PRISONS OF CULTURE: JUDICIAL CONSTRUCTIONS OF INDIGENOUS* RIGHTS IN AUSTRALIA, CANADA, AND NEW ZEALAND

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The article examines the manner in which high courts in Australia, Canada, and New Zealand define indigenous rights in relation to the traditional laws, customs, and practices of pre-contact indigenous societies. One of the great disappointments of this interpretive framework has been its deployment as a means of limiting or denying indigenous rights claims when the laws, customs or practices which are the subject of, or which govern, the right in question have been substantially changed, interrupted or disrupted – regardless of the source of the alteration in question. The article argues that this cultural continuity model of recognition is both unreasonable and discriminatory, and not a particularly effective means of structuring a jurisprudence of state-indigenous reconciliation.

L'article porte sur la façon dont les cours suprêmes de l'Australie, du Canada et de la Nouvelle-Zélande définissent les droits des Autochtones dans le contexte des lois, coutumes et pratiques traditionnelles des collectivités autochtones avant l'arrivée des Européens. Une des grandes lacunes de ce cadre d'interprétation judiciaire est qu'il a été développé afin de limiter ou de refuser de reconnaître les droits revendiqués par les peuples autochtones lorsque les lois, coutumes ou pratiques qui font l'objet des droits en question ou qui le régissent ont été considérablement modifiées ou interrompues, et ce, indépendamment de la source du changement en question. L'article fait valoir que ce modèle de continuité culturelle de reconnaissance des droits est déraisonnable et discriminatoire. De plus, il ne constitue pas un moyen efficace d'établir de la jurisprudence visant la conciliation entre l'État et les peuples autochtones.

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1. Introduction

It was not so long ago in historical terms that the rights claims of indigenous peoples were greeted with minimal recognition or simply

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* I understand the term indigenous to be synonymous with native or Aboriginal, wherever the latter two terms have been employed in the relevant legislation or jurisprudence.

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dismissed in the high courts of Australia, Canada, and New Zealand. Late in the nineteenth century, in *Wi Parata v. Bishop of Wellington*, the Treaty of Waitangi was declared "a legal nullity" by a New Zealand Supreme Court prepared to recognize the pre-existing land rights of civilized peoples but not those of Maori, whose level of social development Prendergast J. described as "barbarian."[1] In Canada, prior to the ground-breaking *Calder v. British Columbia (A.G.)* decision in 1973, the leading Aboriginal rights case was *St. Catherine's Milling and Lumber Co. v. The Queen*, wherein the Privy Council located the source of Aboriginal land rights in the *Royal Proclamation of 1763*, rather than in the authority of Aboriginal societies whose existence long pre-dated European colonization.[2] These limited rights were, moreover, deemed to be held entirely at the pleasure of the Crown, to be recognized or extinguished at its discretion. In Australia, the denial of indigenous rights was both more comprehensive and enduring, and not until 1992 did the High Court in *Mabo v. Queensland (No. 2)* finally lay to rest the assumption of *terra nullius* – that prior to the arrival of Europeans, Australia was legally vacant and open for European appropriation.[3] But the shift towards recognition of indigenous rights did come, in Canada and New Zealand as well as Australia, and despite the lateness of its arrival brought welcome change not only on a symbolic level, but also to the capacity of indigenous peoples to achieve concrete, if modest, change by inducing governments to negotiate the parameters of their rights to lands, resources, economic and cultural activities, and governance.[4]

Yet judicial intervention in all three countries has proven to be both shield and sword in relation to indigenous claims – a shield which protects indigenous rights, but also a sword that cuts them down to a size more palatable to the state and the wider society within which they exist. The purpose of this article is to examine critically one particular

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Malpass, Dylan Richards and Taggart Wilson for valuable research assistance. Financial support from the Social Sciences and Humanities Research Council of Canada is gratefully acknowledged.

[1] *Wi Parata v. Bishop of Wellington*, [1877] 3 NZ JUR (NS) 72 at 76–78.

[2] *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145; *St. Catherine's Milling & Lumber Co. v. The Queen*, [1888] 14 A.C. 46, J.C.J. No. 1 (QL).

[3] *Mabo v. Queensland (No. 2)*, [1992] HCA 23, 175 C.L.R. 1 [*Mabo 2*].

[4] The Supreme Court of Canada has long encouraged governments and Aboriginal peoples to rely on negotiations rather than litigation as a means of determining the specific contours of their socio-economic and political relationships; see e.g. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1086, 1105, 1119, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1123, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.]; *R. v. Marshall*, [1999] 3 S.C.R. 533 at 550, 179 D.L.R. (4th) 193 [*Marshall II* cited to S.C.R.].

dimension of this body of comparative jurisprudence that has both aided and impeded the recognition of indigenous rights in colonial settler states. This is the judicial strategy which defines indigenous rights and entitlements in relation to the traditional laws, customs and practices of pre-contact indigenous societies. Several elements of this judicial analytical frame appeal to those seeking a broader and more robust recognition of indigenous rights. The emphasis on traditional indigenous laws, customs or cultural practices locates the source of indigenous rights in the prior existence of indigenous societies at the time of colonization, rather than in the constitutional authority of the colonizing power. The linkage with indigenous traditions also indicates a willingness to incorporate indigenous perspectives into determinations of the scope and content of indigenous rights, and flags the importance attached by many indigenous peoples to the survival and ongoing development of their distinctive communities and cultures. Yet one of the great disappointments of the judicial focus on indigenous tradition has been its simultaneous deployment as a means of limiting or denying indigenous rights claims. In effect, indigenous societies are limited in their capacity to press their rights claims when there has been substantial change, interruption or disruption of their traditional laws, customs or practices – regardless of the source of the alteration in question. Although it is fair to say that tradition in this judicial framework may not function as a "legal straitjacket"[5] – the prisoner still has some room to manoeuvre – it nevertheless serves as something of a cage, wherein the space for judicially-sanctioned cultural change and adaptation is closely monitored and restrained.

My argument is that this culturally-regulated framework of recognition is not only unreasonable and discriminatory, but functionally unnecessary, and is not a particularly effective means of achieving the reconciliation imperative that courts in Australia, Canada, and New Zealand have adopted (at least implicitly) as an objective of their jurisprudence on indigenous rights. The argument unfolds in four sections. The first two sections provide a critical assessment of the doctrine of cultural continuity as it manifests itself in the Australian, Canadian, and New Zealand jurisprudence on indigenous rights. The remaining two sections investigate alternative judicial frameworks for the recognition of indigenous rights. The third considers, and ultimately rejects as unrealistic, the framework of residual indigenous sovereignty, while the fourth and concluding section makes the case for a more generous and liberal application of the reconciliation doctrine that has taken root, to varying degrees, in the jurisprudence of each of these three settler states.

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[5] This is the language used by Lamer C.J.C. in *Delgamuukw*, *supra* note 4 at 1091.

2. Tradition, Culture, and Continuity

It is now firmly established legal doctrine in Australia, Canada, and New Zealand that indigenous peoples are entitled to certain rights (land, harvesting activities, and cultural practices, for example) which find their origin not in Crown statutes or constitutional instruments, but in the existence of established indigenous societies, possessed of their own systems of law and governance, which pre-dated the assertion of Crown sovereignty.[6] A primary objective of the resulting jurisprudence in all three countries has been to determine the nature and scope of these rights, and to ascertain how they are to be reconciled with the sovereignty of the Crown and the distinctive socio-political and legal architectures that have emerged in each of these settler states.[7] One of the clearest articulations of this objective can be found in the Supreme Court decision in *R. v. Van der Peet*, wherein Lamer C.J.C. described the recognition of Aboriginal rights in section 35 of the Canadian constitution as the "framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown."[8] A notable feature of this jurisprudence of reconciliation is the clear line drawn between Crown *sovereignty* and indigenous *rights*, a line that is arguably more negotiable in Canada than in either Australia or New Zealand. I will return to this point in the third section of the paper, but for now suffice it to say that the courts do not anchor indigenous rights to residual indigenous sovereignty. Instead, these rights are conceptualized as a burden on the sovereignty of the Crown, whose overarching authority the courts have not seen fit to question.[9]

In spite of their reluctance to recognize prior indigenous sovereignty, judiciaries have recognized the authority of pre-existing indigenous laws, customs and practices in characterizing the scope and content of indigenous rights. As Brennan J. concluded for the majority in *Mabo 2*: "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed

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[6] See *Mabo 2*, *supra* note 3; *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321; *Te Weehi v. Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680.

[7] For a comprehensive overview of this architecture, see P.G. McHugh, *Aboriginal Societies and the Common Law*: *A History of Sovereignty, Status, and Self-determination* (New York: Oxford University Press, 2004).

[8] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 539, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

[9] See e.g. *Mabo 2*, *supra* note 3 at 33, 69. Compare *Sparrow*, *supra* note 4 at 1103.

by the indigenous inhabitants of a territory."[10] This language was later incorporated into the statutory definition of native title in section 223 of the Commonwealth's *Native Title Act*, and has been instrumental in shaping the subsequent jurisprudence in this area.[11] The influence of the *Mabo 2* decision was also apparent in the Supreme Court of Canada's characterization of the broader corpus of "existing" Aboriginal rights recognized under the umbrella of section 35 of the Canadian constitution. After explicitly invoking the logic of *Mabo 2*, Lamer C.J.C. settled on a slightly different formulation, to the effect that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[12] For those indigenous peoples seeking remedies in the courts, the dual benefit of this judicial invocation of traditional laws, customs or practices is that it recognizes the distinctive temporal origin of indigenous rights (in pre-contact indigenous societies), while acknowledging the importance of indigenous perspectives and life-worlds in determining the scope and content of these pre-existing rights.[13]

The danger, of course, is that the judicial appeal to tradition may lend itself to a frozen rights interpretive paradigm.[14] Recognizing this danger, courts in Australia, Canada, and New Zealand have declared their intention to avoid an unduly narrow or rigid application of the concept of tradition. In New Zealand, the High Court has acknowledged the change and dynamism that characterized Maori society prior to and after colonization, and has articulated a vision of

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[10] *Supra* note 3 at 58. See also *McRitchie v. Taranaki Fish and Game Council*, [1999] 2 N.Z.L.R. 139 at 147, where the New Zealand Court of Appeal, citing *Mabo 2*, *supra* note 3, and the Supreme Court of Canada's decision in *Sparrow*, *supra* note 4 at 147, concluded: "The existence of a right is determined by considering whether the particular tradition or custom claimed to be an aboriginal right was rooted in the aboriginal culture of the particular people in question…."

