men in our communities who now fulfil this role. In particular, we have the *Indian Act*, the Indian Affairs bureaucracy, and residential schools to blame for this reality, but any form of blaming will not solve the problem' (Monture-Angus and Turpel 1995, p.229).

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15

Contemporary First Nation Lawmaking: New Spaces for Aboriginal Justice

Miriam Jorgensen

Undeniably, Indigenous peoples within Canadian borders have advantages that Indigenous peoples in many other parts of the world do not.[1] Canada recognises First Nations, Inuit, and Métis peoples in its constitution.[2] The Supreme Court of Canada has progressively strengthened Aboriginal authority over land, waters, and natural resources.[3] Since the early 1990s, the provincial and federal governments of Canada have been involved in modern treaty-making to further enshrine the rights of Aboriginal communities with whom the Crown lacked historical agreements. And while progress has been variable, Canada is engaged in a process of reconciliation for some of the worse aspects of its colonial history. In 2008, for example, Canada offered an apology on behalf of Canadians for the Indian residential schools system and signed the Indian Residential Schools Settlement Agreement, providing redress to victims and establishing the Truth and Reconciliation Commission of Canada. As the former UN Special Rapporteur on the Rights of Indigenous Peoples summarises in his 2013 country report, 'Canada's relationship with the indigenous peoples within its borders is governed by a well-developed legal framework that in many respects is protective of indigenous peoples' rights' (Anaya 2013, p. 5).

Yet even in this supportive environment, much remains to be accomplished. Many aspects of Canada's relationship with Indigenous nations still require

This chapter is written with thanks to Stephen Cornell, who worked with me on several of the on-the-ground research and consulting projects that motivated it. All errors are my own.

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J. Hendry et al. (eds.), *Indigenous Justice*, Palgrave Socio-Legal Studies,
https://doi.org/10.1057/978-1-137-60645-7_15

reconciliation, redress, and reform. As the Special Rapporteur also notes, government funding for healthcare, housing, and education is inadequate; disproportionate numbers of Aboriginal people are detained in Canadian prisons and jails; far too many Native women and girls are murdered, missing, or caught up in human trafficking; and 'many of Canada's laws, in particular the Indian Act, still do not permit the effective exercise of indigenous self-government' (Anaya 2013, p. 12).

This chapter takes up the latter issue. It explores how two Mohawk nations pushed back on Canada's restrictions on First Nations' self-government through the creation of contemporary Indigenous lawmaking processes and, in so doing, how they created new spaces for the exercise of Mohawk law and justice. Part I explores lawmaking as a fundamental aspect of self-government and the role of Canada's Indian Act in suppressing First Nation lawmaking and self-governance.[4] Part II describes the legislative procedures designed by the Akwesasne Mohawk Nation and Kahnawà:ke Mohawk Nation separate from Canada's strictures. Part III discusses implications of the nations' lawmaking strategies and, in particular, what their work implies for expanding the scope of Indigenous justice in native communities across Canada and elsewhere. In other words, while this chapter focuses primarily on First Nations and the restrictions the Indian Act places on their lawmaking and self-governance, its lessons may have broader relevance.

Indigenous Lawmaking and Canada's Indian Act

Two concepts—law and governance—frame this discussion:

> *Law* is the system of enforceable rules established in a community. A society's fundamental, constituting law specifies how authority is distributed and organised. Additional laws specify how things are done, from how people should behave to what happens to resources, how the community will prevent harm to individuals and property, and how the community will meet its members' needs. Without law, a society cannot maintain social order, uphold justice, or progress social goals—in fact, it may not even be able to sustain itself as a community.
>
> *Governance* involves taking the actions necessary to enact the community's priorities. It has to do with determining the rules (creating statutes, guidelines, policies, and protocols); enforcing the rules; making and implementing decisions for the community's welfare (e.g. managing programs and building infrastructure on behalf of community goals); resolving disputes (between or

> with individual community members, corporations, or governing authorities), establishing relationships with other governments, and ensuring that these activities can continue over time (often by managing periodic election or appointment processes). In sum, governance 'involves making decisions, establishing policies, and getting things done'. (Cornell et al. 2003, p. 2)

First Nations peoples always have had laws (see, e.g., Borrows 2005). In general, their laws were embedded in culture, in the rhythms of nature, and in the teachings of elders, medicine people, and others. These rules addressed who should make what kinds of decisions, how people should treat each other, and what the appropriate relationships should be with animals and the land. First Nations peoples made and learned these laws in response to the world they encountered.

