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LEGAL PLURALISM AND STATE-INDIGENOUS RELATIONS IN WESTERN SETTLER SOCIETIES

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INTRODUCTION

1. Tribal self-governance is now embedded in the constitutional frameworks of the western settler states. Beginning in the mid-1970s in Canada and New Zealand, and later in Australia, tribal self-governance has emerged from efforts to resolve tribal land claims. In the United States, tribal self-governance has a longer history, but has been invigorated more recently by policies emphasizing tribal autonomy. The constitutional histories of these states differ from one another in important and complicated ways, but in each, indigenous peoples have been treated as a legally distinct population since the earliest days of state-building. The constitutional genealogy of these settler states is therefore tied to indigenous difference as a feature of public law. In each, indigenous legal systems are acknowledged to have existed prior to colonization, and to have continued in modified forms, after the acquisition of sovereignty by the colonial power.

2. This paper will address the legal pluralism of these settler societies. In each, the relation between state and indigenous legal orders is being worked out and given formal effect through written declarations and agreements on tribal self-governance. The paper will be organized around the theme of recognition, that is, how and why these settler governments recognize indigenous law and legal orders in this most recent phase of state-indigenous relations.

3. The paper is premised on the idea that because of the existence of pre-existing indigenous legal systems, the "reach" of settler governments is limited. The political theory of settler states is different to that of non-settler states, because the state infrastructure has been superimposed over an indigenous governance system, comprised of multiple tribal legal orders. Public acceptance of cultural pluralism in the settler states has increased the visibility of indigenous legal orders, and improved public understandings of their cultural significance. This in turn has influenced perceptions of legitimacy, that is, about what constitutes a fair and just use of public authority by a settler government, particularly as regards indigenous communities and their interests. The settler governments discussed here are increasingly reluctant to intervene in tribal governance and law-making unless there are very compelling public interest reasons for their doing so. Since the 1970s, these states have invested considerable resources and time in actively recognizing and formalizing tribal self-governance. These are in part, efforts to "reintegrate" indigenous legal systems into the constitutional framework of settler states, and in so doing, to repair and bolster the legitimacy of settler governments. These policy approaches, and the theories of recognition that guide them, show how universalist principles (including human rights) and pluralism (the specificity of indigenous approaches) are worked out through negotiation and implemented as jurisdictional arrangements.

4. There are 562 federally-recognized tribes in the United States.[1] Most are governed by a tribal council in accordance with a written tribal constitution. In Australia, as at 2007, forty-two native title groups existed, each represented and governed by a Native Title Prescribed Body Corporate (PBC). In the long term, the Australian government has anticipated that there will be 100-150 PBCs operating across Australia.[2] In New Zealand, sixty-three tribes have been officially recognized through the Treaty of Waitangi claims settlements process. At least twenty more settlements are anticipated.[3] According to the Canadian Department of Indian and Northern Affairs, at the time of writing, there were twenty-one self-governing aboriginal communities in existence.[4]. At least seventy-two agreements are currently under negotiation.[5]In addition, there

[1] 334 recognized tribes are located in the lower forty-eight states, the remainder are Alaskan Native peoples. These tribes are governed under a separate and distinctive legal regime which is not referenced in this working paper.

[2] ATTORNEY GENERAL'S DEPARTMENT STEERING COMMITTEE (AGDSC), STRUCTURES AND PROCESSES OF PRESCRIBED BODIES CORPORATE 8-9, (2006).

[3] Catherine J Iorns Magallanes, *Reparations for Maori Grievances in Aotearoa New Zealand,* in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 523, 553 (Federico Lenzerini, ed., 2008).

[4] Sixteen had concluded comprehensive self-governance agreements and the remainder operated under special legislative arrangements. (The latter includes the Nunavut, the Labrador Inuit, the Inuvialuit, and the Cree and Naskapi First Nations of Quebec and the Sechelt First Nation of British Columbia.) The remainder are the Carcross/Tagish First Nation Self-Government Agreement (2005), The Kwanlin Dun First Nation

are currently 632 Canadian Indian First Nations exercising limited delegated governance authority under the auspices of the Indian Act. Importantly for the purposes of this working paper, 243 (thirty-eight percent) have elected to take control of law-making on membership. The majority are also negotiating self-governance agreements.

5. There is enormous cultural and political variation amongst recognized tribes. Despite their specifity, however, the groups share some important characteristics. All hold communal assets on behalf of their members, all have a historic connection with a pre-contact group on which their status is premised, and all are territorial, in the sense that part of their legal self-description includes a defined tribal territory. Because they share the features of historic continuity, territory and self-governance, they are referred to in this paper as "tribes", even though the terminology used to designate them varies from jurisdiction to jurisdiction.[6]

6. Tribal self-governance takes place against a complex demographic backdrop. First, indigenous peoples are a small minority in each of the states discussed in this paper.[7] Not all indigenous persons affiliate to tribes. In each state in the study, the proportion of persons formally enrolled in self-governing tribes is substantially less than the number of persons self-identifying as indigenous. [8] In North America, the proportion of self-identifying indigenous persons *not* enrolled in a tribe is fifty-three percent in Canada and forty-three percent in the United States. Fifty-four percent of indigenous Australians did not affiliate with a tribal grouping, nor did twenty percent of Maori. Likewise a high proportion of indigenous persons, including those who *do* affiliate to tribes, nonetheless do not live in tribal territory.[9]

7. Membership governance then, which is the subject of the latter part of this working paper, is a matter of some importance. It determines a person's access to tribal land, their rights to share in tribal resources and benefit from tribal services, their rights to political and social participation in a tribal community, and increasingly, their right to benefit from public programs for indigenous peoples. As is indicated above, tribal membership is unevenly distributed amongst indigenous peoples. Some people who are regarded as legally indigenous by settler governments are not tribal members, and some tribal members would not qualify as indigenous under settler state laws and policies. Tribal membership is determined by tribal law, and indigeneity is determined by public law.

8. Despite the significance of tribal self-governance in the political theory of settler states, scholars have largely focused their commentary on the tribal *right* to self-governance, and so on the acts and omissions of settler governments in responding to (or not responding to) that claim. The mechanics of tribal self-governance are largely absent, and so also are the law-making activities of

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Self-Government Agreement (2005), Anishnaabe Government Agreement (2004), Westbank First Nation Self-Government Agreement (2003), Kluane First Nation Self-Government Agreement (2003), Tlicho Agreement (2003), Ta'an Kwach'an Council Self-Government Agreement (2002), Nisga'a Final Agreement (1999), Tr'ondek Hwech'in Self-Government Agreement (1998), Little Salmon/Carmacks Self-Government Agreement (1997), Selkirk First Nation Self Government Agreement (1997), Vuntut Gwitchin First Nation Self-Government Agreement (1995), Champagne and Aishihik First Nations Self-Government Agreement (1995), Teslin Tlingit Council Self-Government Agreement (1995), Nacho Nyak Dun First Nation Self-Government Agreement (1993).

[5] Basic Departmental data 2004, p 78. This is the number of negotiation "tables" the federal government is involved in, representing approximately 445 Aboriginal communities. Fourteen groups have signed Agreements-in-Principle.

[6] In New Zealand tribal groups are known as "iwi" or "hapu" (hapu are smaller sub-tribes), the legal term for the Australian indigenous clans and moeities that hold native title is "native title holding community", in the United States the term "tribe" is used, and in Canada the terms "First Nation" and "Self-governing Aboriginal Community" are used to describe the communities of Indians, Metis and Inuit party governed by the Indian Act or party to self-governance arrangements.

[7] Indigenous peoples comprise around 14.5% of the population in New Zealand, 3.3% in Canada, 2.2% Australia and 1.5% in the United States. Using the most expansive self-identification category in the most recent national census in each of the states in the study. For further detail see Chapter One.

[8] Tribal enrollment population data is solicited from U.S. tribes by the federal government (with imperfect response rates), and the Canadian census specifically asks persons to identity as enrolled members of First Nations. In New Zealand, no enrollment data is available, but the national census contains a prompt about "tribal affiliation". No affiliation or enrollment data is collected in the Australian census, although some data is available in specialist surveys.

[9] In the United States and Canada respectively, sixty-one and sixty-nine percent of Indians lived away from tribal lands. In Australia and New Zealand, the proportion of indigenous persons living away from their tribal territories is estimated at seventy-eight and eighty-three percent respectively.

self-governing groups. This paper makes use of tribal constitutions to show the ways in which law-making powers are accorded to tribal governments in public law, and by the tribal communities themselves. These documents have not been given "their due" in theory and policy, largely because they are often not part of the public record. They are considered here, however, because they show the interface of tribal and settler legal systems at the local level.

9. The working paper proceeds as follows.

10. Part A considers the influence of theories of cultural pluralism on legal pluralism. It suggests that in both fields, relational approaches, emphasizing dialogue, are gaining traction. The paper further draws parallels between relational legal pluralism, and changes in way the way indigenous customary law is perceived and discussed. The paper proposes that self-governance arrangements are a manifestation of relational legal pluralism in the settler states, because they allow for the recognition of tribal l*aw-making* as well as tribal *law*. Part B considers in more detail the basic features of tribal self-governance arrangements in each state, with a particular emphasis on tribal jurisdiction to make membership laws. It explains that autonomy in membership governance lies at the core of tribal self-governance powers in each of the states, despite the otherwise significant differences in tribal jurisdictions in each country. The tensions between the interests of settler governments and tribes in the allocation of membership is presented as a classic instance of the coincidence of two legal systems, operating with different fundamental conceptions of the meaning and cultural significance of membership. Part C builds on this framing by taking a closer look at the legal pluralism that is evident in the tribal and settler government governance of legal adoptions. It explains how this pluralism has been debated and managed in New Zealand and Australia, by using relational tools.

A. RECOGNITION AND THE LEGAL PLURALISM OF SETTLER STATES

11. In settler societies, the task of officially recognizing tribal legal systems falls to settler governments. Recognition is a contested concept in the legal pluralism literature. Some legal pluralist accounts address the situation of multiple legal systems in the same society, and others address the diversity of "the" legal system itself (where all law is part of the state's single legal system). The differences in these approaches depend on the idea of recognition that is being deployed.

12. There are at least three ways in which official recognition is directly referenced in the legal pluralism literature. In the first, the term "recognition" is used to describe a situation where there is official acknowledgment that a body of norms is law, albeit law that will not be applied in institutions of the state. This may occur for instance in the "recognition" of foreign law or international law, and also describes the situation where the existence of indigenous "traditional laws" is acknowledged by courts, but these laws do not otherwise qualify for common law recognition.[10] In the third sense, the term recognition is used to denote the state's incorporation of norms into its own legal system as formal legal rules or rights. This occurs in the common law recognition of aboriginal title rights (see the discussion below). Finally, recognition can refer to official deference to a distinct legal system that produces and implements its own law. Tribal self-governance arrangements give effect to recognition in this latter sense.

1. Recognition as a Legitimacy-enhancing Mechanism

13. Recognition of indigenous law and legal systems is way for settler governments to improve or repair their legitimacy. The concept of "legitimacy" is usually used to describe the capacity of an institution or law to attract compliance, even where there is no direct coercion. Communities will accept institutions and laws as legitimate if they perceive them to exercise authority in a fair way. They will tend to accept that authority as valid even if there is no immediate threat of sanction for non-compliance. The concept of legitimacy is intimately tied to the notion of "fairness", both in procedure (the way laws are made and the ways institutions conduct their official business) and substance (whether these laws and decisions are just). Legal pluralism suggests that in a legally plural society, the legitimacy of the state's legal system depends on how fairly it relates to other legal systems. If non-state legal systems are ignored or suppressed, this could compromise the legitimacy of the state's own institutions and laws.

