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Transgressing Categories: Studies on the Cohabitation of Indigenous and Non-Indigenous Peoples^{1*}

*Pierre Noreau, Jean Leclair**

The thematic dossier offered here by the *Review of Constitutional Studies* raises one of the fundamental problems of collective life: that of the differences between the various forms of existence and coexistence within human communities. Facing this problem requires that we distance ourselves from an abstract idea of constitutionalism or federalism, too frequently viewed as the formalized expressions of an improbable social contract whose terms have already been definitely established. This very idea of a covenant settling and organizing all of our political as well as our social relationships tends to congeal shifting realities into words and categories.

The authors gathered in this issue strongly demonstrate that any fixed understanding of the frames into which our collective relationships develop is a negation of our day-to-day realities. They also reveal the limitations of our concepts and of our disciplines. Condemned as we are to understand the universe — as well as we are to share what we think we understand of it — we are quickly inclined to put it in categorical bottles. We are thus inevitably compelled to classify the diverse forms of collective existence into so many distinct categories: culture as a particular ideal concept, politics as a space for managing power, and law as a collection of our conventions, an inventory of promises we have made to one another.

Our idea of culture and of communities of fate presents a particular problem to the field of knowledge and action. Intellectually viewed as separate entities, these categories allow for the circumscription of fields of preferred and specific relationships. However, such a view only makes sense in a universe based on the solitude of these fields. In that perspective, each social configuration defines itself for its own sake. Then the only thing left to do is to establish the extent as well as of the depth of those fields. The federal principle, when viewed in this perspective, i.e., in its most superficial acceptance, offers a fac-

1 Pierre Noreau and Jean Leclair, Professors, Faculté de droit, Université de Montréal. The authors wish to acknowledge the help given by Pierre Leclair in the translation of parts of this text.

ile solution to the problem of difference by subdividing cultural spheres into so many distinct political spheres, and at times by ordering them hierarchically. The solution to the problem of difference is then to be found in the fixity of jurisdictions, of populations and of territories. We assure ourselves of the comfort of the minds, in the same way the cartography of a territory reassures us about the stability of the world.

However, at ground level, things are not as well defined and categorized. Ground level is the space for the interconnection of universes. How then can we reconcile the stability we look for in our categories (culture, rule of law, jurisdiction, state, communities) with the movement and elements exceeding the categorical borders we have established to better circumscribe and understand them?

More specifically focusing on the difficult question of indigenous/non-indigenous relationships, the thematic dossier presented here offers a variety of solutions, all of which remove us from the field of conceptual fixity. The authors advocate a revision, a questioning of the walls we raise with our juridical, sociological or political categories. Must we reintroduce the notion of social relationship in order to extirpate ourselves from a primary culturalism and essentialism; must we insist on the paradoxical interplay of juridical categories tending to perpetuate the colonial condition when in fact they were established so as to liberate us from it; must we overemphasize our faith in juridical normativeness and as from now resort to international law in order to free ourselves of the Canadian constitutional constraints; or must we simply focus on that which works and allows for the peaceful cohabitation between indigenous and non-indigenous peoples? Those are the discursive strategies proposed here. Being developed within the framework of the *Indigenous Peoples and Governance* project, they have the merit of launching the debate anew and out of the reifying frames of admitted intellectual and juridical categories.

In “Socrates, Odysseus, and Federalism,” Jean Leclair introduces the notion of doubt and human frailty in the discussion of normative solutions to the relations between Indigenous and non-Indigenous communities living side by side on Turtle Island. Through his use of federalism, understood not as “a monoconceptual but rather [as] a hyphenated notion forcing one to reconcile dyads such as self — other, us — them, autonomy — solidarity, power — justice, etc.,” he tries to remind us to be “on the lookout for totalizing approaches whose conceptual coherence commands that important aspects of reality be obliterated, perspectives depriving the common person of his/her agency”(7). He claims that too often the concepts we use to apprehend

the reality of Indigenous/non-Indigenous relationships only provide us with a monocular perspective. These concepts are meant to help us identify a single cultural essence, a unique people, an indivisible nation, an all-powerful sovereign. However, says Leclair, these concepts are, one might say, too sure of themselves. They do not provide, as much as many would wish to believe, a faithful picture of the complex and multifaceted nature of our individual and collective lives.

Professor Leclair argues for a truly federal perspective, that is, one that focuses not only on rights or essences or nations, but more fundamentally on relationships. According to him, the specificity of the indigenous peoples' situation "[lies] not so much in their cultural difference as in the particular nature of the *political relationships* they developed first with France and Great Britain and then with Canada (16)." However, such an approach not only requires an examination of relationships between groups, but also of relationships between individuals composing these groups and the relationships they have nurtured over and across the boundaries of their primordial grouping.

In "Building Indigenous Governance for Native Title," Lisa Strelein and Tran Tran analyse, at a more empirical level, what institutional decolonization entails in a federal structure of government, namely Australia. As they eloquently put it, "[d]ecolonisation for Indigenous peoples is not simply a matter of finding space to be Indigenous or to be different, for these too are colonised roles. Instead, [it entails finding] a space for Indigenous peoples to simply be — to be Arrernte, to be Noongar, to be Miriam or Badualgal, to be Karajarri, Yawuru, Yalanji, or any of the hundreds of peoples who make up the first peoples of the continent" (23).

