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## INTRODUCTION

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# **ABORIGINAL GOVERNANCE: THINKING OUTSIDE THE BOOKS**

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The contributions assembled in this collection teach us think about about the future of Aboriginal governance. Each author, in their own way, suggests a way to overcome those preconceived categories which often stop us from questioning the basis and the form of Aboriginal government in Canada and in several other States around the world. Certain pivotal issues cannot be resolved except when freed from the tyranny of established intellectual, political or legal categories<sup>1</sup>. In its own way, this brief introduction will inventory this new intellectual know-how. In fact, each text lifts us out of the rut of ordinary thinking when dealing with Aboriginal governance.

Thomas Kuhn uses the notion of “Ordinary Science” to qualify intellectual conventions which, specifically in the field of research, are used to demarcate both research programs and strategies. When these conventions are met with consensus for a certain period of time, this enables – yet at the same time hampers – the development of the mind’s interpretative possibilities. Intellectual paradigms are thus doomed to succeed one another without ever fully complementing one another. Each new paradigm sheds doubt on the postulates of the previous paradigm, and this implies periodical tensions within each school of thought, or even confrontations between schools<sup>2</sup>.

The present collection of contributions is not merely the product of coinciding interests and encounters. Each text is the result of work completed in the context of the Aboriginal Peoples and Governance project. This ambitious research project, funded by the Social Sciences

and Humanities Research Council of Canada<sup>3</sup>, aims to redefine the basis, the forms and the conditions of contemporary Aboriginal governance. This research program is scheduled to conclude in 2012, but has already given rise to the publication of this work. Each of its texts will explore not only a particular theme, but also the conditions required for renewing research in this field and reflections on exercising Aboriginal governance. It is, in this sense, a flagship publication.

How does one go about re-thinking? The strategies used here are varied. We challenge the intellectual assumptions upon which Aboriginal research is generally based; we adopt new modes of thought: metaphors and transposition, generalizations based on particularly successful experiences, the transformation of questions of principle into a very concrete examination of the advantages and drawbacks of certain options, etc. On each occasion, we seek a vanishing point to direct our view towards a redefined relationship between Aboriginal and non-Aboriginal peoples.

### **The First Vanishing Point: Challenging the Intellectual and Legal Bases of Domination**

The first condition for a renewal of the reflection on Aboriginal governance and the relationship of Aboriginal and non-Aboriginal peoples requires above all that the legal and historical conditions which justified the subjection of Aboriginal peoples be called into question. At issue are the postulates upon which the gradual occupation of Aboriginal territories by the Europeans was based, and which themselves are in contradiction with the legal categories of that period.

This is the intellectual position referred to, in particular, by Caroline Plançon, Michael Asch and Patrick Macklem, who all draw the same conclusion: the justification upon which the Europeans based their appropriation of Aboriginal territory is fundamentally fraudulent. The Europeans violated their own legal norms. Although, for example, the notion of *terra nullius* may have been used to justify the occupation of Aboriginal territory, it cannot fool anyone today, in light of what we know based on archaeological, historical or anthropological findings. And, if the differences in degree of civilization (another pretext) once seemed to justify the legality of the Europeans' discovery and conquest, everything we know today about the diversity

of human communities speaks against the portrayal of the occupation of these territories as legally justified. Retrospectively, it is clear that the legality of this occupation must be contested. It is, however, necessary to follow through with all the consequences of this observation. The same goes for the discovery of new evidence; even long after a trial, such a discovery justifies new inquiry, even if it seemed to have been concluded most definitely.