Since late in the nineteenth century, however, lawmaking for the First Nations within Canada's borders has been largely a non-Indigenous business. The federal and provincial governments of Canada have disregarded the laws of First Nations peoples, imposed Canadian laws in their place, and otherwise worked to constrain First Nations' lawmaking. From a western legal standpoint, this result arises from two Canadian laws—the British North America Act of 1867/Canadian Constitution Act of 1867, which provides Canada with exclusive jurisdiction over 'Indians and lands reserved for the Indians' (British North America Act (1867), s.91 (24)), and the Indian Act of 1876, which explicitly diminishes First Nations' governing power. The Indian Act does so by standardising local First Nation governance through the chief and council system and by stipulating that Canada, acting through a ministerial agent, is responsible for most areas of First Nations affairs. While there are some ways to opt out of the act on a case-by-case or issue-by-issue basis, this 140-year-old law is in many ways unchanged from its original form and 'remains the default and still prevalent regime among First Nations' (Anaya 2013, p. 13; see also Fontaine 2016; Hanson 2009; Hurley 2009).

Together, the Canadian Constitution Act and the Indian Act leave little room for First Nations lawmaking. Section 91 of the Constitution Act assigns the federal government of Canada exclusive jurisdiction over criminal law. Parliament subsequently enacted the Criminal Code of Canada in 1892 as a law of general application—which means it is applicable to everyone living within the borders of Canada, both to settlers and their descendants and to Aboriginal people living off *and on* First Nations reserves. Section 92 of the Constitution Act establishes provincial jurisdiction over many civil matters, including direct taxation, management of public land, prisons and hospitals, municipal institutions, public works and construction, business incorpora-

tion, marriage, property and civil rights, law enforcement and the administration of justice, and non-renewable natural resources. Although judicial rulings of the era emphasised that section 92 was a law for Canadians only and that the laws of First Nations 'were left in full force' (Connolly v Woolrich 1867), section 88 of the Indian Act reversed this policy, further reducing the scope of colonially approved First Nations lawmaking.

Sections 80–85 of the Indian Act do specify issues over which First Nations have contemporary lawmaking authority, and the list is relatively long. It includes the power to regulate traffic, prevent the spread of contagious disease, regulate and develop physical infrastructure, zone land, license and regulate certain types of commerce, control noxious weeds, pass ordinances for animal control, designate rights of non-status Indian spouses or children residing on the reserve, and raise certain taxes, among other powers. Moreover, amendments to the Indian Act made in 2014 eliminated the need for ministerial approval of First Nation bylaws (Indian Act Amendment and Replacement Act, S.C. 2014).

Nonetheless, there at least three problems with this recognised lawmaking authority[5]:

Unless made under the authority of another Canadian law, First Nations' laws must be bylaws to the Indian Act. By definition, a bylaw is a subsidiary law, one that can exist only in relationship to or under the authority of an overarching body of law. In other words, Canada's perspective is that First Nations laws must be subsidiary to the laws of Canada. But from a First Nations' perspective, this constitutes lawmaking under the authority of a foreign power.

First Nations' bylaws cannot contradict or replace Canadian law. Even when legislating on an Indian Act-approved topic, a First Nation bylaw cannot be 'inconsistent with this Act or with any regulation made by the Governor in Council or the Minister' (Indian Act, s.81(1)). While the 2014 amendments allow First Nations to enact bylaws without ministerial approval, they may not prevent Canada from challenging a rule that, once promulgated, it determines to be inappropriate or unnecessary.