[11] *Native Title Act 1993* (Cth.), s. 223.

[12] *Van der Peet*, *supra* note 8 at 549; see also *ibid*. at 545-46: "To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights."

[13] See Lisa Strelein, "Conceptualising Native Title" (2001) 23 Sydney L. Rev. 95 [Strelein, "Conceptualising"] at 98–99.

[14] For some interesting discussions of tradition and the frozen rights paradigm see Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; Manuhuia Barcham, "(De)Constructing the Politics of Indigeneity" in Duncan Ivison, Paul Patton and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 137; Francesca Merlan, "Beyond Tradition" (2006) 7 Asia Pac. J. Anthropol. 85.

the *Treaty of Waitangi* as a living document capable of delivering the rights and resources suitable to the needs and priorities of contemporary Maori.[15] In similar fashion, the Supreme Court of Canada has endorsed a dynamic view of Aboriginal rights wherein ancient rights can adapt and evolve to maintain their relevance to the lives and priorities of contemporary Aboriginal societies.[16] As the Court concluded in *Mitchell v. M.N.R.*, Aboriginal rights "find their source in an earlier age, but they have not been frozen in time. They are, as has been said, rights not relics. They are projected into modern Canada where they are exercised as group rights in the twenty-first century by modern Canadians who wish to preserve and protect their aboriginal identity."[17] In *Mabo 2*, the High Court of Australia also seemed eager to line up behind a more flexible reading of the traditional laws or customs governing claims to native title.[18] As articulated by Deane and Gaudron JJ., the relevant "traditional law or custom is not … frozen as at the moment of establishment of a Colony," and can be modified without extinguishing native title, so long as the group's relationship with its land is neither lost nor diminished in the process.[19] Toohey J. entered an even more robust rejection of the frozen rights paradigm in declaring that "[a]n indigenous society cannot … surrender its rights by modifying its way of life."[20]

These assurances aside, courts in all three countries have clearly signalled their limited appetite for cultural change, adaptation or interruption and have endeavoured to mark the bounds of their tolerance via a doctrine of cultural continuity.[21] That is, in order to prove the existence or survival of an indigenous right, indigenous claimants must demonstrate that the laws, customs or practices which are the subject of, or which govern the right in question, have some reasonable degree of continuity with the laws, customs or practices of

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[15] See *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*, [2000] 1 N.Z.L.R. 285 at 328 (N.Z.H.C.) [*Te Waka Hi Ika o Te Arawa*]; *Te Runanganui o Te Ika Whenua Inc. Society v. Attorney-General*, [1994] 2 N.Z.L.R. 20 at 24-25 (N.Z.C.A.) [*Te Runanganui o Te Ika Whenua*].

[16] See *Sparrow*, *supra* note 4 at 1093; *Van der Peet*, *supra* note 8 at 555.

[17] *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at 978, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.].

[18] See *supra* note 3 at 61, 70, *per* Brennan J. Compare *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [2003] 194 A.L.R. 538 at 552 [*Yorta Yorta*].

[19] *Mabo 2*, *ibid*. at 110; compare *Delgamuukw*, *supra* note 4 at 1088-91.

[20] *Mabo 2*, *ibid*. at 192.

[21] To understand the difference between this doctrine and the common law principle of continuity, see Mark D. Walters "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill L.J. 711.

their traditional, pre-contact indigenous culture.[22] Where a reasonable degree of continuity with pre-contact laws, customs or practices is difficult to establish, the legal foundation of the indigenous right in question is correspondingly weakened or possibly eliminated. Working to this standard, the Supreme Court of Canada has been willing to accept adaptations to traditional Aboriginal activities such that ancient rights may find their modern expression, but claimants must prove that modern activities are the logical evolution of traditional activities, where logical evolution means the *same kind of activity* carried out in modern times by modern means.[23] Correspondingly, the Court has declared that it will not recognize as an Aboriginal right any custom, practice or tradition that is entirely new or which arose exclusively from contact with Europeans.[24]

This doctrine has been applied somewhat more flexibly in Canada with regard to questions of Aboriginal title.[25] Here, the Court has ruled that prior occupation or possession provides sufficient common law grounding for a title claim and, where prior occupancy has been established, permissible Aboriginal activities on, or uses of, title lands are not necessarily restricted by the need to establish continuity with the group's pre-contact customs, practices or traditions.[26] Nevertheless, the continued enjoyment of Aboriginal title is not entirely free of the strictures imposed by the cultural continuity doctrine, since contemporary land usage "must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title."[27]

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[22] See *Van der Peet*, supra note 8 at 554-55; *Yorta Yorta*, *supra* note 18 at 553. The precise temporal standard for Aboriginal title cases in Australia and Canada is pre-(Crown)*sovereignty*. For Aboriginal rights other than title in Canada the standard is pre-*contact*. See *Delgamuukw*, *supra* note 4 at 1097-99. I thank one of the *Review*'s anonymous referees for pushing me to clarify this distinction.

[23] See *Van der Peet*, *supra* note 8 at 554-55; *Mitchell*, *supra* note 17 at 928-29; *R. v. Bernard*; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1 at 234-37 [*Bernard and Marshall* cited to S.C.R.]. Compare *Yanner v. Eaton*, [1999] HCA 69, 166 A.L.R. 258 at 277, where the Australian High Court decided that the use of a motorboat to hunt crocodiles was not a traditional pre-contact means of hunting, but nevertheless was acceptable as "an evolved, or altered, form of traditional behaviour."

[24] *Van der Peet*, *supra* note 8 at 561-62; *Bernard and Marshall*, *ibid*. at 237. Compare *Yorta Yorta*, *supra* note 18 at 554–55.

[25] For a discussion of the Supreme Court of Canada's departure from the doctrine of continuity in the *Delgamuukw* decision see Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 281 [McNeil, "What's Happening?"] at 288 - 93.

[26] *Delgamuukw*, *supra* note 4 at 1080, 1084, 1098-1102.

[27] *Ibid*. at 1080.

The overarching nature of the group's relationship with its title lands must be preserved for present and future generations. It is here that the cultural continuity requirement is re-inserted into the analysis, because a central feature of the Court's strategy for determining the nature of a group's attachment to its land is an investigation of the types of historic activities that established both its physical occupation and the significance of the land in the group's distinctive traditional culture. It follows that any modern activities deemed incompatible with the nature of the group's historic occupation of its territory, or which might undermine the traditional cultural significance of the land, are prohibited.[28] As Lamer C.J.C. concluded:

> It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot.)[29]

The Chief Justice was quick to emphasize that this represents only an overarching limitation on the use of title lands that would still permit certain non-traditional activities to be carried out. Nevertheless, it is clear that Aboriginal title holders are not entirely free to develop or exploit their lands and resources, unless they are willing to surrender their rights and convert their territories into non-title lands.[30]

The Australian High Court, too, has relied on the doctrine of cultural continuity, but its interpretation of the doctrine is possibly even more restrictive than that of its Canadian counterpart. The Court articulated two distinct, but interrelated, dimensions of cultural continuity in the 2003 decision in *Members of the Yorta Yorta Aboriginal Community v. Victoria*.[31] The first refers to the historical pedigree of the indigenous laws and customs governing a title claim,

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[28] *Ibid*. at 1080, 1089.

[29] *Ibid*.

[30] *Ibid*. at 1091.

[31] *Supra* note 18 at 553. For discussion see Richard Bartlett, "An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*" (2003) 31 West. Austl. L. Rev. 35 at 40–43. These two dimensions of continuity are also present in the Canadian jurisprudence, but are not as explicitly distinguished from one another. See *Van der Peet*, *supra* note 8 at 557; *Delgamuukw*, *supra* note 4 at 1103.

which must find their origin in indigenous cultures as they existed prior to the assertion of European sovereignty. The Court was prepared to accept a degree of post-sovereignty adaptation or alteration of traditional law and custom but only "of a kind contemplated by that traditional law and custom," a proviso which mirrors the "logical evolution" thesis articulated by the Canadian Supreme Court in *R. v. Bernard*; *R. v. Marshall*.[32] Moreover, like the Supreme Court of Canada in *Van der Peet*, the High Court of Australia argued that entirely new indigenous laws or customs of post-sovereignty origin are incapable of supporting a claim to native title, even if they arose as a result of indigenous adaptations to European influence or disruption.[33] The High Court also insisted that permissible adaptations of traditional indigenous laws, customs or practices relating to land must preserve the general nature of a group's historic relationship with its territory.[34] Again, title claimants need not conduct their lives identically to those of their ancestors but, as in the Canadian jurisprudence, a certain range of activities are held by the Court to be inherently incompatible with the survival of title, regardless of whether the activities in question were freely chosen by an indigenous people or arose as the result of colonial influence or disruption.

