NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o nga Kaupapa Ture a Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 2 • NUMBER 2 • NOVEMBER 2004 • ISSN 1176-3930

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Dame Sian Elias
Paul McHugh
Mark Bennett
Gordon Hook
Lucy Hare
Malcolm Birdling

VICTORIA UNIVERSITY OF WELLINGTON
Te Whare Wānanga o te Ūpoko o te Ika a Māui

FACULTY OF LAW
Te Kauhanganui Tatai Ture

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW VOL 2 NO 2 NOVEMBER 2004

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2004

The mode of citation of this journal is: (2004) 2 NZJPIL (page)

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

INDIGENOUS AUTONOMY AND JUSTICE IN NORTH AMERICA

Mark Bennett*

Indigenous peoples worldwide are steadfast in their demands for the restoration of their traditional lands, self-determination, and autonomy. This paper examines the evolution of paradigms of indigenous autonomy in the United States and Canada. The author discusses the justifications for indigenous autonomy and the perceived tensions it has with some conceptions of liberalism, and considers the implications of this for New Zealand.

I INTRODUCTION

In contemporary political and social debate in New Zealand, much capital is made from arguing that a modern liberal democracy such as ours should be wary in treating one class of citizens differently from any other. The centre-right Opposition opposes "special" Maori rights, such as seabed and foreshore ownership, Treaty of Waitangi rights, educational quotas, and dedicated parliamentary seats. The centre-left Government has been spurred into action to audit these special rights. The notion that "one standard of citizenship" should prevail is popular, perhaps because of its simplicity and its conformity with some conceptions of the liberal ideal. But struggles for cultural recognition, self-determination, and nationhood cannot be seen as exceptional or viewed in isolation, for they are present in "almost every social relation of modern societies".[1]

To debate adequately the justice or injustice of differentiated rights and citizenship for Maori, we must examine the treatment of indigenous rights and citizenship in other similar liberal democratic settler societies. We must also consider the various theories of justice that examine "special" indigenous rights and indigenous autonomy. Ultimately we must apply these examples and theories to the contemporary New Zealand situation. This

* Assistant Lecturer, Faculty of Law, Victoria University of Wellington.

1 James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995) 15.

sort of comparative and philosophical approach is rare in the current public discourse around Maori rights, though there have been some excellent comparative publications.[2]

This paper analyses progressive changes in the normative paradigms of indigenous autonomy evident in the United States and Canada.[3] Many regard the United States as the epitome of liberal democracy, and New Zealand has already borrowed significantly from the Canadian conception of liberal democracy embodied in its Charter of Rights and Freedoms.[4] It is hoped that this paper may be a catalyst for a thorough analysis of the justice of Maori rights and aspirations, in comparison with the justice of indigenous autonomy found in these two North American examples and against a wider background of different liberal theories.

This paper seeks to identify normative paradigms of indigenous justice in constitutional law. Constitutional law is "an enterprise that actively distributes power, primarily in the form of rights and jurisdiction, among a variety of legal actors, including individuals, groups, institutions and governments".[5] Recognition of the justice of indigenous autonomy involves the distribution of powers of jurisdiction to indigenous groups and institutions within the wider state.[6] A "paradigm of justice" or "normative paradigm" is a set of assumptions, concepts, values and practices that constitute the way of

---

2 See Ken S Coates and P G McHugh (eds) *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998); William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991); Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford University Press, Oxford, 1999). For an earlier legal comparison see Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991).

3 "Paradigm" is used in its (controversial) more recent usage as "A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline": Joseph P Pickett and others *The American Heritage Dictionary of the English Language* (4 ed, Houghton Mifflin, Boston, 2000).

4 Compare the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B) with the New Zealand Bill of Rights Act 1990, and "A Bill of Rights for New Zealand: A White Paper" [1984–85] I AJHR A6. One must also note the significant examples of constitutional innovation in other multinational liberal democracies. See generally Alain-G Gagnon and James Tully (eds) *Multinational Democracies* (Cambridge University Press, Cambridge, 2001).