Logically, this observation seems to call for the return of all “Europeans” to their territories of origin, yet this idea is just as historically fictitious as that of terra nullius. Following through with this idea, we should all return to live in Kenya, the true Cradle of Humankind. One fiction does not undo another<sup>4</sup>. Similarly, one denial of history cannot be corrected by another, which in this case would be to refuse to recognize the very diverse origins of today’s inhabitants of the Americas. Indeed, it is the inevitable fate of humankind to be drawn towards one another. This historical movement contains in itself the seeds of an inescapable encounter. We must face the impossibility of a hypothetical return back to a primordial condition, regardless of when this foreseeable and inevitable contact took place. It does not follow, however, that the most fundamental principles of international law cease to apply to the present and the future. Quite to the contrary, they must, in fact, be reinstated. This is the underlying principle of the *jus gentium*, which allows each community to affirm its common destiny, establish its own polity, and receive recognition for it by others. The known history of Aboriginal and non-Aboriginal peoples illustrates the will of these human communities to have this collective reality recognized, and any dispossession, even if negotiated, which would seem to deny this right must be challenged today, not only in relation to political theory and international law, but also in relation to the *Constitution Act of 1982*.

Reading between the lines of what has been ascertained, the conditions for the reestablishment of legal and political relations between Aboriginal and non-Aboriginal peoples seem to be present. This reestablishment is a fundamental element of the democratic principle. This postulate is also reasserted by the contemporary tenets of deliberative democracy. No matter how it is formulated, it always posits the recognition of the moral equality of the parties to the discussion. First and foremost, the political equality of the

Aboriginal people must be recognized. However, this stance calls into question the postulates upon which the balance of power between Aboriginal and non-Aboriginal people has historically been based. With regards to Aboriginal governmental autonomy, contemporary law must be taken into account and equality in the political relationships re-established. This intellectual process (also the foundation of a discourse ethics) of course also calls into question the legitimacy of the postulates, tacit or explicit, which currently constitute the historical basis for domination. But on many levels, this process justifies the conditions and the necessity of negotiation based on the principle of political recognition of Aboriginal groups, be they peoples, communities or nations.

There is no doubt that this reversal has its emancipating virtues. Yet beyond the applicability of these principles to all peoples, its relevance to us is above all as an intellectual and discursive process. Challenging the historical basis of the relationship of domination between Aboriginal and non-Aboriginal peoples is an initial condition for redefining the conditions of contemporary Aboriginal governance and the governance relations between these peoples. It is an essential condition, but not the only one.

### **The Second Vanishing Point: Challenging the Legal and Political Assymetry of Recognition**

Patrick Macklem's text contains another lesson: compared to the generally accepted principles of international law, the rights of Aboriginal peoples, although recognized, are still considered to be exceptional. Thus, despite the fact that the *United Nations Declaration on the Rights of Indigenous Peoples* recognizes a right to self-determination for Aboriginal peoples, the international community refuses to recognize the resulting political consequences. Thus the political and the legal expressions of recognition continue to be asymmetrical with the result that this recognition is not likely to ever have any real effects.

International law thus remains marked by its origins. Its stability stems from the old forms which made its institutionalisation possible. It is a law based on the principle of mutual recognition. Recognition is given to entities defined as States by other entities also defined as States which themselves benefit from the recognition of the States

which recognize them. Here, there is a sort of symmetry between the legal and political expressions of recognition. In contrast, international law denies Aboriginal peoples any political effect stemming from their legal recognition. At issue is the exercise of a certain dimension of sovereignty and the need to reflect on the conditions for the dismemberment or at least the declination of this sovereignty. International law thus brings about an asymmetry in recognition. It denies that there are political consequences to its recognition of a right, which, moreover, is a sort of *double standard of recognition*. Yet this situation itself is brought about by the nature of the categories we use to define the world, to describe it and to act upon it.