The bylaw designation and the list of approved domains for lawmaking effectively treat First Nations as municipalities.[6] While First Nations may not be (or even want to be) 'nations' in the way the term is commonly understood in international affairs, they are certainly more than municipalities. They have greater inherent authority and greater authority under international law than municipalities have, yet the provisions of the Indian Act deny an understanding of First Nations as having 'national' characteristics.

Reflecting on the definitions of 'law' and 'governance' offered earlier in this section, it is reasonable to conclude that a community's ability to make law is a fundamental aspect—perhaps even the distinguishing aspect—of self-governance. Thus, when an Indigenous nation's law is made by an external government, it is neither self-determining nor self-governing. Given the extensive authority over lawmaking that Canada seeks to exercise, First Nations experience significant constraints on their self-governance.

This result is unjust. It is unjust because it constrains First Nations' lawmaking and their exercise of self-government. It also is unjust because the loss of these procedural tools affects substantive outcomes as well. As noted above, a community's law is the collection of rules about what *that society* believes is right and proper. Justice flows from law as long as that law is the community's law. For First Nations within Canada's borders, it often is not.

Akwesasne and Kahnawà:ke Mohawk Examples

Fortunately, change is in the wind. Not only is Canadian government policy slowly shifting towards recognition that 'the Indian Act is an outdated colonial statute, the application of which results in the people of Canada's First Nations being subjected to differential treatment' (Indian Act Amendment and Replacement Act, (S.C. 2014), c. 38, Preamble, para.1) but some First Nations have found ways to push back on Canada's dominance in lawmaking. Some have done so through self-governance agreements, some through modern treaties, and some through land claims settlements. A small but growing number are doing so outside any of these formal intergovernmental processes and simply are reclaiming the right, as self-determining nations, to make laws of their own.

Two Mohawk communities in eastern Canada, the Akwesasne Mohawk and the Kahnawà:ke Mohawk, have taken this different path. They have engineered systems for community lawmaking that allow them to enact legislation that, as one leader puts it, 'have nothing to do with Canada' (Mitchell Part II), 'it's *our* law' (Mitchell Part III). In other words, these First Nations have self-designed systems that allow them to make contemporary formal law on any number of topics, not simply those to which they are restricted under the Indian Act.

The Akwesasne Example

The Akwesasne Mohawk occupy a jurisdictionally complex territory on the Canada-US border, along the stretch of the St Lawrence River where the provinces of Québec and Ontario and the state of New York meet. On the southern side of the international border, the community is recognised by the US government as the St Regis Mohawk Tribe and is governed according to the provisions of its own tribal constitution. On the northern side, the community is recognised by Canada as the Mohawk Council of Akwesasne and is governed under the Indian Act by a Chief and Council. Akwesasne territory is also the capital of the larger Mohawk Nation, which is governed by the Mohawk Council of Chiefs, a traditional government recognised by the Haudenosaunee Six Nations (Iroquois) Confederacy. The northern part of the community, the First Nation, is the focus of this mini case study.

For the northern Akwesasne Mohawk, innovations arose both from the Chief and Council's frustration with the bylaws process and from community beliefs about the importance of Mohawk-made law (Wildlife Conservation Law; Brimley et al. 2007). Prior to 2014, when ministerial approval was still required, the Chief and Council had tried and failed multiple times to gain approval of an Akwesasne Wildlife Conservation bylaw. The Department of Indian Affairs and Northern Development (now known as the Department of Indigenous and Northern Affairs) repeatedly had responded that the issues were covered under Canadian law. Around the same time, surveys conducted at the behest of the Mohawk Council of Akwesasne found that Akwesasne citizens wanted their own laws, laws that reflected Mohawk concepts and traditions. Even if Canadian laws existed for the same as the purposes, citizens felt it was more appropriate for the laws governing Mohawk territory to be Mohawk laws. 'Coupled with the problems the [Mohawk Council of Akwesasne] had encountered with Indian Act bylaws, this strong, community-wide conviction about the appropriateness of community law provided a compelling incentive to develop an Indigenous, locally controlled form of lawmaking' (Brimley et al. 2007, p. 8).