5 Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 21.

6 Note that in order fully to recognise the liberal concern for the equality of nations, this distribution must be based on a negotiation between equal partners, and therefore any distribution that the indigenous party might suggest needs to be on the table.

viewing justice in a given society.[7] The paradigms identified in this paper are made up of the historical, legal, and normative assumptions, values, and practices that allow or cause people to regard indigenous autonomy as just or unjust. The influence of these paradigms is such that one person can regard cultural destruction as just at one time, while another can regard different rights and duties for citizens of the same state as just at another time.

In Felix Cohen's often quoted metaphor, Native Americans are the canary in the mine of the United States' democratic faith.[8] In this paper, indigenous autonomy is an indicator of the rise and fall of competing strands of liberal philosophy and ideology, culminating in the present debates about indigenous nationhood, constitutionally differentiated group rights, and common citizenship. This paper seeks to analyse the development and content of the changing paradigms of the justice of indigenous autonomy, and to compare their development in two (geographically and ideologically) close neighbours. It also seeks to identify the underlying tensions that exist in the current paradigms, and argues that constitutional and political theory should not ignore social and historical imperatives, but should continue the development of the paradigms of indigenous autonomy with a clear view of social and political reality.[9] Importantly, the paradigms identified are not strictly chronologically distinct and separate, for the legal and judicial contents of a paradigm may arise in one era but lie dormant in another in the face of contrary government policy—and inevitably all eras and societies will have different ideas of justice.

This inquiry may be classified as external legal argument, rather than internal argument about legal doctrine.[10] It seeks to explain the normative understandings implicit in different paradigms of constitutional law, by examining the legislative, judicial, and

---

7 See above n 3.

8 Felix S Cohen "The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy" (1953) 62 Yale LJ 348, 390:

> It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

9 See Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 24–25 for a discussion of ahistorical and acontextual normative constitutional theory.

10 Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 26.

executive actions that have impacted on the constitutional position of First Nations and Native American tribes and individuals.[11]

The first substantive section of this paper introduces the concepts of "autonomy" and "indigenous autonomy". With this background established, the second section examines the "recognition of sovereignty" paradigm. Section three examines the "assimilation" paradigm. Section four introduces the current paradigms found in the United States and Canada: "self-determination" and "self-government". These sections do not aim to be exhaustive, but to outline a legal position comprehensively explored elsewhere.[12] Section five develops the analysis of self-determination and self-government by examining the link between their recognition of the justice of indigenous autonomy and two strands of political liberalism. Section six gives a brief discussion of the implications that the preceding analysis has for indigenous autonomy in New Zealand: How do self-determination, self-government, liberalism, multiculturalism, and the means of indigenous incorporation influence the requirements of a just constitutional order for Maori?

II INDIGENOUS AUTONOMY

A Autonomy

The concept of "autonomy" is widely used in modern constitutional politics. However, as Yash Ghai observes, "[t]here is no developed or reliable theory of autonomy; modern but contested justifications revolve around the notion of identity".[13] In practice, autonomy is a device that allows groups with distinct identities to exercise direct control over affairs

---

11 Here it is important to note a fundamental constitutional difference between Canada and the United States: that Native American tribes are not delegated their sovereignty or autonomy by the United States Constitution. This has been recognised by the United States Supreme Court, most recently in *United States v Lara* (2004) 124 S Ct 1628.