### **The Third Vanishing Point: Challenging Settled Categories of Thought**

Beyond challenging the implicit or explicit principles which underlie our reflection on the Aboriginal condition, there is also the problem of the words we use to explain our world and that of others to ourselves. From a philosophy of knowledge point of view, it is a commonplace fact that we think in words and in categories which act as orientation mechanisms with regards to the different orders of reality. Every time a thing is named, it is circumscribed (defined in its ontology) and qualified (defined in its meaning). Every concept we use to “name the world” both notes and connotes it: it distinguishes this reality from among others (reifies it) and characterizes it. There we have the inescapable paradox of language, whereby on the one hand it allows us to think and conceive of the world, and on the other hand, it limits the meaning we can attribute to it the very instant we use categories and words, for a certain audience, in a certain language. Each category, each concept carries with it a certain theory of the world.

In their own way, the texts gathered here challenge the need for pre-established thought. They invite us to recognize that certain realities which we consider established forever, the ones we thought were properly named (noted) and properly characterized (connoted) do not pass the test of observable reality; that their definition stems from a truncated version of reality, an improper generalization; that they are the product of a self-fulfilling prophecy, a conception of the world so firmly established that it begins to seem ‘natural’, a ‘given’.

Of all these notions, the notion of State certainly best characterizes the limits of our intellectual procedures. This notion belongs to those which generate our reality. The merit of several of the contributions to this work (notably that of Plançon) is that they reveal the fragility of our conception of State as well as its limits as an ideal form of political institution. The notion of State is indeed charged with the complementary ideas of sovereignty and the territoriality of power. The State is an all-engulfing concept. And yet, we know today that the State is but one solution among others to the problem of feudalism and religious imperialism as it stood at the end of the Middle Ages<sup>5</sup>. The works of Weber have revealed the uniqueness of these foundational circumstances<sup>6</sup>. But the strength of established categories lies in their durability, their capacity to survive beyond the context or the reasons from which they sprung. Putting thought into form (into *words*) is necessary for the *world as it is thought* to continue existing. Moreover, by legitimating it, thought creates the reality it describes, so that an often controversial reality is objectified and suddenly imposes itself as the only expression of this reality. And yet, beyond the fact that the Constitution and the consolidation of the State are only one solution among several to the problem of feudalism, the question remains whether this conceptualization takes into account and incorporates the diversity of procedures which operate as the seat of political activity today (just as in the past). The work by Bernard Badie has even shown quite clearly that the notion of State, while acting as a unifying model and a mechanism for mutual recognition between diverse forms of political authority, also stems from a multitude of realities and different compromises, for that same reason<sup>7</sup>. In sum, even if the intellectual and historical destiny of a concept is not always to become 'reality', the existence of the concept does however allow the world to take form. In this specific sense, ideas do make our world... but without ever taming it or reducing it to the unified idea we have of it or to the form we are more or less able to imprint upon it. Work is to be done at the interstices. It follows that the definition of the world only includes a certain number of the realities we name. The fact that they are only 'partial' or 'temporary' truths authorizes us to re-name reality. On the other hand, by demanding of ourselves that we think of the world in only one way (as unique and reassuring), we do not allow ourselves to think it some other way.

It is however intellectual procedure which interests us here. This exercise reveals above all the intellectual conditions needed in order to overcome. It enables us to admit the relativity of our categories as well as the necessity of changing or expanding them. It is this necessity which the Aboriginal question invites us to examine. By framing this question strictly as an issue of State (portrayed here as an ideal and as the sole foundation for a legal order), the complexity of the conditions for *political mediation* are ignored. The potential redefinition of our political and social relations is dramatized; our world, despite being flexible, is reified. All the concepts which corroborate what we think become limits to our thoughts, and sometimes even deny reality. Thought deserves better. If the State were an absolute reality, there could be no social relations except those which flow from the Law. Yet we know that reality is different.