14. As many scholars have pointed out, legal pluralism can appear to challenge elements of the principle of "the rule of law", especially the idea that law should be coherent, comprehensive, transparent and predictable, and should apply to all citizens in the same way. Legal pluralists raise the possibility that efforts to ensure that state law is uniform and comprehensive could compromise, rather than improve, the legitimacy of the state and its legal system. The attendant idea is that recognizing non-state legal systems can help to bolster the legitimacy and so also the effectiveness of the state, by demonstrating that it exercises its authority in a fair way, and is appropriately restrained in the exercise of that authority. In this view, in a legally plural settler society, the state cannot claim to "stand alone" as the sole source and dispenser of law, since this

[10] See for example the analysis used by the New Zealand Law Commission, MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW, Study Paper 9, 1 (1998) "At the most basic level, the term "custom law" is used in a legalistic and narrow manner to refer to particular customs and laws derived from England, and indigenous or aboriginal laws and customs that have met particular legal tests and thus are enforceable in the courts. In a broader sense, it is used to describe the body of rules developed by indigenous societies to govern themselves, whether or not such rules can be said to constitute "custom law" in the former sense.". See also the discussion by Rob McLaughlin of the function of recognition in Australian Native Title Law, "the content of a customary law right is determined (logically) by reference to customary law, but once existence is established, it is statutory mechanisms or else the common law that endows force.. . . . it is arguable that such implied recognition extends only to this 'question of fact' extent, and not to recognition as substantial law." Rob McLaughlin, *Some Problems and Issues in the Recognition of Indigenous Customary Law,* ABORIGINAL LAW BULLETIN 3 ABORIGINAL LAW BULLETIN 20 (1996).

does not reflect the lived reality of many citizens, and so will not satisfy public expectations of what constitutes a legitimate exercise of official power.

15. Legal pluralism accordingly proposes that there are situations where pluralism should be prioritized over certainty. There are situations, it is argued, where law-making occurs beyond the reach of the state, and where those processes are consequently not fully legible to state actors. However, a degree of legal opacity and indeterminacy should be accepted because it contributes to the legitimate governance of a diverse society. It is this logic that forms the impetus for settler governments to recognize the legal systems of indigenous communities. In settler societies, there is a strong public interest in the recognition of indigenous legal systems, even though these systems may not very accessible to outsiders, and in any given situation, the applicable law may be difficult to ascertain or predict. The public interest in the recognition of indigenous law in turn derives from the history of colonization. There is a widely shared public understanding (although by no means a consensus) that settler states acquired their authority in part though unjust means, and that consequently the consent of indigenous communities to their authority was not properly obtained and remains in question today. This understanding informs the concept of legitimacy operating in settler societies. The recognition of tribes as law-making communities is partly reparative, designed to give effect to arrangements that would have been in place, if consent had been acquired in a fair way, and so are intended to "repair" the legitimacy of public governance. By scaling back its own legal system to allow the operation of others, the state can improve its own capacity to attract compliance and so to govern effectively.

16. The relationship of state and indigenous legal systems in settler states is a paradigmatic example of legal pluralism. Indigenous and settler legal systems have separate sources of authority and separate processes for the making and implementation of law, but their content overlaps. The systems regulate some of the same activities, and govern some of the same people. They influence each other's evolution. Self-governance arrangements show the efforts of settler states and indigenous communities to agree on the principles that should govern the coexistence of their legal systems. They have the character of jurisdictional arrangements, where settler governments have exclusive responsibility for law-making on certain questions, and indigenous governments have primary responsibility in others, while some matters are dealt with concurrently. Importantly, these arrangements do not attempt to anticipate every possible site of friction or overlap, but rather emphasize processes for approaching and resolving conflicts where they arise. In this way, the arrangements tend to be relational in character, embodying forms of on-going recognition that can accommodate legal and social change.

2. *Relational Cultural Pluralism / Relational Legal Pluralism : New Theories of Recognition*

17. Changes in the idea of culture have lead to shifts in the types of normative arguments advanced by cultural pluralists. This paper suggests that the field of legal pluralism is evolving in the same way as cultural pluralism, by becoming more *relational* in its outlook. It further proposes that relational legal pluralism encourages political arrangements that recognize indigenous *law-making* as well as indigenous law, and that these ideas are reflected in the model of self-governance arrangements. These are positive developments. Relational legal pluralism helps to model the institutions and dialogic practices that are necessary to resolve conflict about the implementation of human rights in a diverse society. In settler societies the specific experience and history of colonization provides reparative justifications for the recognition of indigenous legal orders. These may not be present in the same way in other legally plural societies. Nonetheless, the relational principles of dialogue and negotiation are generalizable to other settings where legal orders co-exist. These principles are the conceptual bridge between the universalism of human rights, and the specificity of legal and cultural pluralism.

18. Older concepts of culture in cultural theory and anthropology understood it in objective terms, as a "thing" that a community "has". This approach tends to present cultures as holistic (internally uniform) and static. This model accepts that the recognition of cultures can be effected by identifying cultural attributes and incorporating them as legal rights or in institutions. Newer relational approaches however, understand culture as a *process* where cultural attributes are actively chosen and produced by participants. In this model culture evolves and is elaborated through on-going political contestation and disagreement. In developing a new approach to pluralism, relational pluralists use this concept of culture to suggest that recognition should be effected through institutional mechanisms that accommodate change over time, both within cultures, and in the "terms of engagement" by which they interact. The goal of recognition is to protect and bolster the legitimacy of processes by which culture is produced, rather than to preserve cultural outputs in law. [11] The approach places a greater emphasis on the need to ensure that processes are fair and inclusive.

19. Changes in *legal* pluralism follow the same relational vector. More recent approaches show a shift towards emphasis on recognition of the processes by which law is *made*, as well as the laws themselves.[12] Following this principle, relational legal pluralists argue that the recognition of non-state legal orders should include the recognition of "that order's practices of normative deliberation and decision making - the processes by which normative claims are discussed, disagreement adjudicated (in the largest sense of 'adjudicate', including all means of settling disputed norms), and the resultant norms interpreted and elaborated."[13] The quality of these processes, they argue, demonstrates the legitimacy of the resulting norms, as perceived by those who are governed by them.[14] Accordingly, as Jeremy Webber argues, ". . . when deciding whether another normative order is *worthy* of respect we should concentrate on processes, not just on the norms that issue from those processes."[15] In deciding to recognize non-state law, norms should be evaluated in context, against the backdrop of the political process by which they were produced, and the meaning ascribed to them by the relevant local community.[16] Relational forms of recognition are intended to leave greater control in the hands of communities to continue to produce and evolve their own laws.

20. The animating idea of relational legal pluralism is that recognition should be directed to understanding what people name as law, and why they do so. This is an important approach in settler societies, where the tendency of theorists and decision-makers has been to start with the "bench-mark" of state-law and look for equivalents in indigenous communities, rather than to begin with indigenous concepts of what law is and should be. [17] As well as having distinctive concepts of law and legitimacy, indigenous communities have their own views on how their

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[11] See for example the arguments made by Seyla Benhabib ". . . the goal of any public policy for the preservation of cultures must be the empowerment of members of cultural groups to appropriate, enrich, and even subvert the terms of their own cultures as they may decide." Seyla Benhabib, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 58 (2002). Another author puts it this way: "The desire is not for an archetypal political relationship in which powers, jurisdictions and institutions remain either undifferentiated across different groups or fixed and frozen in place. Instead, what is sought is a series of flexible relationships tailored to the specific needs and circumstances of the group or community in question, and subject to periodic review and renegotiation as these needs and circumstances change." Michael Murphy, *Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?* XXXIV:1 CANADIAN JOURNAL OF POLITICAL SCIENCE 109, 113 (2001).

[12] See for example Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism* 13 CARDOZO LAW REVIEW 1443 (1992), Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism* 27(2) JOURNAL OF LAW AND SOCIETY 313 (2000).

[13] Jeremy Webber, *Legal Pluralism and Human Agency* 44(1) OSGOODE HALL JOURNAL OF LAW 167 (2006).

[14] Accordingly relational recognition requires judgments to be made "about the significance of the orders to their members, about their scope, about the capacity that each possesses for respectful dialogue, and about the integrity of the structures by which norms are defined." Jeremy Webber, *Legal Pluralism and Human Agency* 44(1) OSGOODE HALL JOURNAL OF LAW 167, 170 (2006).

[15] Jeremy Webber, *Legal Pluralism and Human Agency* 44(1) OSGOODE HALL JOURNAL OF LAW 170 (2006).

[16] Jeremy Webber, *Legal Pluralism and Human Agency* 44(1) OSGOODE HALL JOURNAL OF LAW 187(2006) " . . the reasons for deference will depend upon how the norms have been developed and the value of the practices to which they relate."

[17] Melissaris makes this point, when he suggests that applying objective criteria that reflect state law "undermines the relativism, which legal pluralism seeks to establish in the first place. If there are self-regulated groups, which are colonized by the dominant legality, classifying their form of regulation in the terms of the dominant legality has an equally colonizing effect.". . . "t[]he only way of approaching a legal discourse and doing justice to it is by having an account of the participants themselves as to what it is that they do when entering that discourse and why." Emmanuel Melissaris, *The More The Merrier? A New Take On Legal Pluralism* 13(1) SOCIAL & LEGAL STUDIES 57, 68 (2004).

relationship with settler governments should be managed. These views, like settler states policies, are likely to change over time as the community's aspirations and cultural identity change. In this light, a further important contribution of relational cultural pluralism to the theory and policy of recognition is the idea of provisionality. The normative claim of relational cultural pluralists is that a legitimate state in a culturally plural society should be in continuous dialogue with cultural communities on the terms of their relationship. Since the object of recognition is in a constant state of transformation, there is no prospect of arriving at an agreement that recognizes authentic cultural identities "once and for all". The aim of relational recognition therefore, is not to arrive at a state of finality in the design of formal arrangements, but to create the conditions for an open, inclusive and on-going dialogue. In order for this to occur, parties to the exchange must commit to continuing the dialogue, and to dealing with disputes and disagreements as they arise.[18]

3. Custom, Tradition and the Evolution of Indigenous Legal Systems.

21. The "relational turn" in the theory of cultural and legal pluralism has parallels in evolving approaches to indigenous "customary law". Increasing, scholarship and policy emphasize the *law-making* capacities of indigenous groups as political entities, rather than understanding customary law as an expression of unchanging "tradition". This has included critical attention to the limits of common-law doctrine, which allows the recognition of certain forms of indigenous customary law, especially those pertaining to property. Because of their relevance to the way legal pluralism and self-governance have been discussed in the settler states, current debates on customary law and aboriginal title are outlined below.

22. The common law doctrine of "aboriginal title" is a set of legal principles developed by courts. It refers to the property-based rights of indigenous peoples, as they exist after a settler state has acquired sovereignty over indigenous territories. The doctrine presumes these rights to continue unless and until they have been explicitly and lawfully extinguished. They are variously known as aboriginal title rights, native title rights and customary title rights. The doctrine itself derives from English common law and exists with some variations in each of the states discussed here. It is the coexistence of the bodies of English common law and indigenous customary law that necessitates the doctrine of aboriginal title. The doctrine contains principles of recognition, under which certain indigenous customary laws will be incorporated into the common law through judicial decision-making. Aboriginal title is a paradigmatic and relatively well-known example of legal pluralism. It therefore provides a good focal point for considering how different theories of legal pluralism and recognition inform agreements on self-governance. I discuss it here to show the beginnings of a shift in policy away from common law (judicial) forms of recognition, to negotiated agreements on indigenous law-making. This shift is part of a broader shift towards more relational models of state-indigenous relationships.