12 For the United States see generally Robert Clinton, Carol Goldberg, and Rebecca Tsosie *American Indian Law: Native Nations and the Federal System* (4 ed, Matthew Bender, 2003); David H Getches, Charles F Wilkinson, and Robert A Williams *Cases and Materials on Federal Indian Law* (3 ed, West, St Paul, 1993); Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, Michie/Bobbs-Merril, Charlottesville, 1982). For Canada see generally Jack Woodward *Native Law* (Carswell, Toronto, 1989); Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Toronto, 1997); Macklem *Indigenous Difference and the Constitution of Canada*, above n 5. Good introductory comparisons can be found in Bradford Morse "Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States" (1997) 10 STTLR 115; Ralph W Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash L Rev 643; P G McHugh "Aboriginal Identity and Relations in North America and Australasia" in Coates and McHugh, above n 2.

13 Yash Ghai "Ethnicity and Autonomy: A Framework for Analysis" in Yash Ghai (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, Cambridge, 2000) 4.

that specially affect them, while allowing the state to control affairs concerning the general interest.[14] It takes many different legal and political forms (including federalism, regional autonomy, regionalism, and decentralisation),[15] depending on such factors as history, traditions of governance, the size of territory, the size and number of communities, and internal and external pressures.[16]

Governments around the world have turned to autonomy as they have become aware of ethnic conflict and cultural difference within their societies. In this context, "autonomy seems to provide the path to maintaining unity of a kind while conceding claims for self-government".[17]

B Indigenous Autonomy

1 Theory

Indigenous autonomy is different from general ethnic autonomy. Ethnic autonomy argues for exceptions to equal citizenship; indigenous autonomy appeals to the equality of nations. This distinction is reflected in current North American constitutional paradigms, which recognise that indigenous autonomy is not merely about the distribution of resources and rights among citizens within the state, but is rooted in the question of how indigenous peoples, as polities, political groups, or "nations", were incorporated into the wider state. This distinction is also reflected in two paradigms of liberalism that arose in the 16th to 18th centuries. The first was concerned with the equality of individuals within the state,[18] the second with the equality of nations (or peoples) within international society.[19]

---

14 Ghai, above n 13, 8.

15 Ghai, above n 13, 8–9.

16 Ghai, above n 13, 4.

17 Ghai, above n 13, 1. See also John McGarry and Brendan O'Leary (eds) *The Politics of Ethnic Conflict Regulation* (Routledge, London and New York, 1993) ch 1 and generally.

18 Early liberalism of Immanuel Kant, Jeremy Bentham, and John Stuart Mill emphasised the importance of the equality of citizens, although some early liberals such as Mill, James Madison, and Alexis de Tocqueville were wary of full enfranchisement. See George H Sabine *A History of Political Theory* (3 ed, Harrap, London, 1963) 694–697, 705–712.

19 For a brief description of the development of this paradigm see Chris Brown *Sovereignty, Rights and Justice: International Political Theory Today* (Polity Press, Cambridge, 2002) 30–34, 44–46, 62–66. The distinction between the two paradigms is made by Patrick Macklem "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan L Rev 1311, 1350–1367. It must be noted that liberal theories of how a nation state is constituted have been relatively sparse: Allen Buchanan "The Making and Unmaking of Boundaries: What Liberalism Has to Say" in Allen

We should be careful in discussing indigenous autonomy not to assume that we are dealing with the justice of individuals within a state (that is, ethnic autonomy); that presupposes the supremacy of the normative order of the colonial state and subordinates the indigenous normative order. It is not contrary to liberalism to employ such international concepts as nationhood and self-determination in a discussion of indigenous justice, or, in justifying indigenous autonomy, to make the same justice claims that states and nations make at the international level.[20] This is not to say that supporters of indigenous autonomy commonly advocate secession from the state.[21] While the right to secede may flow logically from the equality of nations, supporters of indigenous autonomy usually concede it in order to secure the internal aspect of self-determination. But in considering the justice of a given constitutional framework we must conceive of indigenous peoples as nations entitled to the right of self-determination, rather than merely as individual citizens within the state. The latter view tends to follow from the fact that, so far, indigenous self-determination has been achieved within existing states, through what some see as racial preference contrary to the equality of citizens.[22] It must therefore be continually stressed that the pursuit of indigenous autonomy is not about

---

Buchanan and Margaret Moore (eds) *States, Nations and Borders: The Ethics of Making Boundaries* (Cambridge University Press, Cambridge, 2003) 231.