In matters of Aboriginal governance, the same goes for the concept of **territory**. The great strength of Étienne Le Roy's work is to put forward a new definition of a notion, the meaning and reality of which we usually take for granted: land rights. From a strictly legal point of view, this notion implies a tightly defined idea, which (in a Western context) is unavoidably linked to the idea of ownership; this notion is to the individual, what territorial sovereignty is to the State. In this work, Le Roy exemplifies the conditions required for intellectually resuscitating a fixed legal and anthropological concept. His major contribution is that he has unfolded the paper bird, so to speak, and has shown that it is a paper sheet which can be used for other things, that the lines on it can be used differently, that the lines from previous folds are not the final word on what makes up a relationship to the earth, to territory. The limits of the concepts to which we refer as though they were fact are thus plainly illustrated. At the same time, Le Roy suggests what would be required to redefine the concept. The works by Jacques Leroux and Sylvie Vincent undertake a similar challenge and critically examine Le Roy's proposition, by looking at how these categories relate to the traditional and historical use of territory by the Aboriginal people of the Innu Nation. These studies reveal both the diversity of meaning attached to the concept of territory, its forms and its occupation cycles and also how it might be possible to rename the notion. Thus, the Innu notion of *kanauenitam* and the Algonquin *ganawan* relate to different approaches, different concept(ion)s of territory, seen here as an object

to be protected, or as a place to interact rather than as a expression of hegemony. This is no closed off space. Over and above an analysis of the contours of this notion, it is still the intellectual strategy which interests us. The importance lies in knowing how to rename realities, to give them more depth, to open up new horizons... or the bird. Territory, then, is seen as a space for mutual adjustment. Its meaning is thus opened up once again, and moves away from the notions of yours and mine, all or nothing. Thus, from territorial governance emerges the intergovernance of space.

At a completely different level, yet drawing from all the consequences of what has been said, Otis' text puts forward a complete reversal of perspective on the State, on sovereignty, and on the territoriality of legal orders. By framing Aboriginal rights in terms of belonging and responsibility, he not only revives characteristics of customary law, but also the condition necessary for overcoming the territorial attachment of laws, and thus also the recognition of Aboriginal 'personal rights'. In doing so, he reveals the very 'contextual' character of our general conception of law as State-based and territory-based, and defines the requirements for the cohabitation of Aboriginal and non-Aboriginal legal orders. Instead of casting ethnic belonging as a challenge to the universalist, territorialized State-based legal order, he reveals it as necessary to the recognition of an Aboriginal reality, in a context where the Westphalian territorial vision seems to have reached its limits. Here too, pushing beyond the categories and the ideological (and legal) postulates of our conception of Aboriginal and Western worlds appears to be a condition for a rethinking. This brings us back to the conditions explored in this collection mentioned at the first vanishing point: challenging the intellectual and legal bases of domination.

### **The Fourth Vanishing Point: Metaphor as an Intellectual Mode**

If it is necessary to go beyond these 'plays on words', it is certainly important to also explore the intellectual and discursive possibilities which metaphor offers. A strategy is required for playing other registers of reality apart from the rationalist and nominative ideal so typical of Western thought in the past three centuries. It is this strategy which the text by Roderick A. Macdonald and Thomas McMorrow adopts. Beyond the fact that their contribution shows – somewhat like that of Josée Gauthier and Marc-Urbain Proulx – the multiplicity of forms

and meanings which economic activity can take on, they also explore a way of giving form to the present options. And if, when cornered by these words which are “too precise to be true”, it is sometimes necessary to imagine resorting to other words, other concepts, or even to other images or other shared legends; to dare, at the very least, to put intellectual processes to work which are different from the usual process of abstract statements which the intellectual community gives in to all too readily, out of atavism, easiness, habit, convention. Perhaps thinking differently is thinking in a different way. It is another vanishing point to explore and this work exemplifies it. Looking back to Homer or Sophocles is enough to show that these strategies are not foreign to Western thought; they have simply eluded us, as we have ceased to refer back to them and thus ceased to be able to think that way. In any event, is it an avenue to pursue in future research and for the future of the relationship between Aboriginal and non-Aboriginal peoples.