23. The following discussion does not embark on a detailed analysis of the particulars of aboriginal title, as the doctrine has evolved in each state. The doctrine is a core contemporary interface of state-indigenous relations in Canada, New Zealand and Australia, where the claims process began in earnest after 1970. It is less central in the United States, however, where the long history of treaty-making and reservation-based tribal sovereignty has overtaken land claims based on

[18] This idea is effectively advanced in the work of James Tully. He argues that there is no "just and stable form of recognition that will end the struggle", rather "[a]ny form of mutual recognition should be viewed as an experiment, open to review and reform in the future in response to legitimate demands for recognition against it, and so viewed as part of the continuous process rather than as the telos towards which the activity aims and at which it ends.". James Tully, *Introduction* in MULTINATIONAL DEMOCRACIES 20 (eds; Gagnon and Tully, 2001). See also James Tully, Recognition and Dialogue: the Emergence of a New Field, 7(3) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 98 (2004). "Any agreement will be less than perfect. It will rest to some extent on unjust exclusion and assimilation and thus be confronted with ineliminable reasonable disagreement (overt or covert). A norm of mutual recognition is thus never final, but questionable. . . Reconciliation is thus not a final end-state but an activity that inevitably will be reactivated from time to time."

aboriginal title.[19] It is important at the outset to note that courts consider aboriginal title claims under particular institutional constraints. Judicial recognition of aboriginal title does not exhaust the possibilities of recognition through non-judicial means, such as though negotiated agreement. Indigenous claimants and governments are increasingly likely to negotiate settlements rather than litigate property claims in court. In fact, the more willing settler governments and indigenous communities are to negotiate self-governance agreements, the less active courts tend to be in defining and recognizing customary law rights. As Paul McHugh has pointed out:

> [Aboriginal title jurisprudence of the 1990s] has been caught in a mixed world where the new juridical theme of reconciliation (negotiated outcomes and non-adversarial relations with the Crown based on dialogue) tangles with the old, ingrained hostilities. . . . In short, the cautious aboriginal title jurisprudence of the past decade is like the guarded tenor of the New Zealand jurisprudence of Treaty review. It has occurred in a broader context of negotiations and settlements, the likelihood of which has tended judges towards a guarded arms-length approach. [20]

24. In both Canada and New Zealand, courts see the recognition of indigenous self-governance as a matter that should be dealt with by the political branches of government.[21] In contrast, the Australian federal government has not initiated a comprehensive process of negotiation with indigenous communities. In Australia, then, native title claims must still be pursued through the courts, albeit with the possibility that court will sanction a voluntary agreement with governments and third parties outside of the formal native title process. [22] In New Zealand, historic claims are progressed through the Treaty Settlement process, as political claims that the Crown has breached the Treaty of Waitangi.[23] From time to time, tribes have attempted to persuade courts to intervene in the Treaty Settlement negotiations process,[24] but courts have been unwilling to do so, and have emphasized instead the need for parties to reach agreement with resorting to litigation.[25] In Canada, judges hearing aboriginal title claims likewise often urge the parties to negotiate instead of litigating those claims. In the land-mark Delgamuukw case, decided by the Canadian Supreme Court, the Chief Justice affirmed that notwithstanding the fact that aboriginal rights were enforceable in court, they could be given best effect through negotiated agreements:

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[19] The United States experience with "Indian title" is too convoluted and complex to be usefully discussed here. The earliest articulations of the common law doctrine however, emerged from United States jurisprudence and continue to frame the application of the doctrine today.

[20] P. G. McHugh, BRIEF OF EVIDENCE, WAITANGI TRIBUNAL APPLICATIONS FOR AN URGENT INQUIRY IN FORESHORE AND SEABED ISSUES, 10-11, January 13 2004. According to one commentator, "the Canadian [Supreme Court] has created a legal standards that is so hard to meet and has rendered litigation so expensive to pursue that it is thoroughly unattractive for First Nations and the Metis to seek a judicial solution." Bradford W. Morse, *Permafrost Rights: Aboriginal Self-government and the Supreme Court in R. v. Pamajewon* 42 MCGILL LAW JOURNAL 1011, 1037 (1997).

[21] The United States has a much longer experience with aboriginal title claims, dating back to the foundational "Marshall trilogy" of cases heard in the early 1800s.

[22] See Ruth Wade and Lisa Lombardi, *Indigenous Land Use Agreements: Their Role and Scop*e. (Paper presented at: Native Title Forum 1 – 3 August 2001).

[23] Because of the Treaty and the attached claims process, aboriginal title claims have been heard only rarely in New Zealand courts. Following an important customary title claim in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) parliament confirmed the jurisdiction of New Zealand courts to consider Maori customary title claims to the foreshore and seabed, by enacting the Foreshore and Seabed Act 2004. Courts can now make limited determinations of title as permitted by the terms of that Act. Groups can also opt to negotiate agreements on their customary rights with the New Zealand government (the Crown). Crown is currently in negotiations with five groups. See http://www.justice.govt.nz/foreshore/negotiations/index.html

[24] See, e.g., *Watene & Ors v Minister in Charge of Treaty of Waitangi Negotiations* HC WN CP120/01, 12 (unreported, May, 11 2001), also *Hayes and Anor v Waitangi Tribunal and Ors* CP 111/01, HC (unreported, May 10, 2001), p 17, per Goddard J ". . what in effect is sought is a review of the Crown's decision to recognize and accept the mandate of Ngati Ruanui to enter into settlement negotiations with the Crown, including on behalf of Pakakohi and Tangahoe. Such an attempt must fail because the process which it is sought to review is essentially political, involving questions of policy and political judgment.".

[25] See, e.g., *Kai TohuTohu o Puketapu Hapu Inc v Attorney-General*, (unreported 1999), p. 15, per Doogue J: "The claims are claims entertained by the Crown as part of a political process and not part of a legal process . . . The Court has no role in the Minister's process unless it is so flawed that the Court would be obligated to intervene, which is certainly not the case here.". See also, *Greensill v Tainui Maori Trust Board*: (unreported 1995), per Hammond J "to intervene now would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law" and "[t]he assessment by the Crown of historical claims,. . . is essentially a political process. It involves questions of policy and political judgment. As such, the process will ordinarily lie beyond the reach of the Courts." See also *Waitaha Taiwhenua o Waitaki Trust v. Te Runanga o Ngai Tahu* CP 41198 (Jun. 17, 1998), "The negotiated settlement process and the development of policy in relation to that is not by its nature amenable to supervision by the Courts. See also *Pouwhare and Pryor v Attorney-General, Minister in Charge of Treaty Negotiations and Te Runanga o Ngati Awa* (Aug. 20, 2002) HC WN CP 78/02 and *New Zealand Maori Council and Ors., v Attorney-General* [2007] NZCA 269.

> . . . the Crown is under a moral, if not a legal, duty to enter into and conduct . . negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve. . . reconciliation. . . Let us face it, we are all here to stay.[26]

25. Common law aboriginal title is not indigenous law, although it derives from indigenous law. [27] The Australian High Court has held, "[n]ative title is neither an institution of the common law nor a form of common law tenure but it is recognized by the common law."[28] The intersection managed by the common law doctrine is narrow. In applying its doctrine of aboriginal title, the common law acts as a kind of filter. It selects for recognition only those elements of indigenous custom that exist according to the terms of the doctrine itself as it has evolved in each country, and are in keeping with the principles of English common law (there are varied jurisdiction-specific rules on extinguishment and continuity that are too complex to be traversed here). Common law recognition then, is a process by which certain "traditional laws and customs" are deemed to be deserving of expression as common law property *rights*. In order to be considered "traditional", those customary laws and practices must also have been continuously observed since before sovereignty was acquired by the incoming state. Some degree of adaptation and evolution is allowed, but a substantially unbroken "thread" of continuity must be shown.[29]

26. The stringency of the continuity tests used in common law doctrine has proved controversial amongst legal scholars. Of particular concern is the fact that the common law doctrine of aboriginal title, with its narrowly framed concepts of continuity, tends to downplay the law-making capacities of indigenous peoples. Common law recognition of aboriginal title rights does not recognize the *on-going* law-making capacities of indigenous legal systems. The continuity demanded by the doctrine of common law aboriginal title introduces an important and difficult paradox. Indigenous communities must show that they are an identifiable community that continues to be governed by traditional laws. At the same time, common law doctrine does not allow the common-law recognition of "new" laws, that differ from those of existing in the pre-contact period. This creates the conceptually awkward situation in which as a matter of legal doctrine, some traditional indigenous *laws* are recognized, but indigenous *legal systems* are not recognized as active, law-generating systems.[30] The paradox is a troubling one. Kristen Anker describes it as follows: "[t]o speak of surviving rights and interests, or an enduring legal system, without the capacity to create law, gives the system the character of a shell empty of the organism to animate it and give it social sense."[31] This apparent denial of the political, dynamic aspects of indigenous legal systems is increasingly at odds with the political theory of culture and with the efforts of settler states to give public effect to cultural pluralism. The shift in sensibility

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[26]. Delgamuukw *v.* British Columbia, [1997] 3 S.C.R. 1010, para 186, per Lamer J

[27] In the now-famous observation of Justice Brennan in the Australian High Court's *Mabo No. 2* case: ". . . native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs." *Mabo and Others v Queensland* (No. 2) (1992) 175 CLR 1.

[28] *Fejo and Mills v Northern Territory* [1998] HCA 58 (10 September 1998), quoted in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 194 ALR 538, at para 31.

[29] All common law aboriginal title doctrine contains a continuity test, although its formulation differs across jurisdictions –(and will continue to evolve incrementally as new cases are heard). There are important differences between Canadian, Australian and New Zealand common law interpretations of "tradition", "customary" and "continuity", including the degree to which "traditional" practices can change over this time, the degree to which continuous occupation is required for the exercise of customary rights, and the relevance of interruptions. These permutations are too complex to be adequately described here, but it should be noted that they will all influence New Zealand jurisprudence as it develops in the courts.

[30] In Australia, this situation, has been described by the High Court as follows: "Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interest in relation to land or waters, originating other than in the new sovereign order, which will be recognized after the assertion of that new sovereignty, are those that find their origin in pre-sovereignty law and custom." *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 194 ALR 538, at 44.

[31] Kirsten Anker, *Law in the Present Tense: Tradition and Cultural Continuity in Members of the Yorta Yorta Aboriginal Community v. Victoria*, 28 MELBOURNE UNIVERSITY LAW REVIEW 1 (2004), see also Kent McNeil, *Self-Government and the Inalienability of Aboriginal Title* 47 MCGILL LAW JOURNAL 473, 486 (2002).

is one reason why indigenous claims are now more frequently settled by political negotiation than they are by judicial pronouncement.

27. Against the conservative back-drop of common law doctrine on aboriginal title, scholars have begun to emphasize the continuing relevance of indigenous law-making. These accounts stress the relationship between tradition and innovation in the production of indigenous law. As in any law-making system, indigenous law-making is innovative, but constrained by its core values.[32] Some norms are deemed to be mutable, and others are not. Likewise, norms evolve in response to new situations and so are adapted to current circumstances.[33] It is this constant reiteration of the connection between old and new, they say, that is the battery of indigenous law, propelling indigenous legal systems forward while retaining conformity with their traditional underpinnings.[34]

28. Taking a relational approach, then, legal pluralists writing about aboriginal title suggest that "traditional laws" cannot logically be separated from the processes of law-making. Accordingly, as legal pluralists like Jeremy Webber point out "indigenous orders were not frozen at the moment of contact, but [. .] they have continued to evolve and to apportion rights and responsibilities among the community's members."[35] He argues that :

> . . the recognition of native title is about far more than simply the recognition of a particular kind of land tenure, surviving from the period before contact. It is intrinsically bound up with issues of political organization and self-government. This is true, first, in that the title is grounded in and its content determined by contemporary indigenous societies, which have their own legal orders and their own continuing capacity for legal change. Indigenous societies are, by the very doctrine of indigenous title itself, contemporary polities with continuing control over their own normative orders (at least until displaced). The recognition of indigenous title is simultaneously a recognition of that political capacity.[36]

29. It follows from this discussion therefore, that notwithstanding the idea that practices must be continuous and "traditional" in order to be incorporated into the common law as aboriginal title rights, indigenous legal systems continue to produce law that evolves over time. This is true even if common law doctrine does not, in its current form, accommodate adaptations beyond those deemed "traditional". It is these productive capacities that *relational* legal pluralists consider to be deserving of recognition.