20 See Paul Keal *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, Cambridge, 2003) 126–129. Kymlicka notes that the same arguments for differentiated citizenship are used to justify the separation of the world into states: Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995) 124–126.

21 While some indigenous peoples claim secession from the state, in most cases indigenous peoples seek self-determination within the present state system. Roger Maaka and Augie Fleras state that "To be sure, indigenous claims to sovereignty rarely entail separation or secession but instead a reconstitutionalising of the first principles upon which indigenous peoples–state relations are governed": Roger Maaka and Augie Fleras "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison, Paul Patton, and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 89. Jacob T Levy observes in "Indigenous Self-Government" in Stephen Macedo and Allen Buchanan (eds) *Secession and Self-Determination* (New York University Press, New York, 2003) 120 that "it is almost inconceivable that any indigenous groups could successfully secede and establish their own states." See also Sharon H Venne "Self-Determination Issues in Canada: A First Person's Overview" in Donald Clark and Robert Williamson (eds) *Self-Determination: International Perspectives* (MacMillan, London, 1996) 292; Keal, above n 20, 152. Those who do seek complete secession will obviously reject such a statement. But the political inexpedience, and in most cases political and practical near impossibility, of complete secession make it appropriate to treat self-determination within the existing state as the most important and likely option.

22 Macklem "Distributing Sovereignty: Indian Nations and Equality of Peoples", above n 19, 1312–1313; this tension is discussed in *Morton v Mancari* (1974) 417 US 535.

favouring certain groups over others, but rather recognising the self-governing relationship between indigenous peoples and the wider state.

2 *Practice*

In North America, the practice of indigenous autonomy broadly matches the theory. North American indigenous peoples typically base their demands for autonomy on their inherent sovereignty and jurisdiction under the natural law of the Creator.[23] Tribes can often also point to treaties and agreements that uphold their rights to govern themselves and their lands.[24] The specific terms of these treaties, provided they were negotiated on an equal footing, are important in determining to what extent (if any) there was consent to state incorporation. Indigenous peoples commonly phrase their demands in terms of "sovereignty", employing language that emphasises the continuity of their claims from time immemorial.[25] This concern to be seen as sovereign is consistent with their conviction that they are "peoples" with a right of self-determination in the international legal sense.

In North America and elsewhere, the models of autonomy that indigenous peoples aspire to or operate in differ greatly,[26] influenced by the variables noted above in relation to autonomy generally. Practical problems arise where indigenous peoples who have been dispossessed of their traditional territories seek autonomy,[27] because respect for the equality of nations requires that all options (including secession) be open to them. However, most demands for indigenous autonomy do not extend to secession, instead presuming ongoing relationships between indigenous institutions and government

---

23 Frank Cassidy and Robert L Bish *Indian Government: Its Meaning in Practice* (Oolichan Books and the Institute for Research on Public Policy, Lantzville and Halifax, 1989) 32–33; Oren Lyons "Traditional Native Philosophies Relating to Aboriginal Rights" in Menno Boldt and J Anthony Long (eds) *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) 19–23.

24 See for example the Treaty of Fort Pitt with the Delaware Nation of 1778, the Treaty of Dancing Rabbit Creek of 1830 with the Choctaw Nation, and the Treaty of New Echota of 1835 with the Cherokee Nation, reproduced in Clinton, Goldberg, and Tsosie, above n 12, 83–118. The treaties are noted and discussed in Robert N Clinton "There is no Federal Supremacy Clause for Indian Tribes" (2002) 34 Ariz St LJ 113, 120–121. For a discussion of earlier treaties see Robert A Williams, Jr *Linking Arms Together: American Indian Treaty Visions of Law and Peace 1600–1800* (Oxford University Press, New York, 1997).