The second dimension of the Australian continuity doctrine stipulates that the *observance* of traditional laws and customs governing a title claim must have continued substantially uninterrupted from the assertion of European sovereignty to the present.[35] Where there has been a substantial break or interruption in a group's observance of its traditional laws and customs or, as the High Court in *Mabo 2* famously remarked, "when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs," so too has the legal foundation of its claim to native title disappeared.[36] What is more, title, once extinguished by the loss or abandonment of traditional laws or customs, cannot be revived by any subsequent effort on the part of claimants to reanimate their traditional laws and customs.[37] This dimension of continuity also shows up in the jurisprudence of the Supreme Court of Canada; but in the 1996 *Van der Peet* decision, the Court adopted a moderately flexible

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[32] *Yorta Yorta*, *supra* note 18 at 552–53. Compare *Bernard and Marshall*, *supra* note 23 at 237.

[33] *Yorta Yorta*, *ibid*. at 554–55.

[34] *Mabo 2*, *supra* note 3 at 70, 110; *Delgamuukw*, *supra* note 4 at 1080, 1089.

[35] *Yorta Yorta*, *supra* note 18 at 552–53.

[36] *Mabo 2*, *supra* note 3 at 60, *per* Brennan J.

[37] *Ibid*.; *Yorta Yorta*, *supra* note 18 at 553.

interpretation of this principle, such that an unbroken chain of observance would not be the required standard of recognition:

> It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right.[38]

The High Court of Australia also has demonstrated some flexibility in this regard, ruling that interruptions in a group's *physical occupation* of its title lands or in the *exercise* of its native title rights and interests may not be fatal to its native title claim, so long as there has been no interruption in the acknowledgement and observance of the traditional laws and customs which constitute the foundation of that title.[39] The latter qualification carries the sting, since it requires native title claimants to prove that the traditional laws and customs governing their relationships and rights to their land have had continuous force and vitality among their members since the assertion of European sovereignty – an undoubtedly fearsome burden of proof, given that any substantial interruption in the chain of observance would be fatal to a title claim.[40]

3. Frozen Rights: *A Requiem?*

Fears that the doctrine of cultural continuity would preserve elements of the frozen rights paradigm explicitly rejected by the courts have in fact been borne out in a range of cases concerning rights to resource exploitation, commercial enterprise, land, and treaty entitlements. In its 1996 *Van der Peet* decision, for example, the Canadian Supreme Court upheld the conviction of a member of the Sto:lo First Nation for selling a small quantity of salmon, caught legally under an Indian food fish licence. The plaintiff, Dorothy Van der Peet, had appealed her conviction on the grounds that she enjoyed a constitutionally protected Aboriginal right to engage in this practice. The majority disagreed, concluding that the trade and exchange of fish played only a minor role in pre-contact Sto:lo culture. The Court accepted the fact that a

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[38] *Van der Peet*, *supra* note 8 at 557.

[39] See *Western Australia v. Ward*, [2002] HCA 28, 213 C.L.R. 1 at 85-86, 191 A.L.R. 1; *Yorta Yorta*, *supra* note 18 at 562. See also the Federal Court's decision in *De Rose v. State of South Australia (No 2)*, [2005] FCAFC 110 at paras. 62–64. For analysis see Lisa Strelein, *Compromised Jurisprudence*: *Native Title Cases Since Mabo* (Canberra: Aboriginal Studies Press, 2006) [Strelein, *Compromised Jurisprudence*] at 13–15, 68–9, 98–102.

[40] *Yorta Yorta*, *supra* note 18 at 553–55, 564. See Bartlett, *supra* note 31 at 35–36, 43.

significant market in fish did develop at a later date, but mostly as a result of contact with European traders from the Hudson's Bay Company. In other words, the trade and exchange of fish was not an integral feature of the distinctive pre-contact Sto:lo culture, and therefore did not meet the standard for recognition as an *Aboriginal* right.[41] With this decision, the Supreme Court appears to have established a distinction between the rights of non-Aboriginal Canadians – which, being grounded in the normative principle of self-determination, are open to potentially infinite change and adaptation through formal and informal processes of deliberation and conscious (or unconscious) choice; and the rights of Aboriginal peoples which, being grounded in the principle of cultural distinctiveness, are restricted by the need to maintain a clear and central connection to their cultural past.

Soon after *Van der Peet*, the Court heard a case where members of the Eagle Lake and Shawanaga First Nations in Ontario were charged with running high-stakes gambling operations without a provincial licence.[42] Both First Nations claimed an Aboriginal right to regulate gaming on their reserves. The Shawanaga First Nation defended their claim as part of their inherent right to self-government whereas the Eagle Lake First Nation pressed its case on the basis of the right to independently regulate its own economic activities. The Court sidestepped the question of whether self-government was a section 35 Aboriginal right, stating only that if such a right did exist it would still have to be adjudicated in relation to the "integral to a distinctive culture" test laid out in *Van der Peet*.[43] The Court instead asked whether the specific practice of gambling was a central part of either First Nation's distinctive pre-contact culture, and thereby subject to protection as an Aboriginal right. The question was answered in the negative and the convictions were upheld.[44] As in the example of fish-trading in the *Van der Peet* decision, the Court acknowledged that gambling was a part of pre-contact Ojibwa culture, but reasoned that evidence of this small-scale, informal, and largely unregulated practice

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[41] *Van der Peet*, *supra* note 8 at 567-71; compare *Mitchell*, *supra* note 17 at 946-47, 948-49, 952, where the Court ruled that trade *per se* was a central aspect of pre-contact Mohawk culture but that trade on the *particular* North-South route at the centre of the claim was not, hence the Mohawk claim to a contemporary Aboriginal right to trade along that route could not be upheld.

[42] *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 [*Pamajewon* cited to S.C.R.]. For a detailed discussion of this case see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011.

[43] *Pamajewon*, *ibid*. at 832.

[44] *Ibid*. at 833-36.

did not constitute proof of a contemporary Aboriginal right to engage in large-scale commercial gambling ventures, which the Court deemed to be a twentieth century rather than a traditional Aboriginal activity.[45] Granted, the operation of a high-stakes bingo might seem straightforwardly less traditional than trade in a handful of salmon, but this still begs the question: if the Court has truly abandoned the frozen rights doctrine, why is the less traditional activity any less deserving of recognition?

The Supreme Court of Canada's more recent decision in *Bernard and Marshall* raised both commercial enterprise and treaty rights issues. The Mi'kmaq defendants claimed a treaty right to cut timber on Crown land in Nova Scotia without a licence. According to the Court, logging was not a traditional Mi'kmaq activity but a practice they took up as a result of contact with Europeans. The Court went further to declare that commercial logging was more accurately viewed as a threat to traditional practices, such as fishing, that were central to the pre-contact Mi'kmaq way of life.[46] The treaty rights of the Mi'kmaq did receive recognition, but the treaty in question was deemed to comprehend the right to trade in traditional products only – mostly furs and fish, but also small-scale forest products such as baskets, snowshoes, and canoes. Commercial timber harvesting was not, in the view of the Court, one of the traditional activities the parties had in mind when they signed the treaty.[47] Once again, the justices were eager to assert that Aboriginal and treaty rights are not frozen in time, and that traditional trading practices must be allowed scope for adaptation to take advantage of changes in technology and the modern economy. At the same time, the evolution of economic treaty rights must meet the standard of cultural continuity. More precisely, contemporary economic activities must have some logical continuity with the traditional economic activities at the heart of the treaty – they must be the same

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[45] *Ibid*. at 834-35.

[46] *Bernard and Marshall*, *supra* note 23 at 239-40.

[47] *Ibid*. at 234-36. This notion of "what was in the minds of the treaty partners" has also been influential in the New Zealand jurisprudence relating to resource development and the Treaty of Waitangi. In 1994, for example, the New Zealand Court of Appeal concluded that even the most liberal reading of the Treaty could not possibly include a contemporary Maori right to generate electricity via a power dam, because "Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840." See also *Te Runanganui o Te Ika Whenua*, *supra* note 15 at 24–25; while the Court was prepared to accept that the Treaty should be regarded as a living instrument, in its view it would be going too far to suggest it was intended to protect a right to generate electricity.

kinds of activities carried out by modern means.[48] Commercial logging, in the Court's view, did not represent the logical evolution of traditional Mi'kmaq trading activities guaranteed by treaty.[49] Disappointing in their own right, decisions such as *Bernard and Marshall*, *Van der Peet*, and *Pamajewon* are particularly discouraging when viewed in the context of indigenous poverty and disadvantage, and the very limited opportunities afforded to indigenous peoples within the section 35 jurisprudence to escape these conditions by earning a livelihood from natural resources or commercial development initiatives.[50]

New Zealand case law on indigenous treaty and resource rights has also been influenced by the doctrine of cultural continuity.[51] In one particularly controversial case, a claim was launched by representatives of non-traditional, urban-based Maori associations (UMAs) who asserted a right to be recognized as full partners with the Crown in the Treaty of Waitangi, and a corresponding right to receive and distribute economic benefits flowing from a major treaty-based fisheries settlement.[52] Opposing their claim was the Crown and representatives of traditional *iwi* (tribes), both of whom argued that only traditional *whakapapa*(ancestry)-based *iwi* are legitimate treaty partners, and that UMAs were created only for the specific and limited purpose *(kaupapa)* of delivering social services to their members in urban

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[48] *Bernard and Marshall*, supra note 23 at 236-37; see also McNeil, "What's Happening?" *supra* note 25 at 297–303, where he argues that the Court in *Bernard and Marshall* conflates the tests for proofs of Aboriginal title and other Aboriginal rights.

[49] *Bernard and Marshall*, *ibid*. at 240.

[50] Compare *Western Australia v. Ward*, *supra* note 39 at 185, where the Australian High Court opined that the existence of a contemporary Aboriginal right to ownership of minerals or petroleum could not be established in the absence of any traditional law, custom or usage relating to those materials. See also *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, 274 D.L.R. (4th) 75, where the Supreme Court of Canada ruled that the defendants had an Aboriginal right to cut timber on Crown land for personal but not commercial use.