Such deep decolonization proves difficult to realize within the Australian federation. Although the *Mabo* decision did open the door to decolonization by recognizing the wrongs of the past and the existence of native title, it also perpetuated colonialism by legitimizing the doctrine of native title extinguishment. Furthermore, *Mabo's* decolonizing potential has been thwarted by the intricacies of Australian federalism. According to Australia's constitution, the central government is not invested with an exclusive legislative responsibility over indigenous peoples and lands, and therefore faces jurisdictional hurdles in its attempts at providing for national solutions. Power is in the hands of the states. Native title being a land issue, the state legislatures are the primary constitutional actors involved in its recognition, regulation and curtailment. These difficulties associated with federalism have been compounded by the Australian courts' and legislatures' treatment of native title as a private

property interest rather than as a public law interest involving jurisdictional issues rather than simple property concerns. As a result, the authors demonstrate that Australia's indigenous peoples have been sidetracked as constitutional actors and their concerns dealt with under a private rights and interest paradigm instead of a self-determination model.

The right to self-determination, as a decolonizing avenue distinct from the "Euro-monopolizing legal cultures" of the common and civil law (51), is the subject of Larry Chartrand's "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority." The author articulately defends the idea that "Indigenous legal orders still achieve functional social order within their communities" (53). His argument first begins with a description of the spiritual quality of indigenous laws and of what one might call the "unwritten constitutional principles" of indigenous legal orders (the principles of progress as renewal, of balance, of "life-wide legal agency equality" and of decentralized normativity and decision-making), principles forming the basis of the indigenous world view. He then goes on to argue that protection and space for such legal orders can never rest on Canadian constitutional law, the latter being based on a "Eurocentric interpretation of section 35 of the Constitution that unsuccessfully attempts to lessen the racist impact of the doctrine of *terra nullius*" (76). Rather, the author relies on international law, more specifically on the recognition of the right to self-determination that "flows from an international human-rights perspective of equality" among peoples (*id.*).

According to Professor Chartrand, focusing on the principle of self-determination is essential if indigenous peoples aim at possessing "the right to maintain and develop their own legal traditions and not to have another imposed" (71). Such would be impossible if indigenous peoples formulated their claims in terms of cultural rights as opposed to political rights because "ultimately you can have all the cultural rights you want recognized (even Aboriginal self-government as a form of protected cultural right) but the aboriginal community will remain subordinate to Canadian legal authority" (70).

Professor Chartrand does admit that revitalizing indigenous legal traditions will prove a hard task. However that may be, he adamantly challenges the idea that Canada should still be envisaged as a legal unit where no place is recognized for indigenous legal orders. If legal pluralism is more than just words, then the blunt imposition of Euro-Canadian norms without the approval of the affected indigenous peoples smacks of imperialism.

Interestingly enough, in “Indigenous Cultural Rights and Identity Politics in Canada,” Avigail Eisenberg challenges the idea that protection of indigenous cultural rights is, in and of itself, a wrong path to follow. First, she claims, such an objection ignores the fact that cultural difference has always, either implicitly or explicitly, been used by states, courts and legislatures to define their policies relating to indigenous peoples. The question therefore is not so much whether cultural difference should be part of the rights equation as whether it could be envisaged, for the first time in Canadian history, as an advantage rather than as a disadvantage, as a means “to carve out a legal space for Indigenous worldviews and practices” (107). Indeed, “[f]ailure to respect cultural difference can lead to the domination of a minority by a majority” (104). Second, she claims that this objection is based on a restrictive view of the “distinctive culture test” developed by the Supreme Court of Canada. Although the test is certainly flawed in that, for instance, it essentializes indigenous cultures, and by resorting to it the Court is sending the message that section 35 rights are “rights to cultural protection and not sovereign authority” (105), still its critics “discoun[t] the power and capacity of courts to decide differently and more fairly” (104).

According to Professor Eisenberg, the Court’s test is not irretrievably flawed. Cultural difference has never been ignored and never will be by state institutions. Therefore it must be taken into account in adjudicating indigenous rights. However, the problematic dimension of the Court’s approach lies in its “de-linking the protection of Indigenous culture from the recognition of self-determination and sovereign authority” (107-108). Cultural interpretation will only succeed if courts and other state institutions “adhere to norms of democratic accountability, legitimacy, consent, and dialogue in their decision making” (105). In the end, Professor Eisenberg also recognizes that respect for indigenous cultural difference calls for an indigenous political participation.

In “What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke’s Community Decision Making Process,” Kahente Horn-Miller provides us with a fascinating example of an indigenous community deeply committed to the revitalization of traditional modes of governance. In her description of the Kahnawà:ke Community Decision Making Process, developed under the aegis of the Kahnawà:ke Legislative Coordinating Commission starting in 2005, she demonstrates that bridging “old practices and the modern world” (113) is not an impossible task. Leaving aside definitional issues of culture and sovereignty, she gives an account of the process through which her community, guided by the foundational principles of the Kaienere’kó:wa or Great Law of Peace, has tackled the very difficult task of involving the whole

community in the legislative process. Giving voice to the empirical instead of the abstract, Horn-Miller gives a human face to the self-government endeavour. She describes the demands the implementation of such a process requires; she does not shy away from the description of the difficulties faced by those involved in the process. All in all, Professor Horn-Miller's article eloquently demonstrates that, behind abstract concepts, whatever be their content, there are courageous individuals and communities trying hard, with their ancestors' tools, to slowly put in place "a self-empowered, controlled, and gradual step towards a form of traditional governance" in the modern world they inhabit (132). In a way, Kahnawà:ke's citizens are teaching us all a lesson in responsibility, sacrifice, and commitment to our neighbours.