25 Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Coates and McHugh, above n 2, 75.

26 Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Int'l L & Pol 189, 224–225.

27 See McHugh "Aboriginal Identity and Relations in North America and Australasia", above n 12, 142–143, 172–174; Paul L A H Chartrand "Self-Determination without a Discrete Territorial Base?" in Clark and Williamson, above n 21, 302.

institutions, and between indigenous and non-indigenous peoples.[28] The relationships between indigenous governments and the state therefore require a "complex governance framework, often embodied in a formal agreement or in constitutional or legislative provisions".[29]

To summarise, indigenous autonomy is an aspirational goal, the pursuit of which varies greatly. Indigenous autonomy is similar to general ethnic autonomy, but the strands of liberal thought that justify them are different. Indigenous autonomy requires that governments allow and support indigenous institutions and self-government, negotiated on the basis of equality between indigenous and colonial nations. The result of such negotiations, as James Tully has argued, will be a relationship based on the conventions of common law constitutionalism: mutual recognition, consent, and continuity.[30]

III SOVEREIGN RECOGNITION

The sovereign recognition paradigm arose in the United States out of judicial understandings of the historical relationship between Native American tribes and the federal and state governments. Although in early relationships this paradigm was respected by the executive and legislature, it was the judiciary that cemented its place in federal Indian law. Sovereign recognition continues to play an important role today.

A Colonial Law and the Indeterminate Constitution

Early Indian law was founded on early European international law.[31] Sovereignty vested in the first Christian discoverer,[32] and native peoples retained minimal legal rights

---

28 Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", above n 26, 225.

29 Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", above n 26, 225.

30 Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity*, above n 1, 116–129. In many ways these conventions mirror the relational model of indigenous–state relations proposed by Paul McHugh: mutual recognition of "coexisting political communities", brought together in a relationship founded on consent and the understanding of the continuity of the political communities: McHugh "Aboriginal Identity and Relations in North America and Australasia", above n 12, 120–121.

31 Getches, Wilkinson, and Williams, above n 12, 41. For an excellent and broad discussion of colonial legal doctrine in the New World see Leslie C Green and Olive P Dickason *The Law of Nations and the New World* (University of Alberta Press, Edmonton, 1989).

32 Getches, Wilkinson, and Williams, above n 12, 43; Leslie C Green "Claims to Territory in Colonial America" in Green and Dickason, above n 31, 4.

to their lands and government.[33] The Royal Proclamation of 1763 affirmed Indian tribes as nations and guaranteed their possession of unsurrendered lands.[34] In the early colonial era tribes were significant military forces.[35] Government–tribe relations were conducted mostly by treaty-making, with the treaty terms implying recognition of tribes as independent governments.[36] Treaty-making was a federal matter, outside the power of state governments.[37] These foundational principles of Indian law and the historical sovereignty of Native American tribes would play a central part in the judicial recognition of tribal sovereignty.

Although delegates to the Constitutional Convention clearly had Indian issues in mind,[38] the text of the United States Constitution does not definitively situate tribes within the federal system, with only a few references to Indians.[39] While the "Indian Commerce Clause",[40] which enabled federal jurisdiction to regulate commerce with tribes and foreign nations,[41] resulted in the enactment of the "Trade and Intercourse" Acts,[42] this is a minor

---

33 Steven Paul McSloy "Back to the Future: Native American Sovereignty in the 21st Century" (1997) 20 NYU Rev L & Soc Change 217, 228.

34 Roger L Nichols *Indians in the United States and Canada: A Comparative History* (University of Nebraska Press, Lincoln, 1998) 129.

35 For late 18th century examples see Nichols, above n 34, 138–141; *Worcester v Georgia* (1832) 31 US (6 Pet) 515, 549; Johnson, above n 12, 655.