The process the Akwesasne Mohawk designed for making community law is as follows (Legislative Development 2017b):

> *Phase I – Development of Proposed Law*: This phase can be initiated by the Mohawk Council of Akwesasne or by a petition from Akwesasronon (Akwesasne citizens). A task group is then established to develop draft legislation.

Phase II – Acceptance of Proposed Akwesasne Law in Principle: The draft law is brought to a Council meeting for acceptance in principle. If the Council accepts the draft, it is sent to the community; alternatively, it is sent back to the Legislative Commission for more work.

Phase III – Community Consultation: The community reviews and comments on the draft law. At least three information meetings to discuss the proposed legislation are required, one in each district of the northern part of Akwesasne territory. The task group makes revisions to the draft law based on feedback from the community meetings.

Phase IV – Enactment of an Akwesasne Law: After proper notices to the community and an appropriate review period, the final draft law is brought to the community for enactment either by a secret ballot vote at a Special General Meeting or by a referendum vote.

Phase V – Procedures after the Enactment Phase: The enacted law is recorded by the Mohawk Council of Akwesasne in the Kaiahnehronsehra iehiontakwa (Place Where Laws Are Registered), an Akwesasne-developed registry system for the nation's laws. If a law is rejected, a notice is posted to the community, and no further legislation on the same subject matter can be considered for at least 120 days.

The Kahnawà:ke Example

The Kahnawà:ke Mohawk territory lies on the south bank of the St. Lawrence River opposite Montréal, Québec. The original settlement grew substantially in the seventeenth and eighteenth centuries when Mohawk from what is now Albany, New York, moved to Kahnawà:ke to increase their participation in the fur trade; the Jesuits formed a mission; and conflict between the British and French created military and political opportunities (Mohawk Council of Kahnawà:ke 2017). The territory and community remain economically, religiously, and politically important today. For example, a key bridge and road to Montréal cross Kahnawà:ke lands, and the community is the last resting place of the first Native American to be beatified by the Roman Catholic church. The Kahnawà:ke Mohawk are organised under the Indian Act as the Mohawk Council of Kahnawà:ke and have a Chief and Council form of government. Also like the Akwesasne Mohawk, they are part of the larger Mohawk Nation, which is governed by the Mohawk Council of Chiefs and is a constituent nation in the Haudenosaunee Confederacy.

A somewhat different set of concerns led to lawmaking innovation for the Kahnawà:ke Mohawk community as compared to the Akwesasne Mohawk (Kahnawà:ke Legislative Coordinating Committee 2017). For one, there was growing scepticism that an Indian Act-created Chief and Council was the appropriate decision-making body for the community. Although Chief and Council had delegated the task of developing laws to the Kahnawà:ke Justice Commission, this was not a good solution either: having those charged with enforcing and interpreting the law and also writing the law created a conflict of interest. There also was significant community demand for more direct involvement in lawmaking. And, standing behind all of these conversations was a 1979 community mandate for a return to traditional government.

In response to these factors, the Chief and Council directed the Mohawk Council of Kahnawà:ke's administrative branch, the Office of the Council of Chiefs, to develop a community decision-making model. After reviewing various options, holding stakeholder focus groups and community meetings, and consulting with the community's traditional working group on the possibility of developing a more culturally based lawmaking process, the study group recommended a decision-making model that relied on community participation, community input, and community consultation. Termed the community decision-making process (CDMP), the model was established as a mandate of the nation in 2005. According to the Kahnawà:ke Legislative Coordinating Commission (KLCC), which administers the CDMP, 'This model, which is a form of direct democracy, is not the Mohawk Council of Kahnawà:ke's version of 'traditional government', but rather a consensus-building model that incorporates our traditional principles and meeting format so that we may educate ourselves in that area and work towards the eventual implementation of the 1979 Mandate' (Kahnawà:ke Legislative Coordinating Committee 2017, para. 4).