30. Relational legal pluralism, then, helps to conceptualize models that acknowledge that the production of law is an on-going, political process. These approaches explicitly tie the recognition of indigenous law to the recognition of indigenous *legal systems*, including the political processes and structures that allow law-making to occur in indigenous communities. Because recognition necessarily involves evaluation, relational legal pluralism contains the important idea

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[32] Edward F. Fischer, *Cultural Logic and Maya Identity: Rethinking Constructivism and Essentialism* 40(4) CULTURAL ANTHROPOLOGY 486 (1999). See also James Clifford, *Traditional Futures*, in QUESTIONS OF TRADITION 152 (Mark Salber Philips and Gordon Shoschet, 2004).

[33] Bruce Rigsby, *Custom And Tradition: Innovation And Invention*, 6 MACQUARIE LAW JOURNAL 113, 122 (2006). See also Francesca Merlan, *Beyond Tradition,* 7(1) THE ASIA PACIFIC JOURNAL OF ANTHROPOLOGY, 85, 92 (2006): "It represents a position defined by a notion that the aims, purposes, values, and social entailments of activity may not change, while the outward means of accomplishing action may do so (gun instead of spear, outboard motor instead of canoe, and so on)."

[34] An approach of this kind is encompassed in the New Zealand Law Commission's useful exposition of Maori law. New Zealand Law Commission. In the Commission's analysis, "[t]ikanga Mäori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present." MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW, Study Paper 9 (1998), New Zealand Law Commission, MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW, Study Paper 9, 10 (1998), citing Michael Belgrave *Mäori Customary Law: from Extinguishment to Enduring Recognition* 51 (unpublished paper for the Law Commission, Massey University, Albany, 1996).

[35] Jeremy Webber, *Beyond Regret: Mabo's Implications for Australian Constitutionalism*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 60, 63 (Duncan Ivison et. al. eds., 2000).

[36] Jeremy Webber, *Beyond Regret: Mabo's Implications for Australian Constitutionalism*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 60, 68 (Duncan Ivison et. al. eds., 2000),

that the legitimacy of the law-making processes observed in indigenous communities should inform the state in its decisions on whether to recognize those legal systems.

4. *Cognition, Commendation, Constitution: the Recognition of Tribes.*

31. How are tribes recognized in the western settler states? Once it has been decided as a matter of settler state policy that tribes should govern themselves, settler governments must also decide on how a tribe is to be identified as such. This is a legal and political exercise. The tribe must first be recognized *as a tribe*, in the political and sociological sense, as opposed to some other kind of community. In the first stage, the tribe is evaluated for its "tribe-like" cultural and social features. The second step is the recognition of the tribe as one which is qualified to exercise the legal authorities allocated to tribes. The tribe is admitted to the "club" of entities legally entitled to exercise tribal jurisdiction. Frequently this stage involves an assessment of whether the tribe is the legal and political successor of a relevant historic group, entitled to inherit its property and its status. Continuity tests are designed to assess the degree of connection between the tribe and its historic antecedent. Third, the tribe must ordinarily be legally constituted, usually through the preparation and ratification of a tribal constitution. This process reflects the tribal community's own assignment of law-making powers to its tribal governance entity or government. Tribes need not, and often do not take on the full scope of powers to which they are formally entitled. The following section sketches the basic mechanisms by which tribes are recognized.

32. In the United States, since 1978 the federal recognition of tribes has taken place primarily though a settled, pan-tribal administrative procedure.[37] Occasionally tribes are also recognized through Congressional legislation or judicial determination. The majority of recognized tribes in the United States were already acknowledged as domestic sovereigns when the Indian Reorganization Act first formalized their self-governance powers in the 1930s.[38] The remainder were recognized primarily after 1970, during a period of renewed interest in tribal self-governance that accompanied the beginning of "self-determination" policy era.[39] A tribe applying for federal recognition under acknowledgements regulations must prove that it is "descended" from a historic tribe, and is a distinct community that has continuously existed as a political entity since earliest contact with government officials.[40]

33. In Canada, most tribes negotiating self-governance agreements are either parties to a historic treaty (and so have a longstanding existence as a recognized tribe), or have been governed as Indian First Nations (Bands) under the Indian Act (which has existed in various formulations since the mid-1800s).[41] Canadian First Nations have regrouped or "aggregated" in order to progress their self-governance arrangements, often recovering historic confederations in the process. The Nisga'a Nation, for example, is comprised of four semi-autonomous "villages", each of which was a separate Band under the Indian Act.

34. In New Zealand and Australia, recognition occurs in a more ad hoc manner, through the settlement of a tribe's historic claims. Consequently, the meaning of official recognition is more opaque in Australasia than it is in North America. In New Zealand, recognition occurs on a

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[37] See Procedures For Establishing That An American Indian Group Exists As An Indian Tribe, 25 C.F.R. § 83 (2008).

[38] For a partial list of recently recognized tribes see UNITED STATES GENERAL ACCOUNTING OFFICE, INDIAN ISSUE: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25-26 (2001).

[39] At the time of writing, thirty tribes had been recognized or restored by Congress after 1960. A further seventeen tribes had been acknowledged through decisions of the Department of the Interior, and an additional thirty-one had been judicially-restored. As at 2005, at least nineteen tribal petitions for federal recognition were being actively considered by the federal government under the regulatory procedure.

[40] See Procedures For Establishing That An American Indian Group Exists As An Indian Tribe, 25 C.F.R. § 83 (2008).

[41] Historic treaties were not concluded in British Columbia. The British Columbian Treaty process, currently underway, is designed to concluded "modern treaties" between the provincial and federal governments and British Columbian aboriginal communities. The process currently includes 57 First Nations, representing about two-thirds of all First Nations people in the province. See http://www.bctreaty.net, and Introduction to the BC Treaty Process, on the Department of Indian and Northern Affairs website at http://www.ainc-inac.gc.ca/bc/treapro/bctpro/bctpro_e.html.

tribe-by-tribe manner through the Treaty of Waitangi claims settlements process. Sixty-three tribes have been recognized in this way. As in Canada, New Zealand tribes are encouraged (and sometimes pressured) to form large groupings for the purposes of negotiation. In Australia, recognition occurs through the native title claims process. Native title holding communities are identified and described by the National Native Title tribunal during the registration of the native title claim, and by a federal court when it is making a determination. Following a successful determination, the group is obliged to establish corporate structure (a Native Title Prescribed Body Corporate) to represent the title-holders and manage matters of internal governance.

B. JURISDICTIONAL ARRANGEMENTS IN THE WESTERN SETTLER STATES

35. Tribal self-governance is a form of "internal" self-determination, in which tribes acquire a measure of autonomy but exercise it within the constitutional frame of the state.[42] While tribes have always governed themselves, formal, written tribal self-governance is a recent phenomenon. In New Zealand the process was initiated as part of efforts to settle historic claims under the Treaty of Waitangi, begun in the mid-1970s with the establishment of the Waitangi Tribunal. The first settlement was concluded in 1992.[43] In Canada the first judicial determination on common law aboriginal title was made by the Supreme Court in 1973,[44] and the first modern-era self-governance agreement was concluded in 1998.[45] In Australia the landmark High Court decision of *Mabo No. 2*, in 1992, made the first determination of native title, and opened the way for the beginning of the Native Title process. In the United States, recognized tribal self-governance has a much longer history. Tribes have long been recognized, though treaties and other relationship with governments, as possessing inherent sovereign powers to self-govern. The first *pan-tribal* recognition exercise took place in the mid-1930s as part of the implementation of the Indian Reorganization Act. Many more tribes were formally recognized after 1970, with the beginning of Self-determination policy. Under the new policy, all tribes acquired new self-governance powers.

36. All recognized tribes have a territorial base, but the extent to which their jurisdiction is coincidental with that territory, and the exclusivity of that jurisdiction, varies considerably between countries. As a *general principle*, unlike public governments, the jurisdiction of tribal governments is membership-based. It is confined to those persons who can be said to have consented to tribal authority by virtue of their membership, or have otherwise agreed to tribal jurisdiction through contract, agreement, or as a condition of residence. North American tribes are strongly territorial, governing bounded reserved lands ("reserves" in Canada, and "reservations" in the United States). With some exceptions, North American tribal governments are able to control access to, and residence on, the tribal territory. This is not the case for Australian and New Zealand tribes, whose jurisdiction is defined *by reference* by the boundaries of their traditional territories but is narrowly confined to the inter-personal relations of members in relation to the use of tribal property.

37. In North America, tribal autonomy self-government is a public policy goal in and of itself. [46] In contrast, in Australasia, self-governance is derivative of the tribal management of property and the stewardship of territory.[47] The law-making jurisdiction of tribes in Australia and New Zealand is confined to those necessary to manage the property, assets and use-rights they have acquired in the settlement of their claims, and to represent the community in its dealing with third parties. The following outlines the basic jurisdictional features of tribal self-governance in each state.

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[42] See the comment made by Joseph Gospel Sr., then President of the Nisga'a Tribal Council have said "We are negotiating our way into Canada, not out of it." Department of Indian and Northern Affairs Canada, NISGA'A FINAL AGREEMENT ACT : ISSUE PAPERS p 6.2 (undated) available at http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf

[43] HER MAJESTY THE QUEEN AND MAORI, DEED OF SETTLEMENT 4.5.1 (1992).

[44] Calder v. British Columbia (Attorney General) [1973] S.C.R. 313.

[45] Nisga'a Final Agreement (1999).

[46] DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA, FEDERAL POLICY GUIDE : THE GOVERNMENT OF CANADA'S APPROACH TO IMPLEMENTATION OF THE INHERENT RIGHT AND THE NEGOTIATION OF ABORIGINAL SELF-GOVERNMENT (1995), http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html (last visited Apr. 3, 2008). "The objective of the federal government is clear. Significant change must be made to ensure Aboriginal peoples have greater control over their lives. . . . Our goal is to implement a process that will allow practical progress to be made, to restore dignity to Aboriginal peoples and empower them to become self-reliant."

[47] As Kent McNeil, Jeremy Webber and Duncan Ivison have lately observed, the management of communal property rights necessarily entails a degree of internal self-governance, which they claim is implicitly recognized in land claims settlement alongside the recognition of a group' proprietary rights. Kent McNeil, *Self-government and the Inalienability of Aboriginal Title* 47 MCGILL LAW JOURNAL 473, 486 (2002); Duncan Ivison, POST-COLONIAL LIBERALISM, 149 (2002); Jeremy Webber, *Beyond Regret: Mabo's Implications for Australian Constitutionalism*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 60 (Duncan Ivison et. al. eds., 2000).

1. Tribal Self-governance: The Basic Jurisdictional Arrangements

38. This paper cannot hope to capture the detail of self-governance arrangements. Tribal jurisdiction is determined by a matrix of documents including any negotiated agreement(s), the implementing legislation, applicable generic legislation (such as human rights instruments or constitutional provisions), judicial determinations and the tribal constitution. The following discussion is confined to an explanation of the major features of tribal jurisdiction, with a view to explaining the design of the basic tribal self-governance arrangements in each country.