[51] See *Te Runanga o Muriwhenua v. Te Runanganui o Te Upoko o Te Ika Association Inc*. (26 June 1996), 155/95 (C.A.); *Jackson v. Treaty of Waitangi Fisheries Commission* (26 June 1996), 165/95 (C.A.); *Te Runanga o Muriwhenua v. Treaty of Waitangi Fisheries Commission*, [1996] 3 N.Z.L.R. 10 [*Te Runanga o Muriwhenua*]; *Treaty Tribes Coalition, Te R?nanga o Ng?ti Porou and Tainui Maori Trust Board v. Urban Maori Authorities*, [1997] 1 N.Z.L.R. 513; *Te Waka Hi Ika o Te Arawa*, *supra* note 15; *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*, [2002] 2 N.Z.L.R. 17 (P.C.).

[52] For a fuller discussion of the empirical and conceptual issues underlying this claim see Barcham, *supra* note 14; Andrew Sharp, "Blood, Custom, and Consent: Three Kinds of Maori Groups and the Challenges They Present to Governments" (2002) 52 U.T.L.J. 9.

settings.[53] UMA supporters countered with the argument that their goal was not to usurp the role of traditional *iwi*, but to act as the representatives of those urban Maori who no longer knew their ancestral tribal affiliation or who simply chose not to affiliate with a traditional *iwi*.[54] UMA representatives contended that, in spite of their urban and multi-tribal character, they continue to maintain a distinctively Maori identity and conduct themselves in accordance with Maori custom and protocol (*tikanga*). Moreover, they asserted the right to adapt traditional Maori customs and modes of social organization to serve the needs of their members in a modern urban environment – needs they believed were not being served by traditional *iw*i. As one such representative argued in front of the Waitangi Tribunal, it is essential to bear in mind the adaptability of Maori as a living, breathing people, "just as the Treaty of Waitangi is a progressive living onward moving document."[55]

The New Zealand courts showed some sympathy for the claims of UMAs, but after a series of appeals, ultimately decided in favour of the treaty rights of traditional *iwi*. In handing down its decision in 2000, the New Zealand High Court commented on the importance of acknowledging processes of change and adaptation in Maori society. In concluding that "Maori society has been dynamic and fluid and that the structure of Maori society differs today considerably from its structure in 1840," the Court indicated the need to avoid an excessively rigid definition of the term "*iwi*."[56] The Court also expressed admiration for

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[53] In addition to genealogy, traditional *iwi* are defined with reference to a shared culture and their connection to a traditional territory. According to the definition accepted by the New Zealand High Court, "A traditional tribe was a group of Maori people claiming descent from a common ancestor, sharing a common culture and either living in a specified geographical area or descended from ancestors who lived in that area;" see *Te Waka Hi Ika o Te Arawa*, *supra* note 15 at 286. In addition to the claim that urban-based Maori associations (UMAs) do not possess the appropriate cultural credentials to be considered *iwi*, some Maori argued that neither the state nor any state institution (such as the Waitangi Tribunal) has the *authority* to designate or "create" another tribal authority in their traditional territory. See, for example, the submission by Ngati Whatua opposing the Tribunal's authority to confer *iwi* status on the Waipareira Trust (an Auckland-based UMA): "…we denounce the power and authority of the Waitangi Tribunal to create an alien Iwi Authority having the powers of Tinorangatiratanga within the Rohe of the Ngati Whatua Tribe." See Waitangi Tribunal, Record of Inquiry, Te Whanau o Waipareira Claim, First Hearing, 31 August–2 September 1994 (submission of M. Powell, Te Tinana o Ngati Whatua Nui Tonu, A14, filed 31 August 1994).

[54] Waitangi Tribunal, *ibid.* (evidence of John Tamihere, A19, filed 1 September 1994).

[55] *Ibid.*

[56] *Te Waka Hi Ika o Te Arawa*, *supra* note 15 at 301, 328.

the valuable role played by UMAs in the modern urban Maori environment – but this did not alter their conclusion that UMAs were not traditional tribes to whom rights and entitlements accrued under the Treaty of Waitangi because, in the Court's view, they lack the genealogical or kinship structure upon which that status depends.[57] In upholding the High Court's decision and its specific conclusions as to the nature of traditional *iwi*, the Court of Appeal opined:

> It is fundamental, in our view, that the implementation of the settlement accords with Maori traditional values, although it will necessarily utilise modern-day mechanisms and the benefits must go to all Maori…. The settlement was of the historical grievances of a tribal people. It ought to be implemented in a manner consistent with that fact. With all due respect to UMA, who are formed on the basis of kaupapa not whakapapa, they cannot fulfil such a role.[58]

Whereas both the High Court and the Court of Appeal were prepared to acknowledge necessary and legitimate adaptations to traditional Maori socio-political structures in the context of modernization, alongside the principle that all Maori are entitled to the settlement benefits, in their view, UMAs lacked the genealogical basis necessary to establish their continuity with traditional *iwi* authorities – the only legitimate holders of rights and entitlements under the Treaty of Waitangi.[59]

Such restrictions on indigenous rights in the courts of settler societies seem particularly perverse when they arise as a result of

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[57] *Ibid*. at 329–30.

[58] *Ibid*. at 377; for the agreement of the Court of Appeal with the High Court on the *iwi* question see 376–78. The Waitangi Tribunal came to precisely the opposite conclusion; see Waitangi Tribunal, *Te Whanau O Waipareira Report (Wai 414)* (Wellington: GP Publications, 1998); online, <http:// www.waitangitribunal.govt.nz/reports/downloadpdf.asp?reportid={1C99EEB3-27C4-E47-8A37-C64B1A7F0E52}.pdf>. For an interesting Canadian comparison arguing that the Canadian Supreme Court's decision in *R v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1 may limit the capacity of Métis to form contemporary rights-bearing communities in urban centres, see Chris Andersen, "Residual Tensions of Empire: Contemporary Métis Communities and the Canadian Judicial Imagination" in Michael Murphy, ed., *Canada*: *The State of the Federation 2003*: *Reconfiguring Aboriginal-State Relations* (Montreal and Kingston: McGill-Queen's University Press, 2004) 295.

[59] *Te Waka Hi Ika o Te Arawa*, *supra* note 15 at 378; in the words of the Court, UMAs "cannot legitimately claim to be tribes or the successors of tribes." Although both the Court of Appeal and the High Court supported the notion that the settlement benefits should be allocated to all Maori, they said little about how this ought to occur, other than that it should be accomplished to the best abilities of the parties concerned, and that UMAs should be consulted; see *Te Runanga o Muriwhenua*, *supra* note 51 at 19–20; *Te Waka Hi Ika o Te Arawa*, *supra* note 15 at 331–79.

cultural change or discontinuity that is a direct result of colonialism. Representatives and supporters of UMAs, for example, cite the New Zealand government's deliberate policy of urbanizing Maori to facilitate their rapid assimilation and to open up their land holdings for the purpose of European settlement and agricultural development.[60] Under the *Maori Community Development Act* of 1961,[61] moreover, the government itself encouraged the formation of non-traditional Maori associations to meet the urgent needs of the rapidly expanding urban Maori population. In testimony before the Waitangi Tribunal, UMA representatives noted the particular irony of efforts to deny treaty status to organizations formed in response to the impending urban crisis created by the Crown's own policies of assimilation and land dispossession – policies that were in clear violation of its treaty obligations to Maori.[62]

Equally troubling is the incentive this creates for governments to take advantage of the success of their own historic colonial policies, however pernicious, as a means of undermining the legal foundation of contemporary indigenous rights claims. In a recent Australian Federal Court case covering a claim by the Noongar people to native title in the Perth area, counsel for the Government of Western Australia adopted precisely this tactic, arguing that the devastating effects of state policies of assimilation and displacement effectively severed the thread of cultural continuity essential to the Noongar title claim.[63] The Noongar were therefore confronted not only with the devastating material and psychological legacy of state-sponsored injustice but also with the very real possibility that the "success" of those unjust actions could be

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[60] See Jack Kent Hunn, *Report on Department of Maori Affairs*: *with Statistical Supplement*, *24 August 1960* (Wellington: Government Printer, 1961); Edward Douglas, "Urbanisation of the Maori Population with Special Reference to the Growth of Auckland" Waitangi Tribunal, Record of Inquiry, *supra* note 53, Fourth Hearing, 20 March 1995 (D1).

[61] (N.Z.) 1962/133.

[62] Synopsis of Opening Submission of Claimant Counsel, Waitangi Tribunal, Record of Inquiry, *supra* note 53, Second Hearing, 21 September 1994.

[63] *Bennell v. State of Western Australia*, [2006] FCA 1243, 153 F.C.R. 120 [*Bennell*]; the substance of the Crown's argument was conveyed by lead counsel for the Noongar, Vance Hughston, and chief executive officer for the South West Aboriginal Land and Sea Council (SWALSC), Glen Kelly, at a public session of the 2007 Native Title Conference in Cairns. Although the trial judge ruled in favour of the Noongar claim, the decision has been appealed by the government of Western Australia, which claims that the judge's reasoning runs counter to the High Court's native title jurisprudence.

invoked as a means of compromising their capacity to seek legal redress and a belated recognition of their rights.[64]

To make matters worse, those groups who have suffered the greatest impacts of colonial policy and settlement patterns often, as a consequence, have the most difficulty seeking redress for those injustices by proving their rights in court. Such was the fate of the Yorta Yorta people in their bid to secure native title to their traditional territories and waterways in what is now an intensively developed agricultural region of Victoria and New South Wales.[65] The Yorta Yorta claim was denied on final appeal to the High Court of Australia based on the conclusion that, at some point between 1788 and the present, the ancestors of the Yorta Yorta claimants had ceased to observe the traditional laws and customs essential to the establishment of their native title claim. The majority decision was anchored in the second dimension of the continuity doctrine – that there was an interruption in the observance of, as opposed to some change to the content of, traditional laws and customs.[66]

> [T]he findings we have identified are more radical than is acknowledged by arguments about the particular content of laws and traditions at particular times. They are findings that the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. Upon those findings, the claimants must fail.[67]

The High Court took note of the fact that settler encroachment, disease, the forced relocation of the Yorta Yorta on mission settlements, and the suppression of their language and culture took a heavy toll on this indigenous community, forcing significant changes and adaptations to its way of life. The High Court further acknowledged the difficult burden this placed on the Yorta Yorta in proving the continuity of their traditional laws and customs, and that this ought to be taken into account in the deliberations over their title claim. Nevertheless, the Court was equally clear that any substantial interruption in the

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[64] See Simon Young, "The Trouble With 'Tradition': Native Title and the *Yorta Yorta* Decision" (2001) 30 West. Austl. L. Rev. 28, at 49–50.