The CDMP consists of three phases:

> *Phase I – Preparation*, *Information*, *and Dissemination*: The KLCC coordinates all requests for legislation and sets a legislative calendar. As the schedule dictates, information about issues scheduled for legislative action is disseminated broadly in the community, and the KLCC holds community and stakeholder consultations. Based on the information gathered, the KLCC prepares a draft bill.
>
> *Phase II – Hearing*: The KLCC holds a hearing (and, for Type II laws, a second hearing) to generate input on the proposed legislation. After incorporating modifications, the KLCC presents an implementation plan to the Chief and Council. A final version of the law is read into the legislative record and presented to the community for ratification.

Phase III – Enactment: Chief and Council pass a Mohawk Council Resolution called a 'Confirmation of the Will of the People', the resolution is signed, and the law is published.

A further noteworthy element of the Kahnawà:ke CDMP is that it specifies slightly different processes for different kinds of laws (Kahnawà:ke Legislation Type I, Kahnawà:ke Legislation Type II, Kahnawà:ke Legislation Urgent). More hearings are held, and thus more public feedback is sought, for laws that will affect the entire population (Type I laws) as compared to laws that will affect only a subset of the community (Type II laws). Additional modifications to the process are allowed for 'urgent' legislation.

What Can Be Learned from the Akwesasne and Kahnawà:ke Mohawk Examples?

There are several takeaways from the Akwesasne and Kahnawà:ke communities' experiences with contemporary Indigenous lawmaking. Both cases demonstrate how community lawmaking expands a First Nation's capacity for self-governance and self-determination. Both cases provide institutional details from which other First Nations can learn. And both cases suggest strategies for generating internal and external support for community laws. Even at—and perhaps particularly at—a time when the Canadian government is attempting to pull back from the detailed oversight of First Nations affairs, this is invaluable information.

Increased Opportunities for Self-Government and Self-Determination

Akwesasne Mohawk first used its Indigenous lawmaking process to develop a wildlife conservation law, which was affirmed by the community in 1989. Other community laws followed. In the 1990s, residency, drug use, and banishment were key issues for legislation. More recently, the nation turned its attention to institutional design and formed a wholly Akwesasne court (Akwesasne Tekaia'torehthà:ke Kaianerénhsera; see also Henderson 2016, and Valiante 2016). Looking to the future, the nation plans to act on issues concerning water and education and to amend its wildlife conservation law (Akwesasne Law, s.3).

Like the Akwesasne Mohawk, the Kahnawà:ke Mohawk have used their indigenously designed lawmaking process to move beyond the confines of Canadian law. Most of the laws in the Kahnawà:ke registry were enacted during the period of Indian Act dominance and address 'municipal issues', such as traffic, street lights, and use of the community's common space. Newer laws, enacted via the CDMP, address issues such as language preservation and the creation of Kahnawà:ke justice forums 'to adjudicate and interpret laws applicable to the Territory in order to maintain peace, order and justice' (Kahnawà:ke Justice Act (2015)).

For both First Nations, a community-law approach has created the possibility of getting things done that Canada cannot accomplish—or cannot accomplish in ways that are acceptable to the community (e.g. wildlife management at Akwesasne). The option to adopt a community law also creates the possibility of doing things that Canada never would have thought to address in law but which are important to First Nations. This is how community law expands self-government and self-determination: it reprises Indigenous governments as lawmakers on topics of their choice. It allows them to use their own law to make progress towards their own goals.

Significantly, when a First Nation creates a process for making community laws and enacts community law, it is not simply strengthening the legislative capacity of its government. In order to enforce community laws, a First Nation also must strengthen the executive and judicial components of its government. This is one reason the Mohawk Council of Kahnawà:ke requires a financially transparent implementation plan before it certifies any community law. It is also a reason that the Akwesasne Mohawk community created an Akwesasne court under Akwesasne community law—it would be inappropriate to rely on a provincial or federal court to enforce Mohawk law.

Sample Institutional Details

Any First Nation that hopes to enact community laws must design a process or system for community lawmaking. While there are strategic issues involved in system design, some of which are discussed briefly below, the first concern is simpler: what are the potential elements of a community lawmaking system? Both the Akwesasne and Kahnawà:ke Mohawk examples offer guidance.