### **The Fifth Vanishing Point: An Interactive Approach as an Antidote to Reification**

Most of the texts assembled here also lay down the groundwork for a relational conception of the Aboriginal issue, with its uniformity and its unity of meaning acting as peacemakers. Approached in their simple plasticity, the notions of governance, territory, State, entrepreneurship, law, all refer to dead notions. They cease to be alive the moment they are integrated into the common lexicon and the ritual of the players involved. What is more, none of these notions has a reality of its own. The reification of the world fixes its contours and its possibilities. In response, several of the authors here put forward a ‘living’ definition of these notions. Territory stops being defined as a fixed and demarcated space, and becomes a space for interaction. Similarly, economic activity is presented here as a form (or the place for a multitude of possible forms) of social ties.

Seen as a closed space, these areas of human activity, of collective activity, can only be objects of appropriation, or better said, disappropriation, steeped in potential conflict. Defined as a space for interaction, all these dimensions take on a new, rather process-oriented, meaning. Each one is a system of relations. The modelling of the relations of governance thus takes on much less mechanical forms. Besides being a place of fixed consensus regarding the allotment of powers, of territories

and of resources, these can also be varied spaces for continued negotiation. The problem of governance now ceases to be quite geometrical in nature, and instead becomes the condition for an adjustment to varied and changing movements. It is not a flowchart, but a system of relationships. Therefore, the conditions for Aboriginal governance will never be settled in the form of a final negotiated solution. Macdonald and McMorroff illustrate this approach by questioning whether the notion of 'ownership' is in fact closed, individualized and exclusive, and go on to see the material and immaterial world as a place where the identity and the meaning of things are negotiated. This is also what Le Roy's typology proposes. Territory is not an absolutely appropriated place, but rather a space where a multitude of interactions and customs come together.

### **The Sixth Vanishing Point: The Exemplary Nature of Observable Practices**

The debate on Aboriginal governance must turn around a point which is not centred on a system of pre-constructed meaning. If not, every deliberation or negotiation on Aboriginal issues will fail as the result of a lack of understanding. Being in the right becomes an end in itself and every claim, every demand, implies a sacred value. Two theories of the world thus oppose each other every time. The point is not to deny the specificity of the systems of meaning upon which our respective communities are founded, but rather to establish conditions for living together which imply discussion about our interactions and their meanings. This brings us back to the necessity for a relational perspective on the world. But these relations, for the most part, are already predicated on a multitude of established practices from which it would suffice to select the standards and procedures upon which to base subsequent relations.

It is the virtue of many of the assembled texts to address reality. Upon reading the contributions by Otis, Macdonald and McMorroff, or Gauthier and Proulx, one immediately understands the importance of looking beyond the general principles invoked every time legitimate claims are made, whether these be Aboriginal or not. The complementary discourses existing between governance and law often go without saying. This fact is confirmed by the studies on Aboriginal entrepreneurship. These focus less on claims to a right to Aboriginal economic development and more on examples and the terms which

make a certain economic autonomy for these communities possible in a concrete way. They inform us that beyond the usual forms of enterprise, Aboriginal economic practices often take on multiple forms, using innovative structures (Grand Council or regional development corporations) or collective practices which, without always being as innovative (referring to the cooperative movement), do correspond to the imperatives of Aboriginal reality, inevitably predicated on the common use of resources rather than exploitation by individual means. Many of these practices imply systematic partnership-building with other Aboriginal or non-Aboriginal interests, developing forms of intergovernance of obvious strategic (financial and political) significance. As far as Aboriginal studies are concerned, these contributions especially show the need for more studies based on empirical research. These are essential for discovering the conditions for the emergence of a truly autonomous Aboriginal economy without which it is illusory to imagine governmental autonomy. Looked at from another aspect, Macdonald and McMorro's contribution reveals the diversity of angles and parallel approaches in Aboriginal economic activity, as well as the necessity of knowing how they all work. It also highlights the necessity of approaching Aboriginal economic development as a space for social experimentation. Aboriginal governance then ceases to appear like a structural or organizational issue (which is more or less a public law problem), and becomes a practical issue, or better said, a question of structuring practices (which are more related to issues of private law, a more everyday law).