[65] See *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [1998] FCA 1606 (unreported); *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [2001] FCA 45, 180 A.L.R. 655; *Yorta Yorta*, *supra* note 18. Detailed discussions of this series of cases can be found in Bartlett, *supra* note 31; Young, *ibid*.; Kirsten Anker, "Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v. Victoria*" (2004) 28 Melbourne U. L. Rev. 1.

[66] *Yorta Yorta*, *supra* note 18 at 564.

[67] *Ibid*. at 565.

observance of traditional laws and customs, regardless of its source, would be – and in this case was – fatal to a title claim.[68] In the Court's view, once the substantive break in the observance of traditional laws and customs was established, the Yorta Yorta effectively ceased to exist as a traditional society, after which point neither the society, nor its native title rights, could ever again be revived and recognized in Australian law.[69] As Lisa Strelein notes, the High Court drew this conclusion in spite of the claimants' undisputed genealogical links to the pre-sovereignty occupants, their continuing presence in the territories under claim, and their ongoing identification as a community interested in revitalizing its traditional culture.[70] The Yorta Yorta may very well be a recognizably indigenous community, but in the eyes of the law not a community capable of asserting a right to native title.

For groups like the Yorta Yorta that have been profoundly affected by the legacy of European settlement, influence, and interference, the judicial standard of cultural continuity constitutes an almost insurmountable burden of proof, and undoubtedly renders indigenous land rights more vulnerable to extinguishment. As one observer of native title litigation in Australia soberly concludes: "The onus is on claimants to prove a substantial continuity in specific practices associated with traditional law and custom in the face of a brutal history that makes this degree of continuity extremely unlikely for the majority of Aboriginal people."[71] More than just difficult to meet, the cultural continuity requirement is fundamentally discriminatory, given that non-indigenous landowners are not required to pass a similar cultural test in order to sustain their common law property rights.[72] This

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[68] *Ibid*. at 554–55, 557, 563–71. For a similar determination at the Federal Court level, see *Risk v. Northern Territory of Australia*, [2006] FCA 404, especially paras. 811–39. Wilcox J. of the Federal Court adopted a more flexible approach with respect to forced change in *Bennell*, *supra* note 62 at paras. 774–91; see also Samantha Hepburn, "Social Continuity and Forced Change: The Noongar Case; *Bennell v. State of Western Australia*" (2006) 11 Deakin L. Rev. 173.

[69] *Yorta Yorta*, *supra* note 18 at 564.

[70] Strelein, *Compromised Jurisprudence*, *supra* note 39 at 84–86, 91. In their dissenting opinion, Gaudron and Kirby JJ. adopted a more flexible line on the issue of community continuity, arguing that it "is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question;" see *Yorta Yorta*, *supra* note 18 at para. 117.

[71] Anker, *supra* note 64 at 26; see also Strelein, *Compromised Jurisprudence*, *supra* note 39 at 130–31. The Federal Court's approach in *Bennell*, *supra* note 62 arguably offers native title claimants more hope in this regard; see Hepburn, *supra* note 67.

[72] See Bartlett, *supra* note 31 at 35–36; Noel Pearson, "The High Court's

discriminatory interpretation of indigenous property rights takes a somewhat different form in the Canadian jurisprudence, which uses prior occupation (not cultural continuity) as the standard for proving title claims, but nevertheless places restrictions on the use of title lands to which non-indigenous landowners are not subject.[73] Granted, in *Delgamuukw*, the Supreme Court adopted a comparatively more liberal line in relation to the activities which may take place on Aboriginal title lands; but title holders are still required to ensure that any proposed activities do not threaten the general nature of the group's connection to the land – and this connection is to be determined in relation to pre-sovereignty land use patterns and the significance of the land in relation to the group's distinctive traditional culture.[74] It is difficult to see the justice in such a requirement. Following the analysis of Kent McNeil, in a truly equitable land rights regime neither of these restrictions would be applied to indigenous title claims. Title instead would be determined primarily in relation to traditional common law standards of prior use and occupation, and indigenous owners would be free, in the same sense as non-indigenous title holders, to use or develop their lands in the absence of any cultural restrictions.[75] This is not to say that traditional laws and customs are irrelevant to indigenous land rights. As Noel Pearson argues in the Australian context, they might very well be of relevance in governing "the internal allocation of rights, interests and responsibilities amongst members of the native community."[76] Alternatively, traditional laws and customs may prove valuable in the

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Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*," [2003] A.I.L.R. 15 (Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle); and Strelein, *Compromised Jurisprudence*, *supra* note 39 at 130–31, 137. See also the dissenting opinion of Kirby J. in *Commonwealth v. Yarmirr*, [2001] 184 A.L.R. 113 at 196–98 where he invoked both the common law and international human rights law in opposing this discriminatory reading of native title.

[73] See Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 [McNeil, "What's the Connection?"] at 137–38.

[74] *Delgamuukw*, *supra* note 4 at.1080, 1089.

[75] As McNeil concludes, "[Aboriginal peoples] would therefore be able to practice agriculture, engage in lumbering, extract minerals, and so on, regardless of whether they had done so in the past;" see McNeil, "What's the Connection?" *supra* note 72 at 137.

[76] Noel Pearson, "Land Is Susceptible Of Ownership," online: Cape York Partnerships <http://www.capeyorkpartnerships.com/team/noelpearson/papers/NPlandSUSCEPTIBLE2003.pdf> (paper delivered to the High Court Centenary Conference Canberra 9–11 October, 2003). Pearson draws much of his inspiration here from McNeil, "What's Happening?" *supra* note 25 at 307.

proof equation where indigenous occupation has been interrupted as a result of colonial displacement.[77] In both examples, however, the essential point is that cultural tradition is conceived as an asset, not a liability, to indigenous title claims.

3. Why Must Difference Make a Difference?

In previous centuries, indigenous peoples in North America and Australasia were habitually denied fundamental rights and freedoms – including the most basic rights of citizenship – on account of their profound cultural or racial differences from Europeans – differences that in the eyes of the colonizers marked them as indisputably inferior. When rights did eventually become available for indigenous acquisition, the asking price was usually assimilation and the erasure of indigenous identities and indigenous rights.[78] Now, in an age where this colonial logic has been largely repudiated, Europeanization, whether as a source of influence on or interruption of indigenous cultures, has come to be linked to the judicial restriction or nullification of indigenous rights. It would seem that indigenous people who previously were disadvantaged by their radical differences from Europeans, are now disadvantaged when they cannot prove that they are different enough. While not exactly a jurisprudence of frozen rights, high courts in Australia, Canada, and New Zealand have articulated what Bradford Morse has called a "permafrost" paradigm of indigenous rights, wherein only so much cultural change, adaptation or interruption can be sanctioned before rights disappear.[79] This restrictive culturalist jurisprudence has had a very real, and negative, impact on indigenous choices and activities, including the capacity of indigenous peoples to gain title to their traditional territories, to develop those territories and their natural resources in accordance with their own priorities, to own and operate large-scale and profitable commercial enterprises, or to be recognized as legally and legitimately indigenous in the eyes of the settler state.

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[77] Strelein, *Compromised Jurisprudence*, *supra* note 39 at 131–32; Strelein, "Conceptualising," *supra* note 13 at 111–14.

[78] See John Chesterman and Brian Galligan, *Citizens Without Rights*: *Aborigines and Australian Citizenship* (Cambridge: Cambridge University Press, 1997); David Pearson, *The Politics of Ethnicity in Settler Societies*: *States of Unease* (Basingstoke: Palgrave, 2001); Darlene Johnston, "First Nations and Canadian Citizenship" in William Kaplan, ed., *Belonging*: *The Meaning and Future of Canadian Citizenship* (Montreal & Kingston: McGill-Queen's University Press, 1996) at 349–67. The remainder of this paragraph draws on Michael Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" (2001) 34 Can. J. Pol. Sci 109 at 127–28.

[79] See Morse, *supra* note 42.

Given its obvious inadequacies, it bears asking why the courts have been so captivated by the cultural continuity paradigm of indigenous rights, and whether the reasons for this choice of judicial framework stand up to critical scrutiny. Perhaps the most obvious reason is the desire both to acknowledge pre-existing indigenous societies as the source of indigenous rights and entitlements, and to carve out a legal space wherein indigenous perspectives or worldviews can help shape the character and scope of those rights. Yet the force of this argument cannot but be diminished when this framework of recognition adds to an already difficult burden of proof in court, when it renders indigenous rights more vulnerable to the impact of colonialism, and when it places discriminatory restrictions on the capacity of indigenous peoples to translate those rights into employment and development opportunities in the modern economy. What should be an element of recognition ends up being yet another means of facilitating denial and extinguishment.[80] The continuity requirement seems almost custom-designed to frustrate the judicial objective, articulated by the highest courts in each of these three countries, of facilitating the evolution of indigenous rights so that they remain relevant to the needs and circumstances of dynamic contemporary indigenous communities.