39. Deeds of Settlement concluded between the New Zealand Crown and a tribe typically include the following: an agreed historical account of the events and actions giving rise to the claim, a detailed Crown apology to the tribe, specification of the financial and commercial redress to be provided to the tribes, specification of the types of cultural property that are to be provided, and provisions explaining the types of statutory instruments that will allow tribal involvement in public decision-making. Financial and commercial redress ordinarily includes the transfer of commercial property formally held by the Crown to the tribe, rights of first refusal on key properties, and the award of a sum of money in compensation. Cultural property include moveable artifacts, sites of significance, and certain minerals or fauna. Other forms of cultural redress can include guaranteed rights of access to traditional territories, the right camp, hunt and fish on Crown land, rights to own or manage non-commercial cultural property or sites, and the right to be consulted on and have input into local and central government law-making on the management of resources in the traditional territory.[48] It is these forms of cultural redress that provide for the exercise of tribal law over tribal territory. Tribal law and custom is also applied in the internal governance of the tribe and its institutions.

40. In Australia, a native title determination typically empowers the native title community, though its corporate structure, to exercise a series of rights over the claimed territory. These extend only to those traditional practices that have survived the Crown's acquisition of sovereignty and have not been legally extinguished. Native title determinations vary considerably in the degree of detail by which traditional practices are described, and in the degree of exclusivity accorded to title holders in the exercise of those rights. Notwithstanding this variation, a typical native title determination would specify the right of native title holders to live on the land, or to be present on it, in order to conduct at least several of the following activities: hunting, fishing and gathering, engaging in spiritual and cultural activities, conducting ceremonies, managing burial rites, maintaining and protecting sacred sites and water sources, taking materials for shelter, medicine, and weapons, regulating and controlling the use and enjoyment by others of the land and its resources, teaching law and custom, and inheriting and succeeding to native title rights and interests. All native title practices are to be conducted in accordance with, and regulated by, the group's traditional laws and customs.

41. There are two types of law-making indigenous communities in Canada: "Indian Act First Nations", governed by the Indian Act, and Self-governing Aboriginal Communities, who are party to self-governance arrangements. The Federal Government of Canada has formally acknowledged that aboriginal communities have an inherent right to self-government, and that this right is constitutionally protected. [49] The designation of the right as "inherent" is an acknowledgement that it is not granted or devolved from the federal government, but rather recognized as a pre-existing entitlement, derived from the prior occupation of the territory now governed by a settler government.[50] The federal government recognizes that the right extends to

[48] OFFICE OF TREATY SETTLEMENTS, KA TIKA Ä MURI, KA TIKA Ä MUA, HEALING THE PAST, BUILDING A FUTURE: A GUIDE TO TREATY OF WAITANGI CLAIMS AND NEGOTIATIONS WITH THE CROWN 83-84 (2000).

[49] "s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. 2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired." Constitution act 1982.

[50] Some negotiated self-governance arrangements do explicitly delegate law-making authority to Aboriginal governments, rather than recognize their inherent right to do so. The Sechelt Indian Band Self-Government Act, passed in 1986 establishes the Band as a municipality and expressly

the right to make and enforce laws, through tribal courts if appropriate, on "matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."[51] Generally, federal law continues to apply to Self-Governing communities and will prevail in the event of conflict, to the extent of that conflict. However, laws falling within the group's jurisdiction as specified in the relevant Agreement and legislation will prevail over federal and provincial laws passed in respect of the same subject matter. Self-governing communities and Indian Act First Nations are subject to the provisions of the Canadian Charter of Rights and Freedoms. [52] Until June 18 of this year First Nations governed by the Indian Act were exempt from the operations of the Canadian Human Rights Act, for actions that were directly delegated to Band Councils by the terms of the Indian Act. [53]

42. There is some variation in the law-making powers recognized for Self-governing tribes in Agreements. In general, however, primary law-making authority is granted for matters involving the administration of government, the management of lands and assets, culture and language, membership, traffic, marriage and adoption, health, education and social welfare. Those First Nations still governed by the Indian Act also enjoy limited delegated authority to make by-laws governing activities on the reserve. These include by-laws to regulate traffic, promote law and order, prevent disorderly conduct, manage farm animals, construct and maintain roads, control noxious weeds; regulate sports, protect game animals and fish, and regulate residence. First Nations are obliged to forward copies of all by-laws to the Minister for Indian and Northern Affairs for approval.

43. In the United States, tribes exercise retained sovereignty, except where it is inconsistent with the overriding territorial sovereignty of the United States, [54] or has expressly been limited by Congress. [55] They are not subject to the constitution of the United States. They have been most famously described as "domestic dependant nations",[56] but also as "quasi-sovereigns"[57] and "[u]nique aggregations possessing attributes of sovereignty."[58] The practical extent of tribal sovereignty is matter of common law, and so is built incrementally through judicial determinations. It is constantly evolving as new cases are decided. There remain large areas where the respective powers of tribal and other governments are indeterminate, because these have not been in issue in a litigated dispute.[59]

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delegates law-making authority to its government. The Nunavut Territory is also a special case. It was created in 1999 and operates with a public territorial government, in a similar way to the North-West Territories of Canada. The vast majority of residents in the territory are Inuit.

[51] DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA, FEDERAL POLICY GUIDE : THE GOVERNMENT OF CANADA'S APPROACH TO IMPLEMENTATION OF THE INHERENT RIGHT AND THE NEGOTIATION OF ABORIGINAL SELF-GOVERNMENT (1995), http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

[52] John Barg Email, on file with author. See also Parliamentary Information and Research, C-21 : A BILL TO AMEND THE CANADIAN HUMAN RIGHTS ACT, LEGISLATIVE SUMMARY, 4 (2008).

[53] Complaints can now be brought again First Nations Councils, although they may not be made until three years has passed since the amendments wee made. Canadian Human Rights Commission News Release, Canadian Human Rights Commission Applauds Extension of Rights Law to First Nations (June 18, 2008).

[54] Oliphant v. Squamish Indian Tribe, 435 U.S. 191, 208-09 (1978).

[55] United States v. Wheeler, 435 U.S. 313, 323 (1978).Also National Framers Union: "[A]ll aspects of Indian sovereignty are subject to defeasance by Congress".

[56] Cherokee Nation v. Georgia 30 U.S. 1(1831).

[57] Morton v. Mancari, 417 U.S. 535 (1974).

[58] United States v. Mazurie, 419 U.S. 544, 557 (1975)

[59] The uncertainty and issue-specific development of common law on tribal jurisdiction is one reason why there has been an increase in the numbers of inter-governmental jurisdictional agreements and compacts concluded between tribal governments and other governments including municipal, state and tribal governments. Note: Intergovernmental Compacts In Native American Law: Models For Expanded Usage *112 Harv. L. Rev. 922* (1999), David H. Getches, Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government, 1 Rev. Const. Stud. 120, 121 (1993), Vine Deloria, Jr., Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law, *31 Ariz. L. Rev. 204, 205 (1989).* For a list of state-tribal Law Enforcement Agreements see the collection of the National Congress of American Indians at http://www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp. The Indian Gaming Act and Indian Child Welfare Act specifically grant authority to tribes and States to enter into intergovernmental jurisdictional agreements. J. Ashley and S. Hubbard, NEGOTIATED SOVEREIGNTY: WORKING TO IMPROVE TRIBAL-STATE RELATIONS (2004).

44. In general, matters consider "internal" to the tribe (and therefore within its inherent sovereignty), are confined to issues involving only tribal members.[60] Among the affirmed inherent powers of tribes are the following: the authority to design tribal constitutions and choose the form of tribal government, to pass criminal and civil laws for internal governance including the regulation of domestic relations between tribal members, to exercise judicial jurisdiction over matters occurring on the reservation, to exclude persons from the reservation, and to regulate the use of tribal land. Tribes do not retain inherent judicial jurisdiction over non-Indians in criminal cases, although they do have such authority over Indians, including non-member Indians.[61]

45. These inherent powers have been bolstered in recent decades by the enactment of numerous legislative and policy measures designed to improve tribal autonomy in self-governance. Self-determination policy began in earnest in 1975 with the passage of the Indian Self-determination and Educational Assistance Act. The Act authorizes tribes to take over the administration of programs that had been managed by the federal Bureau of Indian Affairs and the Indian Health Service. Almost all tribes administer contracts of this kind, covering programs in law enforcement, education, social services, health, and infrastructural development.[62]

[60] *Montana v. United States,* 450 U.S. 544 (1981), p. 565. Atkinson Trading Co. v. Shirley 532 U.S. 645 (2001), p. 653, fn. 5. "only full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense."

[61] Congress has legislated to assert federal jurisdiction for major crimes, although concurrent tribal jurisdiction may exist (the matter of concurrency has not been conclusively decided). Federal courts have long held that tribes have the inherent authority to determine their own membership and govern membership disputes. In the landmark 1978 *Santa Clara Pueblo* the Supreme court affirmed the general principle that tribal governments are immune from suit in federal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In this case the Court declined to judicially review tribal membership law for compliance with the federal Indian Civil Rights Act (1968). That Act is a modified version of the Bill of Rights, that constrains the operation of tribal government, but cannot be enforced against tribal governments in federal court unless that government waives immunity.

[62] Under *self-governance* compacts, tribes can receive lump sump funding to take over the design and implementation of multiple federal programs. U.S. GENERAL ACCOUNTING OFFICE, INDIAN ECONOMIC DEVELOPMENT, RELATIONSHIP TO EDA GRANTS AND SELF-DETERMINATION CONTRACTING IS MIXED (2004).

C. LAW-MAKING ON MEMBERSHIP : THE CORE OF TRIBAL SELF-GOVERNANCE

46. While the jurisdictional arrangements agreed between settler governments and indigenous communities vary substantially in their content and scope, all acknowledge the tribe's right to determine its own membership. All recognized tribes have the jurisdiction to make laws specifying how a person comes to be a formally enrolled member of the community. By governing membership, the indigenous community identifies the persons who are to be subject to its jurisdiction. Membership governance then, lies at the very core of tribal self-governance.

1. Descent Groups and Legal Adoption in Liberal Settler Societies: Normative Frictions

47. Political and legal theorists have often expressed the concern that tribal self-governance could create illiberal enclaves within settler societies. The central anxiety is that persons subject to tribal law-making could be denied the protections and freedoms owed to them as citizens of a liberal state. Tribal membership rules are squarely implicated in this problematic. Tribes pose a particular challenge to liberal political theory, because descent from a pre-contact society appears as racial difference. Descent-based membership rules, in turn, appear to be race-based exclusions.[63] Two apparently competing principles are in play; first that tribes should control their own membership as part of their right to self-determination and self-governance, and second that distinctions should not be made between persons on the basis of their race or ethnicity.

48. The issue is particularly fraught because it strikes at the core of the concept of "descent" that is used by governments to recognize tribes in the first instance. As discussed above, most official recognition exercises require the applicant tribe to show that it is comprised of persons who are biologically descended from a known ancestral community. Shared descent is a primary marker of tribalism in public policy, because it is thought to show that the group has had a continuous existence as a tribe. Having been identified and defined as a descent-group, tribes find themselves pressured to justify their continuing use of descent rules in membership governance, and from time to time to field complaints that these rules are forms of racial discrimination. This paradox leads to some of the most difficult and complex issues in tribal-state relations.