It is this very concrete and very realist approach which also marks Ghislain Otis' contribution, which explores personal Aboriginal status. Once again, with regards to intellectual strategy, it is not as much a matter of theoretically reconceptualizing the Aboriginal legal condition (even though this reconceptualization is necessary), as it is a matter of systematizing recourse to a legal form largely recognized for its functionality, considering both Aboriginal law where Aboriginal people are legal subjects, and the contemporary legal system which accommodates collectives made up of social groups whose unique origins are historically noted. Here too, the process undertaken does not propose the constitution of a new legal order but rather the extension of an already established legal mode, altered to suit the contemporary Aboriginal reality. One might notably consider the

condition of Aboriginal individuals living outside of their community, that is post-territorially, or de-territorialized, with regards to their community of origin. In each case, there is much to be learned about the reality of human collectives as a whole, and about the complexity of Western society. For, contrary to what the very slick description of our own institutions might have one believe, the observation of reality as it is experienced shows that at the heart of each society there are models which are thought to be universal (*State, subject of rights, ownership, Nation*) from which very different practices and modes for living collectively can be drawn.

### **Temporary Conclusion: Recentring a Dissociated World**

In the end, all these intellectual strategies aim to accomplish the same thing: to move beyond the *great disagreement*, the *great misunderstanding* in which the relations between Aboriginal and non-Aboriginal people are steeped; to define what the new common place is. Such spaces, cognitive and deliberative, must exist in order to define how we refer to things and which intellectual and legal categories we use and to define the challenges associated with a conflict which, even though mostly latent, nevertheless still harms contemporary society in the Americas. A centre must be found among these dissociated worlds. The lessons learned from these difficult steps will help ease the perhaps even greater tensions which await future societies. The solution to the issue of Aboriginal governance is thus not the result of a political or structural compromise, but rather the definition of a new interactive mode: we must learn to live together.

There remains the question of which process is likely to lead us from point A to point B. The *United Nations Declaration on the Rights of Indigenous Peoples* is an example of one possible approach. Signed by States which do not have to deal with the difficult issue of Aboriginal governance as directly as we do, paradoxically the Declaration demonstrates the importance of third parties in resolving conflicts between two opposed collectives. Our difficulties suddenly become reflected in the eyes of the other. Of course, this distorting mirror has its limits. However, the presence of this third party is often necessary for the objectification of one's own debate. The entire significance of this form of recourse has not yet been recognized: we

remain *entre nous*. It would surely be a sign of maturity to admit that an external view of our disagreement is necessary. We must at least reflect upon the solutions and terms of an alliance between Aboriginal and non-Aboriginal peoples, and also upon a new, more process-oriented, more *dialogical* approach, better in line with the imperatives of recognition which must govern our relations from now on.

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<sup>1</sup> Jean LECLAIR, 2009 : « Les périls du totalisme conceptuel en droit et en sciences sociales ». Lex Electronica 14 (1) < [http://www.lex-electronica.org/docs/articles\\_233.pdf](http://www.lex-electronica.org/docs/articles_233.pdf) >.

<sup>2</sup> See Thomas KUHN, 1996: , Chicago Il.

<sup>3</sup> A new version of the postulate of terra nullius.

<sup>4</sup> Pierre MANENT, 1987 : *Histoire intellectuelle du libéralisme: dix leçons*. Calmann-Lévy, Paris.

<sup>5</sup> Max WEBER, 1963 : *Le savant et le politique*, Plon, Paris.

<sup>6</sup> Bertrand BADIE and Pierre BIRNBAUM, 1982 : *Sociologie de l'État*. Grasset, coll. Pluriel, Paris; Bertrand BADIE, 1992 : *L'État importé. L'occidentalisation de l'ordre politique*. Fayard, coll. L'espace du politique, Paris.