Their processes suggest that other First Nations might consider questions such as these:

What entity should manage the community lawmaking process? The Chief and Council? Members of the administrative part of the First Nation's government? A more independent and perhaps newly created body?

Who should be able to propose community legislation? Any community member? Only affected parties? Only elected leaders? Only certain community members (elders, hereditary chiefs, clan mothers, voters, resident members/citizens)?

How will the process for making community law—and progress with the laws under consideration—be made known to the community? Should the managers of the legislative process be required to regularly brief relevant parties? Should households receive information via the mail or via email? Should information on proposed topics and in-process legislation be made available on a webpage or other publically accessible platform?

Who needs to participate in the review and approval process? Do all voting age community members have a say in the process? What role will Chief and Council (or other elected officials) have? Will community members who do not live on the First Nation's territory be invited to participate? If so, how might they participate?

What will the steps of the process be? Who is responsible for developing draft legislative language? At what point will a draft law be presented to the community? How many times will drafts be taken to them? Should feedback meetings be organised geographically? By family? On another basis? Will an implementation plan and financial analysis be required? If so, who are they for—everyone, or perhaps elected officials only? Will different types of legislation require different processes? Is training necessary for management staff to make all of this work? Who reviews the law to make sure it does not contradict previously enacted laws?

How will laws be made available to the public and to outsiders once enacted? Will laws be available online? Will they be organised into a 'codebook' or other registry format that can be distributed in hardcopy? How will the nation number and refer to its laws? If it uses a registry, will the registry be organised topically? Will it be searchable? Will older laws, such as bylaws or traditional law, be incorporated into it?

If draft legislation is voted down or otherwise does not progress, what happens? Will there be a moratorium on addressing that topic? Is a process in place in case a dispute about the law's progress arises?

This list, gleaned from the community lawmaking processes adopted by the Akwesasne and Kahnawà:ke Mohawk communities, is not complete. Each First Nation surely will encounter additional questions that it must address

along the way. Nonetheless, the list provides useful ideas for systematic thinking about lawmaking, even for First Nations that are not yet considering legislation outside the Indian Act.

Strategic Action

Both the Akwesasne and Kahnawà:ke Mohawk have been extremely strategic in their pursuit of community lawmaking. Several of their strategic efforts have focused on questions of sustainability: what might the designers and managers of a community lawmaking process do to help ensure that the First Nation's own citizens adhere to community laws? What might they do to help ensure that Canada does not challenge the laws? These are questions, respectively, of internal and external legitimacy.

Leaders managing the development of the first-ever Akwesasne community law turned to a highly respected cultural resource to bolster the internal legitimacy of their work. Looking for confirmation that the entire notion of a community law—one that was enacted outside the confines of the Indian Act and separate from Chief and Council decision-making—was reasonable and that the content of the law they were considering was appropriate, these legal innovators sought approval from the Mohawk Council of Chiefs (Mitchell Part II). Having granted their approval, the respect afforded these chiefs redounded to the community lawmaking effort, clearing the path for its proponents (Mitchell Part II). Even the final documents on file in the Kaiahnehronsehra iehiontakwa note that the Mohawk Nation Council's support enabled the creation of a community law from the failed effort to create a wildlife conservation bylaw and that the final version of the community law was 'ratified' by the Council of Chiefs (Wildlife Conservation Law, Resolution Preparation/Submission Form).

Both the Akwesasne and the Kahnawà:ke Mohawk also considered 'cultural match' (Cornell and Kalt 2007) in developing their community lawmaking processes. Because traditional Mohawk decision-making was quite participatory, working groups tasked with designing community lawmaking models proposed processes that included substantial citizen engagement. In other words, they sought a match between community members' culturally influenced expectations for decision-making and the actual process used for community lawmaking. As noted above, the Kahnawà:ke Mohawk even viewed the CDMP as working towards traditional decision-making. This coherence supports internal legitimacy and the longevity and effectiveness of

political institutions (ibid.). Critically, it helps affirm First Nations' citizens' sense that community laws *really are their laws* and helps diminish any inclination citizens might have to simply ignore Mohawk law or to break ranks and seek alternatives under Canadian law.