49. This core problem, of how to conceive of the responsibilities of tribal governments in a liberal democracy, arises in various forms during the negotiation of self-governance arrangements. Like immigration law, all tribal membership law involves exclusions. Liberal settler states have an interest in ensuring that tribes do not arbitrarily discriminate *between members* (once admitted), but it is much harder to define what constitutes arbitrary discrimination in the *selection* of members. As in immigration, in tribal membership governance, the moment of discrimination occurs prior to that person becoming formally subject to the tribe's jurisdiction.

50. One important area where there has been friction between liberal ideals of non-discrimination, and tribal membership law, is in matters involving the membership status of legally adopted children. Put simply, the issue is as follows: standard human rights principles prevent public governments from making distinctions between adopted and biological children. Most tribes, however, enact membership laws that give preference to persons who are biological descendants of tribal ancestors. Is it reasonable to expect tribes to conform to public law standards in membership governance?

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[63] FOR DISCUSSION ON THIS POINT SEE SCOTT C. IDLEMAN, *MULTICULTURALISM AND THE FUTURE OF TRIBAL SOVEREIGNTY* 35 COLUM. HUMAN RIGHTS L. REV. 589 (2004), ALSO GENERALLY ANGELA R. RILEY, *(TRIBAL) SOVEREIGNTY AND ILLIBERALISM* 95 CALIF. L. REV. 799 (2007), ALLISON M. DUSSIAS, *GEOGRAPHICALLY-BASED AND MEMBERSHIP-BASED VIEWS OF INDIAN TRIBAL SOVEREIGNTY: THE SUPREME COURT'S CHANGING VISION*, 55 U. Pitt. L. Rev. 1, 81-82 (1993), REBECCA TSOSIE, *AMERICAN INDIANS AND THE POLITICS OF RECOGNITION: SOIFER ON LAW, PLURALISM, AND GROUP IDENTITY* 22(2) LAW & SOCIAL INQUIRY, 359 (1997).

51. This tension can be framed as a classic human rights matter, in which the central issue is the right of adopted children not to be discriminated against relative to biological children. Looked at in this way, it illustrates a tension between collective and associational rights on the one hand, and individual equality rights on the other. Depending on the national-law formulation of the community right, the tension could be for instance, between the non-discrimination principle (on the grounds of family status), and the right of the tribal community (and its members) to self-determination, to collectively own property, to freely associate, or to practice of their culture in community with one another. In such an approach, state institutions must decide which right should prevail in the event of a dispute. When the legal systems of tribes and states diverge on membership issues, a classic human rights approach offers little traction on the prior fundamental issue - the meaning of descent in the constitution of tribes.

52. A classic human rights approach, then, runs the risk of assuming that the relevant concept - in this case the legal meaning of descent - is agreed at the outset. In fact the meaning of descent is exactly in question. The divergence between tribal and public approaches benefits from being viewed through the "legal pluralism lens". In the case of adoptions, the friction arises because two partially competing concepts of "descent" have emerged respectively from settler and tribal legal systems. Put in very broad terms, settler states tend to view descent as a matter of legal status, not biology, while tribes tend to insist that *for tribal purposes* legal descent can only be conferred on persons with blood-ties to tribal ancestors. Because tribes are undeniably descent-based communities, there can be no suggestion that membership in a tribe should be open to everyone, regardless of their ancestry. However, while settler governments may be prepared to accept that tribes need not admit non-descendants, it is more difficult for them to accept distinctions that are apparently made *between* descendants, on another ordinarily prohibited ground, namely, a person's status as a legal adoptee.

53. The issue of how to accommodate the rights of legal adoptees to tribal membership is a paradigmatic example of legal pluralism in action. The tensions it produces have been dealt with in each of the states in the study in different ways. In each, the response has *not* been to insist that tribes give effect to public anti-discrimination law in their selection of members. Settler governments have tended not to insist on the inclusion of adoptees as a condition of recognition. More often, the competing preferences of state and tribal actors have been stated in broad declaratory terms in self-governance documents, and left for negotiation or dispute resolution, if and when the issue should ever arise in concrete terms.

54. This very narrow slice of the relation between tribal and settler legal systems, then, offers a good example of the types of relational, "incompletely theorized" agreements that were referenced in the earlier part of this paper. The principles of engagement and conditions for dialogue are agreed, but many issues are left to be addressed as the relationship evolves over time. The following section gives examples (by no means a comprehensive account), of how the imperfect alignment of state and tribal concepts of legal adoption have been dealt with in western settler states.

2. The Tribal Preference for Descent in Membership Law

55. The following discussion is directed to showing how tribes have used the concept of descent in their membership law-making. Significantly, tribes do sometimes admit identify legally adopted persons *as descendants* for the purposes of membership governance. Overwhelmingly, however, tribal descent rules are framed as biological measures (by reference blood-ties and blood quantum), or else are silent on whether adopted children are to be regarded as descendants. Importantly, a majority of tribes provide for the special incorporation of persons who are not descendants, at the discretion of the tribal government.

56. All tribes have experienced demographic changes and disruptions since colonization began. Increasingly large numbers of tribal members live away from the tribal land-base, and increasing large numbers choose spouses who are not themselves tribal members, or who are not themselves indigenous. These changes rule out some membership criteria that may worked well for previous generations, such as residency requirements, "two parent" rules, high blood quantum rules or a rules requiring a high degree of cultural proficiency (such as language skills and cultural knowledge). Descent, however, remains a polar organizing principle for modern tribes. All tribes reference descent as the primary organizing feature of their membership regimes.

57. Because of the dominance of descent, membership laws tend to follow a basic, "narrative" structure. First, a tribal constitution will specify the concept of descent that is to be the "backbone" of the membership regime. Second, the descent category is qualified by rules that narrow the class so that some descendants do not qualify. Third, a constitution will ordinarily specify the class of persons who may be incorporated into the tribe at the discretion of the tribal council. These are usually non-descendants. Descendants are the genealogic "core" of the tribe, admitted more or less "as of right" to membership. Non-descendants must show that they are otherwise closely connected to the tribal community. They may show this close connection by demonstrating one or more valued characteristics. Examples include: indigeneity (descent from another indigenous community), cultural competency, capacity to contribute to the welfare of the tribe, long residency, marriage to a tribal member, and importantly for the purposes of this paper, legal adoption by a tribal member.

58. The following section gives examples of the strategies and relations established by settler governments in relation to tribal membership, showing various arrangements of legal pluralism that bear on the status of adopted children.

D. NAVIGATING THE LEGAL PLURALISM OF ADOPTION

a. The United States

59. The vast majority of United States tribes define descent by reference to a base-roll.[64] Tribes use five basic rule-types to construct membership regimes: lineal descent, parental enrollment, Indian blood quantum, tribal blood quantum, and parental residency. Parental enrollment is the most frequently occurring descent rule, used by just over half of tribes.[65] The remaining tribes use lineal descent, variously referring to.[66] "direct descendants",[67] "lineal descendants", "lineal descendants by blood",[68] "issue by blood",[69] "biological lineal descent",[70] "blood line descendant",[71] and persons with "blood ties through ancestry".[72]. No United States tribe includes legally adopted children in its definition of descent. A sizable majority of United States tribes, do however make provision for the incorporation of non-descendants at the discretion of the Tribal Council.[73] While very few tribes *expressly* authorize the incorporation of a member's adopted child, discretionary enrollment is one route to membership for the legally adopted children of members.

60. United States law and policy ensures that tribes exercise a very high of autonomy in membership governance. The federal government takes a very "hands-off" approach. Its involvement in tribal membership governance is limited to those instances where federal supervision is authorized by Congressional legislation, or in the rare instances where a tribe's first membership roll (the base-roll) is prescribed by Congress.[74] When Congress has prescribed the a tribe's first roll, it has not included adopted children in the criteria. In fact, federal Indian policy does not accord Indian status (for federal purposes) to adopted children who do not have requisite blood quantum, and federal policy encourages tribes to restrict their membership to persons who are Indians "by blood". Accordingly, when the Secretary of the Interior is called on to prepare a tribal roll it excludes adopted children from the definition of descent used to define eligibility:

> Descendant(s) means those persons who are the issue of the ancestor through whom enrollment rights are claimed; namely, the children, grandchildren, etc. It does not include collateral relatives such as brothers, sisters, nieces, nephews, cousins, etc. or adopted children, grandchildren, etc.[75]

61. The tribe-state model used in the United States then, places sole responsibility for granting membership status to adopted children in the hands of the tribe. Because of the way that it understands Indianness to be a measure of blood quantum, federal policy resonates with the tribal sentiment that membership should ordinarily be confined to biological descendants.

62. Even if there were a divergence on this point, however, in the self-determination era, the opportunities for the federal government to legitimately impose its own view are few and far between.[76] The federal executive now operates with a "well-established practice under which [it]

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[64] 85.71% SPSS Output (Aug. 29, 2008) (on file with author).
[65] SPSS Output (Sept. 1, 2006) (on file with author).
[66] 102 tribes, 41.63% of those in the study. SPSS Output (Sept. 29, 2006) (on file with author).
[67] CONSTITUTION AND BYLAWS OF THE PAIUTE-SHOSHONE TRIBE OF THE FALLON RESERVATION AND COLONY s. 11(1)(d) (1963) (Doc. No. C-US-186-A, on file with author).
[68] See e.g., CONSTITUTION OF THE OSAGE NATION Art. II I(1) (1994) (Doc. No. CE-US-181-A, on file with author.)
[69] See e.g., CONSTITUTION OF THE WYANDOTTE TRIBE OF OKLAHOMA Art. 5(1)b (1999) (Doc. No. C-US-327-B, on file with author).
[70] CONSTITUTION OF THE HOPI TRIBE II(1)(c) (undated) (Doc. No. C-US-103-B, on file with author).
[71] See e.g., FORT INDEPENDENCE INDIAN COMMUNITY, CALIFORNIA Art. II (1965) (Doc. No. C-US-87-A, on file with author).
[72] See e.g., CONSTITUTION AND BY-LAWS OF THE MIAMI TRIBE OF OKLAHOMA Art. III(1)c (1996) (Doc. No C-US-156-B, on file with author).
[73] 73.87%. 181 tribes. SPSS Output (Sept. 5, 2006) (on file with author).
[74] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.C (Rennard Strickland et al. eds., 1982).
[75] 25 CFR 61.1
[76] About half of recognized tribes are incorporated under the Indian Reorganization Act are obliged to acquire the approval of the Secretary of the Interior for the first draft and any subsequent amendment of their constitution (including its membership provisions). The Secretary is increasingly reluctant to exercise this review power, in keeping with Self-determination era policy in general, and the Supreme Court's 1978 Santa

refrains from interfering in internal tribal matters, particularly with respect to issues concerning tribal membership."[77] There is no federal forum for the consideration of tribal membership disputes. In the United States model of pluralism then, any appeal for the inclusion of a legally adopted child must be heard in tribal forums, and decided in accordance with tribal law.

b. Canada

63. The Canadian government takes a different approach to tribal membership, as does the New Zealand government. Both refrain from interference in the *prospective* membership practices of tribes, but control the composition of a newly recognized tribe's first roll - the base-roll. The criteria for compiling the first roll are matters to be negotiated along with other aspects of the new jurisdictional arrangements. The state's concern is to include in the tribe's base-roll all those living persons who are identified by the government as entitled, at the moment of "hand-over", to a share in the resources transferred to newly recognized (or newly empowered) tribes. As the federal government of Canada has said:

> Generally speaking, an implicit principle followed by the federal government is that self-government arrangements should not leave individuals covered by them worse off than they were prior to the conclusion of those arrangements, particularly in respect of the most vulnerable individuals in self-governing communities.[78]

64. Accordingly, in Canada, First Nation control of membership is conditioned by the "acquired rights" doctrine. This specifies that membership rules "may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force."[79]

65. The result is a two-tiered approach to the status of adopted children. Adopted children must be included in the first roll, but thereafter their status is to be determined by the tribe in accordance with its own priorities. In so doing, tribes are subject to the Canadian Charter of Rights and the Canadian Human Rights Act. Canadian Final Agreements carry through to their eligibility criteria the Indian Act (public law) definition of an eligible child, that includes legally and customarily adopted children.[80] The Final Agreements of the Self-governing Yukon First Nations and the Nisga'a Nation, or example, require the tribes to enroll the legally or customarily adopted children of persons who qualify by descent. Thereafter, they may amend their membership criteria, conceivably to exclude some or all non-descendants, including adopted children.[81] So far, no Self-governing tribe has amended their membership regimes, nor have there been (at the time of writing) any challenges to membership decisions made or rules enacted by Self-governing tribes.