Perhaps the courts are concerned that a culturally unbounded right to development would open up a Pandora's box of indigenous rights claims, and that the continuity requirement is necessary to place reasonable limits on those claims.[81] There seems to be particular judicial apprehension around the potential commercialization of indigenous rights, perhaps because of the consternation this might cause to competing non-Aboriginal commercial interests and the broader public.[82] Of course, devising reasonable means of limiting the

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[80] As Strelein argues in relation to the Australian native title jurisprudence, "the Courts use the notion that native title has its foundation in Aboriginal law as the source of its vulnerability rather than a source of strength;" see Strelein, "Conceptualising," *supra* note 13 at 122.

[81] Consider McNeil's interpretation of *Van der Peet*: "Lamer C.J.C. was obviously concerned about one segment of Canadian society having constitutional protection for rights not enjoyed by all Canadians. In my opinion, this concern prompted him to limit those rights as much as possible, and one way of accomplishing that was to define those rights in terms of pre-contact practices, customs and traditions;" see McNeil, "What's the Connection?" *supra* note 72 at 131. For a related observation in the Australian context, see Young, *supra* note 63 at 48. An interesting comparison can also be made with the Supreme Court of Canada's logic of containment in relation to the Crown's fiduciary duty to First Nations in Canada in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at 286-88. Thanks to one of the *Review*'s anonymous referees for drawing my attention to this case.

[82] As evidence of this apprehension, Peter Russell cites the unprecedented move

scope and content of indigenous rights is itself not an unreasonable objective, but the judicial and legislative arms of the state already possess a vast array of instruments for the purpose of circumscribing and limiting indigenous rights. Among other things, indigenous peoples are required to prove before the courts that their rights have not already been precluded or extinguished by legislation or other acts of state,[83] that the recognition of the rights in question will not fracture a skeletal principle of the constitution,[84] that those rights can be rendered "cognizable" to the settler state's legal system[85] and are not incompatible with the sovereignty of the Crown,[86] and that the laws and customs governing those rights are not repugnant to natural justice.[87] Any surviving rights deemed capable of recognition are also then subject to limitation or override for any number of reasons linked to the wider public interest.[88]

In Australia and New Zealand, where there has been no formal constitutional entrenchment of indigenous rights, governments have the authority to limit or even extinguish indigenous rights at their pleasure, limited only by their own self-imposed (and ultimately revocable) legislative instruments. Neither government has been shy of exercising this authority in times when the competing interests of non-indigenous majorities were thought to be at risk. In 1998, in an effort to address growing public hysteria regarding the impact of native title claims, the Australian government amended the legislative regime covering native title – an amendment that required the partial suspension of the Commonwealth's own *Racial Discrimination Act* – to facilitate greater

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by the Supreme Court of Canada in *Marshall II*, *supra* note 44, to clarify its decision in *R. v. Marshall (I)* ([1999] 3 S.C.R 456 that the Mi'Kmaq and Maliseet peoples have a treaty right to fish for a moderate livelihood. The clarification was issued in the wake of an angry reaction from the media, non-Aboriginal fishermen and the general public; see Peter H. Russell, *Recognizing Aboriginal Title*: *The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005) at 345.

[83] See *Van der Peet*, *supra* note 8 at 526; *Te Weehi*, *supra* note 6 at 691–92; and *Mabo 2*, *supra* note 3 at 83. Preclusion is somewhat different than extinguishment. For example, in 1999 the New Zealand Court of Appeal ruled that a Maori customary right to fish for an introduced species of trout in the Mangawhero River was precluded by the fact that the species in question was, from the very outset, controlled by a legislative regime which left no room for acquisition of customary rights; see *McRitchie*, *supra* note 10 at 153.

[84] *Mabo 2*, *supra* note 3 at 29.

[85] *Van der Peet*, *supra* note 8 at 550-51.

[86] *Mitchell*, *supra* note 17 at 985-86.

[87] *Mabo 2*, *supra* note 3 at 68.

[88] See *Delgamuukw*, *supra* note 4 at 1111; and *Te Runanganui o Te Ika Whenua*, *supra* note 15 at 21.

ease of extinguishment and to further restrict the capacity of indigenous claimants to negotiate and benefit from their native title rights and interests.[89] The vulnerability of indigenous rights to Crown override was similarly illustrated in New Zealand in 2004 when the Labour government, also in an effort to contain public panic and outrage over Maori title claims to portions of their traditional sea country, unilaterally vested ownership of New Zealand's entire foreshore and seabed in the Crown, effectively precluding any future Maori attempts to prove their title claims before the courts.[90]

In Canada, where Aboriginal rights were constitutionally entrenched in 1982, the federal government no longer enjoys the unfettered authority to extinguish Aboriginal rights, but it nevertheless retains the constitutional capacity to set legislative constraints on Aboriginal rights and entitlements. Granted, the federal government has a fiduciary duty to conduct itself with the best interests of Aboriginal peoples in mind, and it must meet a fairly strict constitutional standard to justify any adverse legislation, but the Supreme Court of Canada seems prepared to accept a very broad range of imperatives that might justify government infringement of Aboriginal rights.[91] In relation to Aboriginal title alone, these imperatives might include "the development of agriculture, forestry, mining, and hydroelectric power … general economic development … protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those

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[89] See Larissa Behrendt, *Achieving Social Justice*: *Indigenous Rights and Australia's Future* (Sydney: The Federation Press, 2003) at 52–53; Strelein, *Compromised Jurisprudence*, *supra* note 39 at 6-7. Australia was criticized by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for the discriminatory aspects of its native title legislation; see Committee on the Elimination of Racial Discrimination, *Decision 2 (54) on Australia* (Australia. 18/03/99 A/54/18, para. 21(2), Fifty-Fourth Session). The criticism had no discernable impact on the government's policy.

[90] The case that precipitated the crisis was *Attorney General v. Ngati Apa*, [2003] NZCA 117, 3 N.Z.L.R. 643. For a discussion of this issue, see McHugh, *supra* note 7 at 527–29; Roger Maaka and Augie Fleras, *The Politics of Indigeneity*: *Challenging The State in Canada and Aotearoa New Zealand* (Dunedin: University of Otago Press, 2005) at 143–46. The government's foreshore and seabed legislation also drew criticism from the CERD. See United Nations Committee on the Elimination of All Forms of Racial Discrimination, *Decision 1(66)*: *New Zealand Foreshore and Seabed Act 2004* (11 March 2005) CERD/C/66/NZL/Dec.1. Similar criticisms were voiced by the Waitangi Tribunal in its *Report on the Crown's Foreshore and Seabed Policy*, W.A.I. 1071 (Wellington: Legislation Direct, 2004) at 136–38.

[91] See *Sparrow*, *supra* note 4 at 1103, 1108–10, 1076–80; *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 762-75; and *Delgamuukw*, *supra* note 4 at 1107-11.

aims."[92] This extensive line-up of legal and political hurdles must also be viewed in relation to the fact that indigenous peoples in Australia, Canada, and New Zealand continue to be among the most disadvantaged and disempowered segments of society, faced with a difficult struggle to assert and protect their rights in the face of fickle, frequently unsympathetic, and unfailingly powerful majorities. In such difficult soil, indigenous rights are hardly at risk of uncontrolled proliferation, and in this light the requirement of cultural continuity as yet another layer of containment seems both unreasonable and unfair.

4. Alternative Frameworks

A) Residual Indigenous Sovereignty

For those seeking an alternative legal-constitutional foundation for indigenous rights, one of the more popular options is residual indigenous sovereignty.[93] Within this framework, the recognition of indigenous rights and interests would not be linked to the distinctive laws, customs and practices of pre-contact indigenous societies but to the prior status and authority of those societies as independent and self-governing political communities. From this perspective, courts would recognize indigenous peoples as the bearers of a form of parallel jurisdictional authority that would operate in co-ordination with the sovereignty of the Crown. The underlying source of indigenous rights and entitlements would thus be located in the status of indigenous peoples as free and self-determining peoples – a status equal in principle to that of non-indigenous communities – which would remain unaffected by changes or adaptations to their traditional indigenous laws, customs or practices.

There is much to recommend in this approach. First and foremost, it resonates strongly with many of the principles articulated by indigenous peoples as the foundation for a renewed relationship with the Crown, including equality of peoples, autonomy, non-interference, and government-to-government relations based on negotiation and consent.[94] Recognition of indigenous sovereignty would also facilitate

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[92] *Ibid*. at 1111; see also *Gladstone*, *ibid*. at 775. For a critique of the Court's standard of justified infringement, see John Borrows, ''Uncertain Citizens: Aboriginal Peoples and the Supreme Court'' (2001) 80 Can. Bar Rev. 15 at 32–37.

[93] See Henry Reynolds, *Aboriginal Sovereignty*: *Reflections on Race, State and Nation* (St. Leonards: Allen and Unwin, 1996); and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 107–31.

[94] See e.g. Maaka and Fleras, *supra* note 89; Behrendt, *supra* note 88; and Dale Turner, *This Is Not a Peace Pipe*: *Towards a Critical Indigenous Philosophy* (Toronto:

the principle of democratic self-determination, opening up a legal space within which indigenous peoples could begin to assert control of their lands, resources and socio-economic development, not to mention the character, pace and direction of cultural change and adaptation. The reality, however, is that this more fundamental question of indigenous sovereignty rarely qualifies as a subject for serious judicial deliberation. In many cases, the issue of indigenous sovereignty or control looms large in the background but is passed over in silence in the key deliberations, a fact duly noted by the dissenting judge in *McRitchie v. Taranaki Fish and Game Council*. In this case concerning Maori fishing rights in the Mangawhero river, the New Zealand Court of Appeal structured its deliberations around issues such as the customary basis of particular Maori fishing practices, the particular species of fish caught, and the impact of the Crown's legislative regime relating to freshwater fisheries; but as Thomas J.A. concluded, for Maori these were not the most fundamental issues:

> [W]hat Maori assert is their mana whenua and tino rangatiratanga over the river…. At the very least it is a plea for their right to participate in the control of the river in accordance with the principles of the treaty as defined by this court.[95]

These were issues that neither the Crown, nor the Court of Appeal, was prepared to address.