One strategy in support of external legitimacy is to pick the topic area of lawmaking carefully. For instance, there are silences in the Indian Act and interstices in other parts of Canadian law that First Nations' community laws might fill; these gaps make it difficult for Canada to claim that a First Nation's law is unnecessary or that it contradicts provincial or federal law. There also are topics on which Canada might find it more difficult to question First Nations lawmaking. Again, the Akwesasne Wildlife Conservation Law is a case in point. Given the intimate connection Mohawk people share with their lands and waters and with the animal and plant life of those lands and waters—a connection that is expressed eloquently in the *Ohenten Kariwatekwen* (Thanks Giving address), a sacred statement that Mohawk people traditionally use to open and close any gathering or meeting—it is difficult for Canada to argue that in Akwesasne territory, Canadians' knowledge of wildlife and conservation issues is somehow greater than Akwesasne Mohawks' knowledge.

A second strategy is to implement the law well. A First Nation that is operating somewhat outside its jurisdiction as determined by Canada but is executing its work in a fair and transparent fashion and/or achieving positive outcomes gives the provincial and federal governments of Canada little to complain about. Over time, the First Nation may become acknowledged as the only reasonable, capable, and appropriate lawmaker in that lawmaking domain. To borrow a phrase from a former member of Canada's Royal Commission on Aboriginal Peoples, a First Nation's strategy should be to create conditions under which 'practices crystalize into rights' (Chartrand 2009)—or at least forestall countervailing action.

Certainly, self-governance agreements, treaties, land claim settlement agreements, and other types of bi- and trilateral agreements that First Nations may broker with the federal and provincial governments of Canada can allow for the kinds of entrepreneurial lawmaking that the Akwesasne and Kahnawà:ke Mohawk communities have pursued. While such intergovernmental agreements may make First Nation lawmaking more acceptable to Canada, the Kahnawà:ke and the Akwesasne examples suggest that they may not be strictly necessary. Through community lawmaking, more First Nations may have a way 'out from under the Indian Act' than current Canadian Indigenous policy might suggest—and while the colonial laws that condition their circumstances

are different, community lawmaking also may provide new options for Métis and Inuit communities and for Indigenous communities still elsewhere. The benefits to self-governance and self-determination—and ultimately, to Indigenous community welfare (Cornell and Kalt 2007)—could be substantial.

Notes

1. This is not to say that colonisation in Canada was any less brutal or insidious than it was elsewhere. The settlement of Canada by European immigrants involved, among other practices, land grabs and other forms of asset stripping; the suppression of Indigenous ceremonies, languages, and other cultural practices; discrimination in access to employment; the removal of children to residential schools (where many were abused and large numbers died), and other injurious practices. See, for example, MacDonald and Steenbeek (2015).
2. The Canadian Constitution recognises three groups of Aboriginal peoples: First Nations peoples ('Indians'), Inuit, and Métis (Constitution Act 1982, Part II, s.35(2)).
3. Among these are *Delgamuukw v British Columbia* ([1997] 3 S.C.R. 1010), *Haida Nation v British Columbia* (Minister of Forests) ([2004] 3 S.C.R. 511), and *Tsilhqot'in Nation v British Columbia* ([2014] 2 S.C.R. 256), which, respectively, established aboriginal title as a proprietary right, acknowledged Canadian governments' formal duty to consult and to accommodate Indigenous interests, and affirmed aboriginal communities' right to use, manage, and economically benefit from 'unceded territory'. Also see Racette (2018).
4. Following Abele (2007), while this section analyzes a law—the Indian Act—the analysis itself is not a legal analysis. It is instead an 'attempt to understand the logical implications of various provisions of the Indian Act for First Nations governance' (Abele 2007, p. 3).
5. A similar (although less pointed) analysis can be found in Abele (2007), pp. 10–11.
6. In fact, one of the definitions of 'bylaw' is 'an ordinance of a municipality or community' (http://www.dictionary.com/browse/bylaw, date accessed July 25 2017).

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