Clara Pueblo decision in particular.Cahto Tribe v Pacific Regional Director, BIA 38 IBIA 244 (2002), p. 6-7. "Even where a tribe has given BIA formal authority to review tribal actions through its constitution or ordinances, that authority must be narrowly construed, and BIA review must be undertaken in such a way as to avoid unnecessary interference with the tribes' right to self-government.."

[77] Cahto Tribe v Pacific Regional Director, BIA 38 IBIA 244 (2002), p. 6

[78] Email from John Barg, Self Government Policy Directorate Claims and Indian Government, Department of Indian and Northern Affairs Canada, to author (Jul. 14, 2006) (on file with author.).

[79] The Indian Act, R.S.C., ch I-5 (1985) s. 10(4).

[80] See common article S 3.10. "Adopted Child" means a Person who, while a Minor, is adopted pursuant to Law relating to adoption recognized in Canada or pursuant to aboriginal customs." See also the eligibility provision: A Person is eligible for enrollment as a Yukon Indian Person under one of the Yukon First Nation Final Agreements if that Person is a Canadian citizen, and: . .[. .] establishes that he is an Adopted Child of a Person living or deceased eligible under [. . .]. See also Chapter 20, s1(c) of the Nisga'a Nation Final Agreement.

[81] See email from John Barg, Self Government Policy Directorate Claims and Indian Government, Department of Indian and Northern Affairs Canada, to author (Jul. 14, 2006) (on file with author.) "[The "acquired rights guarantee"] may be rather an assurance that beneficiaries will be included on a First Nation's first membership list. Thereafter, all individuals on the first membership list become subject to prospective membership / citizenship rules of the First Nation. Should they run afoul of those rules, they would be subject to any First Nation sanctions, including the possibility of losing their membership / citizenship (subject to other protections, for example, as set out in the Charter of Rights and the Canadian Human Rights Act)."

66. This model of legal pluralism allows the settler government to satisfy itself that it has met its own human rights obligations, and that it has not unjustly prevented a deserving, living person from benefiting from the settlement of historic land claims. By ensuring minimal inclusivity at the "starting-block", the Canadian government can be reasonably assured that whatever policy the tribe subsequently arrives at (with regard to adopted children for instance) will be made by the community that includes all those with an immediate interest in the outcome. If and when a dispute arises about the membership status of an adopted children, it will be dealt with by a federal court applying the Canadian Human Rights Act and the Canadian Charter of Rights and Freedoms.

67. For those First Nations still governed by the Indian Act (except for membership matters), the situation of adopted children is more opaque and potentially more legally volatile. To recap, the Indian Act allows Indian status to be conferred on adopted children. When First Nations opt to take control of their membership governance, the "acquired rights" doctrine dictates that the membership rules must not exclude persons who would have qualified at the moment of opt-out. Thereafter, First Nations can make their own rules, subject to the Charter of Rights and Freedoms (and as of this year, the Canadian Human Rights Act).

68. Most Indian Act First Nations allow the enrollment of all children of enrolled members. Most Codes define "child" to include "a legally or customarily adopted child", replicating the language used in the Indian Act. However, some Codes overlay descent criteria such as "Indian blood" and "ancestry" on a parental enrollment rule, by specifying that children of members must *also* show that they are of Indian descent. The likely intent of such provisions is to exclude from eligibility the children of persons who lack Indian ancestry, but were granted Band membership under the Indian Act. These include the children of legally adopted non-Indian children, and non-Indian women who acquired membership through marriage to a Band member. These are people who gained Indian status under the Indian Act other than by biological descent. Overall the prevalence of these rules in Codes points to the efforts of First Nations to refashion membership in biological terms by excluding non-Indian persons from membership.

69. One such membership code was considered in 2006 in Grismer v. Squamish Indian Band.[82] This case gives an indication of how federal courts are likely to regard the application of the Charter to First Nations law-making on membership. The First Nation had provided for the "automatic" enrollment of biological children, and allowed the incorporation (at the discretion of the council) of adopted children who had two enrolled parents. The First Nation had not provided, however, for incorporation of adopted children with only one enrolled member. This distinction was challenged under the equality provisions of the Charter of Rights and Freedoms. The court found that the First Nation's policy met the "reasonable limit" test of s 1 of the Charter and so did not unfairly discriminate against adopted children.[83] The Judge held that "[r]restricting membership to persons who have a bloodline connection to the Squamish Nation is rational way of preserving and protecting the unique Squamish culture and identity", and noted that the Nation had "sought to balance the potential rights of persons with no Squamish blood against the Squamish tradition and the need to preserve the unique Squamish culture and identity." The Nation had succeeded in reaching a "compromise position" that could accommodate the interests of at least some adopted children, namely those with a very strong familial and cultural connection to the community.

70. As indicated above, large majority of Canadian Indian Act First Nations allow the incorporation of non-descendants, and more than half specify that adopted children in certain named classes are eligible for membership.[84] These sorts of law-making exercises by tribal governments, and

[82] Grismer v. Squamish Indian Band [2006] F.C.J. No. 1374.
[83] The text of Section1 is as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[84] 134 First Nations. SPSS Output (Jan. 16, 2007) (on file with author).

evidence of their efforts to balance the rights of members in a diverse tribal community, are likely to be relevant to any judicial consideration of claims made about the membership status of adopted children.

c. Australia

71. In Australia, just over half of recognized native title communities describe their membership by reference to descent.[85] These constitutions usually identify eligible members as being "of" specified descent, by reference to a community or ancestor. Only one group includes adopted children it its definition of descendant.[86]

72. Australian native title groups have the legal right to determine the membership of their community, provided that they admit only indigenous persons, and that they determine membership in accordance with their "traditional laws and customs".[87] A degree of legal change is permissible, but "the key question is whether the law and custom can still be seen to be 'traditional', in the sense of 'at sovereignty"'.[88] The application of common law continuity tests to membership governance raises very difficult questions. How far can a group deviate from pre-contact practice and remain within the jurisdiction assigned to it in a native title determination?[89] Importantly, unless a clamant group can demonstrate that incorporations of non-descendants were part of the pre-sovereign traditional laws and customs of the group, they will not be able to incorporate adopted children in the exercise their post-settlement membership jurisdiction. Much depends on the way the native title group is describe in the court's determination.

73. Federal court descriptions of native title holders vary considerably in their degree of specificity. A federal court must name the native title holders, but it is not obliged to identify the group's membership. [90] This is the job of the group's governance body. One of the tensions that the court must resolve in describing the native title community is whether "descent" should operate as a strictly biological measure, or whether it could extend to customarily incorporated persons. In its first native title case, the High Court referred to biological descent as a requirement of native title holder status, [91] but it was not included as a provision of the Native Title Act 1993 that now guides the courts in the making of determinations. Biological descent is not now a requirement of status as a native title holder. The test is rather as stated in *Ngalakan People v Northern Territory*:

> [l]ack of biological or adoptive descent does not therefore create a problem in an application for a determination of native title if a particular person can show that he or she is a member of the claimant group by virtue of the traditional laws acknowledged and traditional customs observed by that group.[92]

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[85] Fifty-eight percent in total..

[86] See The Rules of the Bar-Barrum Aboriginal Corporation (on file with author).

[87] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 194 ALR 538, 562. The laws and customs must also have "normative content" rather than simply comprise "observable patterns of behavior". See the discussion in Lisa Corbellini, *Ethnographic Evidence, Rights and Interests, and Native Title Claims Research*, 3(11) LANDS, RIGHTS, LAWS: ISSUES OF NATIVE TITLE 4. (2007)

[88] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 194 ALR 538.

[89] If the matter was contested, the federal court has jurisdiction to decide. "[O]nce the determination is made, and a registered native title body corporate has been appointed . . the ascertainment of who is a common law holder is a matter to be determined, if necessary, in a Court of competent jurisdiction, by reference to the traditionally based laws and customs of the common law holders named in the determination, as those laws and customs are at the time currently acknowledged and observed." *Western Australia v Ward* [2000] FCA 191 at para. 218.

[90] A native title determination need not specify the means by which the future members of the group will be identified. "Section 225(a) by its terms contemplates that a determination may be made in favour of a group of persons holding common or group rights. There is no requirement that each member of the group be named or otherwise identified." *Western Australia v Ward* [2000] FCA 191, para. 189. Native Title Act 1993, s 225 (Cth. Austl).

[91] Brennan J. explained that "[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people."*Mabo and Others v Queensland* (No. 2) [1992] HCA 23; 175 CLR 1, 70, per. Brennan J. 1, 70.

[92] *The Ngalakan People v Northern Territory of Australia* [2001] FCA 654, para. 51.

> Although the point has never been litigated, the available materials suggest that if the membership determinations of a PBC are questioned, the dispute would be susceptible to review in federal court. The job of the court would be to decide whether the PBC had correctly applied the group's traditional laws and customs in making determinations on membership. [93]

74. This passage illustrates the significance of the description of the native title group in the native title determination, since this determines the scope of subsequent judicial review of tribal governance. In sum, then, non-descendant adopted children may be included as native title holders if they are indigenous (and so meet the legal test for indigeneity in federal legislation), and if the incorporation of non-descendant children was part of the traditional laws and customs of the group, as exercised in the pre-sovereignty period and continuously since then. If there is a dispute within the community as to the content of traditional law and custom, and it cannot be resolved by the group's own dispute resolution mechanisms, it can be heard in the federal court.[94]

d. New Zealand

75. In New Zealand, the definition of the "beneficiaries" of Treaty settlements is included in the Treaty documents, and all those persons are entitled to vote on the adoption of the new constitution and to be registered as tribal members. In both countries the understanding is that tribe is free to alter membership criteria (in accordance with appropriate constitutional procedure) following the settlement if it elects to do so.

76. In New Zealand, all recognized tribes define membership by reference to descent. Tribal constitutions usually refer to a person's descent from a named ancestor, or a tribal grouping, or both. Some use the customary law concept of "whakapapa", usually translated is "genealogy".[95] A few tribes deploy the concept of descent in such a way as to include legal adoptees and customarily adopted persons (whangai) as *descendants.*[96] In the current New Zealand tribal constitutions, explicit reference to the incorporation of non-descendants is limited to "whangai" (customarily adopted children). As is discussed below, these differences in terminology can be important. To show how these ideas interrelate in the New Zealand context, I take a closer look at their implications for membership governance by tribes in the Treaty settlements process.

77. The Crown's understanding is that New Zealand human rights legislation prohibits distinctions made between children on the basis of their having been adopted.[97] The Crown therefore feels an obligation to ensure that legal adoptees are not discriminated against in the settlement of Treaty claims. This has translated into a series of attempts to persuade tribes to enroll legal adoptees as tribal members. These efforts have been only partially successful. Tribes are very

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[93] *Western Australia v Ward* [2000] FCA 191 at para. 218.