The reluctance of the courts to address, let alone recognize, indigenous sovereignty is in fact the principal weakness of this alternative framework of recognition. High courts in Australia, Canada, and New Zealand have consistently, and definitively, declined the invitation to challenge the overarching sovereignty of the Crown. As the Supreme Court of Canada emphasized in *Sparrow*, ''There was from the outset never any doubt that sovereignty and legislative power … vested in the Crown.''[96]

Brennan J. conveyed this sentiment in even starker terms in *Mabo 2*: "The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court."[97] Similarly in New Zealand a series of judicial decisions have confirmed the supremacy of Parliament and the illegitimacy of any judicial challenge to its sovereign authority.[98] Of course, indigenous rights in all

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University of Toronto Press, 2006).

[95] *McRitchie*, *supra* note 10 at 156.

[96] *Sparrow*, *supra* note 4 at 1103. See also *Delgamuukw*, *supra* note 4 at 1096.

[97] *Mabo 2*, *supra* note 3 at 69.

[98] For discussion see P.G. McHugh, "Living With Rights Aboriginally:

three countries act as a burden or a limitation on Crown sovereignty, a burden shouldered more lightly in Australia and New Zealand where indigenous rights are not constitutionally entrenched, but this is a far cry from recognizing indigenous peoples as the constitutional equals of the Crown.

Australia and New Zealand seem particularly resistant to the notion of sharing sovereignty with indigenous peoples, and there is no recognition in either country of separate or autonomous indigenous legislative authority. As the High Court of Australia concluded in *Yorta Yorta*:

> … [W]hat the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and … that is not permissible.[99]

Critics have challenged the conceptual coherence of this strict and indivisible view of Crown sovereignty, arguing first that the High Court's own recognition of indigenous laws and customs as independent sources of indigenous rights itself suggests the existence of a parallel indigenous legislative authority, and second that there is no necessary incompatibility – theoretical or practical – in recognizing parallel orders of sovereignty that operate in co-ordination with one another in the same territory.[100] But such arguments are unlikely to have any real influence over judicial practice. It may well be true that the courts are dealing with an outmoded understanding of absolute and indivisible sovereignty. It may also be true that as a matter of legal interpretation there is nothing preventing them from reading in the existence of some residual indigenous sovereignty. It may even be true that the courts are already providing mixed signals regarding the survival of indigenous sovereignty. Yet even if the courts could be persuaded of all of this, and of the further conclusion that the recognition of residual indigenous sovereignty is more consonant with basic principles of political morality or natural justice, in purely practical terms there is little to no chance that the highest courts in Australia, Canada or New Zealand are going to step across the

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Constitutionalism and Maori in the 1990s" in Michael Belgrave, Merata Kawharu, and David Williams, eds., *Waitangi Revisited*: *Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005) at 287–90.

[99] *Yorta Yorta*, *supra* note 18 at 552.

[100] See Garth Nettheim, "'The Consent of the Natives': *Mabo* and Indigenous Political Rights" (1993) 15 Sydney L. Rev. 223; Duncan Ivison, "Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism" (1997) 17 Oxford J. Legal Stud. 253 at 263; and Strelein, *Compromised Jurisprudence*, *supra* note 39 at

carefully-drawn judicial line that leaves decisions about sovereignty firmly, and exclusively, in the hands of the Crown.

Even in Canada, where indigenous self-government is already a reality on the ground, and where the Supreme Court has openly considered the possibility (without coming to a formal decision) that self-government is a constitutionally protected Aboriginal right, the prospect of a judicially-mandated order of indigenous sovereignty is more dream than reality.[101] Some observers may have been tempted to look for such a breakthrough in the joint opinion of Binnie and Major JJ. in *Mitchell*, where the judges argued that Aboriginal peoples were not comprehensively subordinated by the introduction of Crown sovereignty in the Americas. But those judges once again closed the door on any notion of a separate or parallel Aboriginal sovereignty, preferring instead the conclusion that Aboriginal peoples had become "merger partners" with non-Aboriginals in a common Canadian sovereignty – a single ship of state.[102] Despite a rather lengthy discussion on the subject, the judgment did not offer any specific conclusions regarding the relationship between this sovereignty merger and the Aboriginal right to internal self-government, other than that the resulting partnership was not predicated on the imperative of assimilation.[103] Nevertheless, there are several features of this sovereignty merger doctrine that render it incompatible with a residual indigenous sovereignty perspective. As a start, there seems to be no room in the doctrine for indigenous consent – whether indigenous peoples agreed to it or not their prior sovereignty was merged with that of the colonizing power – a process that more closely resembles a hostile takeover than a negotiated partnership among equals. Equally telling, this doctrine appears to function less like a positive form of recognition and more like yet another judicial instrument for limiting indigenous rights – rights which will not qualify for recognition if they are deemed incompatible with Canadian sovereignty.[104]

128–29. For a contrasting perspective on the relationship between the High Court's recognition of traditional law and custom and the question of indigenous sovereignty, see Jacob T. Levy, "Three Modes of Incorporating Indigenous Law" in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) at 300, 304–05.

[101] For the Supreme Court's musings on self-government, see Pamajewon, supra note 42 at 834; and Mitchell, supra note 17 at 979-81, 992-94.

[102] *Mitchell*, *supra* note 17 at 976-77.

[103] *Ibid*. at 979-81, 992-94. It is also worth noting that even if internal self-government was eventually ruled to be compatible with Canadian sovereignty, it would almost certainly be subject to the same "integral to a distinctive culture test" as any other Aboriginal right; see *Pamajewon*, *supra* note 42 at 835-36.

[104] *Mitchell*, *supra* note 17 at 985-95. A comparison with the United States is

B) After Tradition: *Reconciliation and Equality of Peoples*

Whatever the strengths of the normative arguments in favour of recognizing prior indigenous sovereignty, in practical terms it is not an ideal on which judiciaries, keen not to exceed the bounds of their constitutional authority, can be expected to deliver. A better alternative, in my view, is to seek a more generous and liberal application of the judicial metaphor of reconciliation.[105] Reconciliation is more immediately promising because it is already firmly a part of the judicial agenda in Australia, Canada, and New Zealand. Granted, the Supreme Court of Canada is more explicit in its invocation of the reconciliation metaphor, but whether or not they openly acknowledge this fact, high courts in Australia and New Zealand have also come to play a significant role in the process of coming to terms with the historic collision of indigenous and non-indigenous societies that weighs so heavily on their constitutional pasts, presents, and futures.[106] Reconciliation in this judicial context refers to the relatively more modest objective of achieving a fair and workable accommodation among the rights and interests of indigenous and non-indigenous peoples within an overarching framework of Crown sovereignty. Yet while the courts tend to place greater emphasis on the practical dimensions of reconciliation – on what might be called functional terms of co-existence among different rights-bearing societies – they have also at times emphasized normative principles like fairness,[107] justice and non-discrimination,[108] and the honour of the Crown.[109] In my view, the practical and the normative dimensions of reconciliation must be treated as interdependent, since it will be difficult to build support and legitimacy for practical arrangements that are not viewed as fair and

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telling in this context. Whereas prior indigenous sovereignty has been recognized by the U.S. Supreme Court, the special domestic and dependent character of this sovereignty means that, in practice, tribal nations are effectively subordinate to Congress, which enjoys an almost unrestrained authority in the realm of Indian law and policy; see Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven and London: Yale University Press, 1987)at 53–86.

[105] The language of a "generous and liberal interpretation" is borrowed from the Supreme Court of Canada's decision in *Sparrow*, *supra* note 4 at 1077.

[106] See McHugh, *supra* note 7 at 539–611; and Jeremy Webber, "Beyond Regret: *Mabo* and Australian Constitutionalism" in Ivison, Patton and Sanders, *supra* note 14 at 60–88.

[107] See *Delgamuukw*, *supra* note 4 at 1125-26; *Van der Peet*, *supra* note 8 at 551; and *Te Runanganui o Te Ika Whenua*, *supra* note 15 at 21.

[108] *Mabo 2*, *supra* note 3 at 42.

[109] *Delgamuukw*, *supra* note 4 at 1113-14, 1133-34; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at 526-31; *New Zealand Maori Council v. Attorney General*, [1987] 1 N.Z.L.R. 641 at 642.

just by both parties. Courts must therefore work to ensure that these normative principles are at the very core of a jurisprudence of reconciliation. In so doing, they should endeavour to measure their deliberations on Aboriginal and treaty rights against two key dimensions of equality: equal opportunity and equal consideration.

Equal opportunity as a measure of a jurisprudence of reconciliation means that indigenous peoples should enjoy a right to development equal to that of the non-indigenous communities with whom they share a state. Like their non-indigenous neighbours, indigenous communities are entitled to the freedom to develop and adapt their communities, economies, and cultures to satisfy the contemporary needs and circumstances of their members without having the legitimacy of their choices measured against a judicially-constructed cultural standard whose roots are firmly grounded in their ancestral pasts. Far from being a radical agenda, the equal right to development is fully consistent with the expressed desire by courts in Australia, Canada, and New Zealand that indigenous rights remain relevant to the priorities and circumstances of dynamic, *living* indigenous societies.[110] The courts in all three countries have emphasized repeatedly that one of the primary functions of Aboriginal and treaty rights is to afford indigenous peoples sufficient legal space within which to choose their own developmental path – a path that will enable them to flourish in a complex and ever-shifting socio-economic and political environment. Indeed, this is the concern which motivates judicial opposition to the "frozen in time" approach to indigenous rights. Societies and cultures naturally change and evolve in relation to new circumstances, environments, constraints, and opportunities, and in relation to the shifting interests and priorities of their members. To limit the opportunities available to contemporary indigenous communities on the basis of the priorities, practices, and choices of their ancestral forebears is to hold them to a standard that no living culture should be required to meet, and places them at a real disadvantage in a world wherein rapid change and adaptation has become the norm.