[94] The Federal Court's explanation in *Western Australia v Ward* gives an indication of what may be in store for group's whose membership determinations are contested: "[O]nce the determination is made, and a registered native title body corporate has been appointed . . the ascertainment of who is a common law holder is a matter to be determined, if necessary, in a Court of competent jurisdiction, by reference to the traditionally based laws and customs of the common law holders named in the determination, as those laws and customs are at the time currently acknowledged and observed. The occasion for a dispute requiring curial determination should be rare. The need should not arise in dealings between third parties and the registered native title body corporate as that body has the capacity and standing to represent the common law holders from time to time. Such a dispute is more likely to arise between the registered native title body corporate and people claiming to be entitled to be recognized as common law holders. That would be a dispute between people with a close knowledge of the relevant traditional laws and customs." *Western Australia v Ward* [2000] FCA 191 at para. 218.

[95] THE RULES OF TE RUNANGA O RAUKAWA INC. Interpretation 2004 (Doc. No. C-NZ-12-C, on file with author), TE ATIAWA MANAWHENUA KI TE TAU IHU TRUST: REPLACEMENT DEED OF TRUST cl. 6 (2000) (Doc No. C-NZ-23-E, on file with author.), and NGATI MUTUNGA IWI AUTHORITY CONSTITUTION cl. 1. (1998) (Doc. No. C-NZ-28-A, on file with author).

[96] TE ATIAWA MANAWHENUA KI TE TAU IHU TRUST: REPLACEMENT DEED OF TRUST cl. 6 (2000) (Doc No. C-NZ-23-E, on file with author) referring to "descent by birth or adoption including either formal legal adoption or customary Maori adoption."

[97] Human Rights Act 1993, s21(l)iv (N.Z.)

resistant to any intervention touching on whakapapa, which lies at the core of tribal customary order.[98] The status of legal adoptees is increasingly the subject of parliamentary debates during the passage of Settlement legislation. It was a central issue in the discussion four of the most recently concluded settlements (Ngati Mutunga,[99] Ngati Tuwharetoa, Ngati Awa,[100] and Ngaa Rauru.)[101] In each case, Maori and non-Maori members of parliament debated the merits of clauses identifying legal adoptees as descendants, and so entitled to benefit from the settlement of the tribal claim. Outcomes have varied. Some settlement legislation defines descent to include legal adoptees, and some does not.[102]

78. Tribes continue to vehemently assert their right to determine tribal membership by reference to whakapapa independently of anti-discrimination law, or the preferences of the Crown. Two tribes have apparently won the debate, and have succeeded in having positional statements on whakapapa and adoption included in the Deeds of Settlement. These are apparently legally binding on the Crown.

> Ngaa Rauru Kiitahi wishes to place on the record that it considers it is for Ngaa Rauru Kiitahi, in accordance with Ngaa Raurutanga, [tribal law] to determine who is a member of Ngaa Rauru Kiitahi. Ngaa Rauru Kiitahi considers that: . . . Ngaa Uki o Ngaa Rauru Kiitahi [descent from the eponymous ancestor] is determined by whakapapa; and . . . . adoption does not confer whakapapa on an individual.[103]

79. Importantly, in making these arguments, tribes are not rejecting the idea that adoptees can be descendants of members. Rather, they argue that they have their *own* law of descent and adoption, and that this should take precedence over the preferences of the Crown. Tribes are willing, for example, to accept whangai (customarily adopted children) as members. However, they argue strongly that the designation of a person as a whangai is a matter of tribal law. Only the tribe can assign whangai status. The result is that not all whangai are legally adopted, and not all legal adoptees are regarded *are* whangai. Paradoxically, Maori customary adoptions are not recognized as legal adoptions in New Zealand law.[104]

80. Compromises on this point have been reached in the agreements giving effect to Treaty settlements. For the purposes of the pan-tribal Fisheries Settlement, intended to benefit "all Maori", a member of a tribe is legislatively defined as "a person who affiliates to the [tribe] through descent from a primary ancestor of the iwi, or a person granted that status [as a

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[98] Telephone interview with Mike Neho, Chairman of Ngaa Rauru (Mar. 12, 2006), and interview with Anake Goodall, Chief Executive, Te Runanga o Ngai Tahu, in Christchurch (Mar. 23, 2006)

[99] "The Office of Treaty Settlements, the Crown, requires that Ngati Mutunga tikanga be overridden by a number of Acts, including the Adoption Act. In a sense, for many Maori, that is anathema. It is an absolute no-no. The reason is that inheritance in Te Ao Maori proceeds on the basis of genealogical ties - blood ties . . We have come to accept that this will become part of settlements, but it does not mean to say that we all like it." Hon Georgina Te Heu Heu, Ngati Mutunga Claims Settlement Bill, Second Reading, (Nov. 6, 2006)

[100] Ngati Awa Claims Settlement Bill - In Committee, Procedure (Mar. 1, 2005).

[101] "[The Minister in charge of Treaty of Waitangi Negotiations] brought to light that there is an anomaly between treaty settlements and the Adoption Act. It is something that is causing some considerable difficulty in the passage of claims, and will do so until that anomaly in the Act can be addressed. Here is the anomaly. For any tribal group to trace their whakapapa to an eponymous ancestor, it has to be proven through blood lines. . . On the one hand we are asking people to identify their blood relationships with whakapapa, but also we are asking them to accept someone who may not be of a blood affinity as part of that group." Mahara Okeroa, Rauru Kiitahi Claims Settlement Bill - Second Reading, (Jun. 21, 2005).

[102] See s. 13(4) of the Ngati Awa Claims Settlement Act 2005 (N.Z.), Also s 13(2) Ngati Mutunga Claims Settlement Act 2006. Compare the Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005 (N.Z.), the Ngati Ruanui Claims Settlement Act 2003 (N.Z.), the Ngati Tama Claims Settlement Act 2003 (N.Z.), and the Te Roroa Claims Settlement Bill: Government Bill (106-2) 2007.

[103] DEED OF SETTLEMENT OF THE HISTORIC CLAIMS OF NGAA RAURU KIITAHI cl.1.11 (2003) (Doc. No. DS-NZ-4-A, on file with author). See also DEED OF SETTLEMENT OF THE HISTORICAL CLAIMS OF TE RORORA cl.1.5.1. (2005) (Doc. No. DS-NZ-55-A, on file with author). "Te Roroa wish to place on record that they consider that adoption does not confer whakapapa." Another tribe (Ngai Tahu) publicly explains its policy on adoption as follows: "[t]he policy remains that enrolments are only accepted from direct bloodline descendants of the Kaumatua in the 1848 Ngai Tahu Census. Adopted persons are therefore not eligible to enroll as Ngai Tahu beneficiaries unless they are of Ngai Tahu descent." http://www.ngaitahu.iwi.nz/Whakapapa%20Registration/Registration%20Information *(last visited May 1, 2008)*.

[104] The Adoption Act (1955), s. 19 "Adoptions according to Maori custom not operative. 19 Adoptions according to Maori custom not operative. (1) No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Maori custom. . .

whangai]."[105] Any dispute involving the implementation of the pan-tribal Fisheries Act falls in the first instance by the Maori Land Court, a specialist court established to regulate the use of Maori land, including the application of Maori customary law. The Court consequently has some expertise in the tribal law of whakapapa (genealogy) and whangai. As a bi-cultural forum, it is well-placed to be able to balance the tribal and settler concepts of descent, whakapapa, whangai and legal adoptee if and when the matter ever arrives in court. [106]

[105] Maori Fisheries Act 2004 (N.Z), s.1.
[106] Te Ture Whenua Maori Act 1993 (N.Z.), s 108.

E. CONCLUSION

81. The examples sketched above show that tribes overwhelming use biological descent criteria to choose members. Very few include legal adoptees as "descendants", but some allow the incorporation of legal adoptees into the tribe as non-descendant members. In the public law of settler governments, however, distinctions made between biological and adopted children are suspect. There is a divergence, then, in the legal meaning ascribed to descent by tribal and public legal systems. Each of the settler states in the study could conceivably have imposed its own approach on the tribes, for instance by and requiring them, as a condition of recognition, to include all legally adopted children as members on the same basis as biological children. None has opted to do so. The mechanisms for resolving disputes about the tribal membership status of adopted children vary, but none are prescriptive.

82. The forbearance of settler states on matters of tribal membership in particular, and on tribal use of biological descent in particular, is in part recognition of the special significance of descent rules in tribal communities. Tribes are clearly law-making communities, but they do not easily fall into the categories used to identify private and public entities. They are not families, clubs, corporations or other classically private associations, but neither are they agents of settler governments, exercising delegated public authority. While they share features of all of these entities, ultimately tribes are sui generis. One of the distinctive features of modern tribalism is organization on the basis of shared descent, variously known as genealogy or kinship. Tribal legal systems, as a product of tribal politics, are dependant on descent in a way that non-tribal legal systems are not. The divergence between tribal and public approaches, then, benefits from being viewed through the "legal pluralism lens". The question of whether the human rights principle of formal equality for legal adoptees should be applied to tribes cannot adequately be addressed unless attention is given to the *reasons why* tribal communities rely on biological descent in membership governance. This allows the question to be reframed as one of legal pluralism, that is, of how co-existing legal systems are to reconcile divergences on matters of legal principle, in this case the principle of descent.

83. Relational legal pluralism offers two broad insights that are relevant to these discussions, and more generally to debates human rights implementation in legally plural societies. First, relational legal pluralism emphasizes the need, as part of official recognition, to establish the institutional conditions for on-going dialogue between legal orders. Recognition is framed as an-going process, in which agreed solutions are provisional and subject to change. Representative structures are essential. Second, the approach stresses the need to take into account the subjective experience of non-state communities in law-making, and to recognize the political processes of law-making alongside the resulting norms.

84. The self-governance agreements that operationalize tribal self-governance give effect to the types of recognition envisaged modeled in relational legal pluralism. The parties establish through agreement the basic "rules of engagement" and set up the institutional forms necessary to enable dialogue. The expectation is that that legal systems themselves evolve over time and that they mutually influence one another in the process. Many issues are left to be addressed as the relationship progresses. In this way, in keeping with the relational approach, political arrangements recognize indigenous *law-making* as well as indigenous law. (This is in contrast with older, more conservative approaches to recognition, evident for instance in the common law recognition of aboriginal title. In those approaches, the tendency has been to start with the content of state-law and look for equivalents in bodies of indigenous law.)

85. Relational legal pluralism helps to focus attention on the processes through which the legal construct of descent has evolved in each system, and why. In many instances tribes have reached

a solution on the status of adopted children that differs from the one that would have been used by a public government, had it occasion to decide the issue on its own. However, the interests of tribal and non-tribal communities in the regulation of descent are different. Taking a closer look at tribal membership rules in each of the states in the study, it is apparent that tribal membership rules are the product of a political process. The regimes contain compromises, wherein descent is paramount but various other avenues are available to non-descendants who have close social and cultural ties to the tribal community. Membership rules reflect tribal policy-making, through which tribal communities have deliberated on the proper balance of the interests of the community, adopted children and their parents. In order to understand how the "legal pluralism of adoption" relationship might be managed as a matter of policy, it has been necessary for public-decision-makers to engage with the subjectivity of tribal communities in the making of membership law. That is, to try to understand the meaning of tribal descent rules in the tribal context, rather than to begin by assuming that the concept bears same cultural and political meaning as it does in more familiar, non-tribal legal systems. This is a method of recognition that takes account of the politics of rule-generation within a tribal community, and assesses those rules by reference to the legitimacy of the processes that produce them. In so doing settler governments can bolster their own legitimacy.

86. In sum, relational legal pluralism models the institutions, dialogic practices and recognition principles that can help to implement human rights in a legally-plural society. While the histories and pluralism of settler states is of a particular kind, the relational principles of dialogue and negotiation are generalizable to other settings where legal orders co-exist.

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