A similar message lies at the core of the human right to development in international law, which finds its roots in the more fundamental principles of self-determination and equality of peoples. As Kirby J. concluded in dissent in *Commonwealth v. Yarmirr*, "the application of international human rights law … repeatedly emphasises that the principle of non-discrimination must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies

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[110] See *supra* notes 15–20.

do."[111] Yet the doctrine of cultural continuity, even though it avoids the extremes of the frozen rights doctrine, nevertheless violates the principle of equal opportunity, given that indigenous peoples are not permitted the same scope as non-indigenous peoples to modify, interrupt or abandon their traditions without foregoing their rights. While courts pay lip-service to the notion of a living tradition, indigenous claimants continue to be penalized by their own self-chosen cultural adaptations or by forces of change, interruption or dissolution visited on their communities and cultures as a result of European settlement and colonial policies.

Would a more equitable approach to the right to development – unshackled from the chains of cultural continuity – lead to a proliferation of unregulated indigenous rights? I think this is highly unlikely, given the many other obstacles already faced by indigenous claimants in the struggle to prove their rights in court, and the wide range of instruments by means of which governments and judiciaries may limit or restrict any rights that qualify for recognition. Reasonable and equitable limitations on the right to development are in any event best determined by means of political negotiations rather than judicial pronouncement – and with a focus on what constitutes a fair and sustainable compromise between the competing interests and priorities of indigenous and non-indigenous societies rather than on a cultural continuity test that only the indigenous party is required to pass. This more flexible and open-ended approach to the right to development may still be too radical for some on the bench, but support for it in some of the more strongly worded dissenting opinions in Australia, Canada, and New Zealand is evidence that it may yet find support in a majority decision.[112]

Equal consideration is the second key measure of a more generous jurisprudence of reconciliation. It calls for a more equitable balancing of the rights and interests of indigenous and non-indigenous communities, taking into consideration the very different challenges and obstacles they have faced in the history of their mutual interaction and the resulting disparities in terms of their ongoing access to socio-

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[111] *Yarmirr*, *supra* note 71 at 197. See the *United Nations Declaration on the Right to Development*, web site of the Office of the High Commissioner for Human Rights, online: <http://www.unhchr.ch/development/right.html>.

[112] See e.g. the lengthy dissenting opinion of L'Heureux-Dubé in *Van der Peet*, *supra* note 8 at 572-625. For commentary, see Anthony Connolly, "Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law" (2006) 7 Asia Pac. J. Anthrop. 27; see also the dissent of Gaudron and Kirby JJ. in *Yorta Yorta*, *supra* note 18 at 98–125, discussed in P.G. McHugh, "Aboriginal Title in New Zealand: A Retrospect and Prospect" (2004) 2 *N. Z. J. Pub. & Int'l L.* 139 at 169–71.

economic resources and political power. Crucial to this balancing equation is the recognition that indigenous peoples on the whole were dealt a much harsher hand by the processes and policies associated with colonial state formation, a fact that has contributed heavily to their presence among the most socio-economically and politically marginalized sectors of society and to the vulnerable position they tend to occupy in their relations with non-indigenous communities and governments.

With these disparities in mind, the principle of equal consideration would first of all direct the courts to exercise a greater degree of vigilance in shielding indigenous rights from instances of interference and override whose purpose is to secure the countervailing interests of non-indigenous communities. Canadian courts to a certain extent have already acknowledged this principle by reading the Crown's fiduciary duty to Aboriginal peoples as a limit on its capacity to interfere with constitutionally protected Aboriginal rights, but in recent years the standard of protection has been lowered to the point where even fundamental constitutionally protected Aboriginal rights can be infringed by rights and interests of the non-Aboriginal majority that are not themselves constitutionally enshrined. Constitutional rights are by no means absolute, but when their purpose is to protect the vital interests of vulnerable minorities against the whims of powerful majorities, they demand a higher standard of immunity than Canada's highest court currently seems committed to upholding.[113]

In keeping with the principle of equal consideration, judiciaries in Australia, Canada, and New Zealand should also work to expand the legal space within which indigenous rights can legitimately adapt in response to the unwanted impacts, but also the new opportunity structures, brought about by European settlement and dominion. Some on the bench have already taken a step in this direction. In a recent decision on native title in the Perth region, for example, Wilcox J. of the Australian Federal Court considered the impact of colonialism in his application of the cultural continuity test, and ultimately concluded that changes to indigenous laws and customs may not be fatal to a native title claim if it can be established that those changes were *forced upon an indigenous society from the outside*, by a colonizing power, for

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[113] For the relationship between the fiduciary doctrine and the Crown's right of regulation and infringement, see *Sparrow*, *supra* note 4 at 1108–10. Much more detailed critiques of the Court's downgrading of the standard of protection for Aboriginal rights can be found in Kent McNeil "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8 Const. Forum 33; and Borrows, *supra* note 91 at 32–37.

example.[114] A similar step might see the courts prepared to recognize the indigenous rights of entirely modern indigenous collectives formed within, and in response to, the imperatives of urban environments. It might also see judiciaries more willing to expand the commercial scope of indigenous rights, such that these rights can be translated into genuine opportunities and improved socio-economic outcomes in a market economy – and real progress in the struggle to overcome indigenous disadvantage.[115]

Such initiatives have a clear resonance with the practical and the normative dimensions of a jurisprudence of reconciliation. In practical terms, they are geared towards the objective of providing indigenous communities with genuine opportunities to rebuild their societies and economies, while in normative terms they embody the principles of justice and fairness by seeking to repair the damage inflicted upon indigenous peoples, and upon the honour of the Crown, by historic policies of displacement, disempowerment, and assimilation. One must of course acknowledge that there are limits on the capacities of courts to address issues of historic injustice and political empowerment, and that judges have legitimate concerns about exceeding the bounds of their authority; yet at the same time there is no avoiding their role in the political side of the rights game. Decisions about the distribution of rights are inevitably decisions about the legitimate distribution of power, which in turn have real repercussions on the capacity of indigenous peoples to negotiate partnerships of mutual advantage with non-indigenous societies and governments.[116] The Supreme Court of Canada has been more open in its acknowledgement of this fact, but high courts in Australia and New Zealand have also identified a role for themselves in facilitating – if only indirectly – a negotiated political

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[114] According to Wilcox J., "No doubt changes in laws and customs can be an indication of lack of continuity in the society; they may show that the current normative system is 'rooted in some other, different, society.' Whether or not that conclusion should be drawn must depend upon all the circumstances of the case, including the importance of the relevant laws and customs and whether the changes seem to be the outcome of factors forced upon the community from outside its ranks;" see *Bennell*, *supra* note 62 at para. 776. It remains to be seen whether this decision will stand up to appeal in the full Federal Court.

[115] For the link between indigenous rights and improved socio-economic outcomes, see Stephen Cornell, "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States" in Robyn Eversole, John-Andrew McNeish, and Alberto D. Cimadamore, eds., *Indigenous Peoples and Poverty*: *An International Perspective* (London: Zed Books, 2005) at 199–225.

[116] See e.g. Macklem, *supra* note 92 at 21–28.

regime of reconciliation.[117] If the courts take their supporting role in fair and effective negotiation processes seriously, they need to take a hard look at how the doctrine of cultural continuity continues – unfairly and unnecessarily – to compromise the position of indigenous peoples in the matrix of power that conditions their relationships with the Crown.[118]

5. Conclusion

Reconciliation in the judicial forum will, by necessity, be a limited enterprise. Courts cannot be expected to assume the more comprehensive agenda of a formal truth and reconciliation commission, of the South African variety, tasked with healing the wounds of a deeply divided society transitioning from a violent and authoritarian past.[119] Nor should they be asked to provide detailed and substantive recommendations to guide a nation-wide process of reconciliation, as was the mandate of the Australian Council for Aboriginal Reconciliation.[120] For these more ambitious tasks courts have neither the institutional capacity nor the political mandate. They can, however, and to a certain extent already do, play a valuable supporting role in broader processes of social and political reconciliation, by articulating some of the legal-constitutional parameters within and through which those processes can be navigated. If the courts are to succeed even in this relatively minor role in reconciling the rights and interests of indigenous and non-indigenous peoples, the parties to their decisions must be convinced that a measure of justice has been served. Not perfect justice, of course, but at least a more even-handed justice that considers the needs and interests of all in relation to very different circumstances, capacities, and levels of empowerment, and which offers indigenous and non-indigenous communities an equal

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[117] See James Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: The Canadian Supreme Court as Meta-Political Actor" (2005) 35 Publius: J. Federalism 217; McHugh, *supra* note 7 at 521–25, 576; and Webber, *supra* note 105 at 70–77.

[118] Kelly and Murphy, *ibid*. at 26.

[119] On the South African Truth and Reconciliation Commission, see David Dyzenhaus, "Justifying the Truth and Reconciliation Commission" (2000) 8 J. Pol. Phil. 470; and Lyn S. Graybill, "South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives" (1998) 12 Ethics & Int'l Affairs 43.

[120] See *Reconciliation*: *Australia's Challenge*: *Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: Council for Aboriginal Reconciliation, 2000); and Michelle Grattan, ed., *Reconciliation*: *Essays on Australian Reconciliation* (Melbourne: Bookman Press, 2000).

opportunity to develop their communities, cultures, and economies.[121] High courts in Australia, Canada, and New Zealand have the capacity to advance this more modest reconciliation agenda, and they can do so by releasing indigenous peoples from their judicially constructed prisons of culture, leaving them free to choose their own pathways towards development and well-being.

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[121] See John Borrows, *Recovering Canada*. *The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 72. On even-handed justice, see Joseph H. Carens, *Culture, Citizenship and Community*: *A Contextual Exploration of Justice as Evenhandedness* (New York: Oxford University Press, 2000).