36 Getches, Wilkinson, and Williams, above n 12, 83.

37 Jill Norgren *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw Hill, New York, 1996) 30, citing the Articles of Confederation (1777), Art IX.

38 See Clinton "There is no Federal Supremacy Clause for Indian Tribes", above n 24, 129–130; John R Wunder *"Retained by the People": A History of American Indians and the Bill of Rights* (Oxford University Press, New York, 1994) 19.

39 See *United States v Kagama* (1886) 118 US 375, 378: "The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders".

40 US Constitution, art I 8 cl 3. For discussion of the history and effect of the Indian Commerce Clause see Robert N Clinton "The Dormant Indian Commerce Clause" (1995) 27 CTLR 1055; McSloy "Back to the Future: Native American Sovereignty in the 21st Century", above n 33, 256–265.

41 *United States v Kagama*, above n 39, 378–379 held that the reference did not extend federal power past commerce-related matters. The Supreme Court has recently used the Indian commerce clause as the primary constitutional provision supporting federal power over Indians: Strickland, above n 12, 209; *McClanahan v Arizona State Tax Commission* (1973) 411 US 164, 172. The "Treaty clause" (US Constitution, art II 2 cl 2; see Strickland, above n 12, 207, and *Morton v Mancari*, above n 22, 551–552) and the "Property Clause" (US Constitution, art IV 3 cl 2; Strickland, above n 12, 209) are sometimes seen as further sources of federal authority.

exception to the Constitution's fundamental vagueness as to the relationship of Native American tribes with the United States constitutional order. This indeterminacy has meant that the Supreme Court's recognition of Indian sovereignty at different times has varied greatly, and that the Court's decisions in respect of tribal sovereignty can be interpreted (taking a realist approach) as reflecting the dominant moral and political conceptions of justice in each era.[43]

B The Marshall Trilogy and Sovereign Immunity: Tribal Sovereignty as Justice

In the courts, recognition of the sovereignty paradigm begins with the "Marshall Trilogy": *Johnson v McIntosh*,[44] *Cherokee Nation v Georgia*,[45] and *Worcester v Georgia*.[46] In these cases Chief Justice John Marshall set out the constitutional status of Indians and Indian tribes,[47] and established two key propositions. First, he recognised tribes' legal claims to territorial possession.[48] Second, he characterised tribes as "domestic dependent nations" within the United States constitutional system;[49] not foreign nations, but nations with diminished sovereignty.[50] *Worcester v Georgia* laid down the enduring rule on Indian

---

42 Trade and Intercourse Act 25 USC § 263 (1834). See Strickland, above n 12, 212–213; Getches, Wilkinson, and Williams, above n 12, 99; Jean M Silveri "A Comparative Analysis of the History of United States and Canadian Federal Policies Regarding Native Self-Government" (1993) 16 Suffolk Transnat'l L Rev 618, 624.

43 The aspect of legal realism that is drawn upon is the idea that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious" have a definite part to play in the result of legal judgement: Oliver Wendell Holmes *The Common Law* (ed M D Howe, Little, Brown and Co, Boston, 1963) 5. Patrick Macklem, discussing the Canadian constitution, argues that judicial interpretations of the constitution have "a unique way of infiltrating and shaping inquiries into the justice of certain constitutional arrangements", and that the courts' decisions are central to citizens' perceptions of a just constitutional order: Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 20. He acknowledges that "[j]udicial rulings at best are contributions to an ongoing debate concerning constitutional justice".

44 *Johnson v McIntosh* (1823) 21 US (8 Wheat) 543.

45 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1.

46 *Worcester v Georgia*, above n 35.

47 For a good overview of the basic model of tribal sovereignty laid down by the Marshall trilogy see Strickland, above n 12, 232–235; Philip P Frickey "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members" (1999) 109 Yale LJ 1, 8–11.

48 *Johnson v McIntosh*, above n 44, 574.

49 *Cherokee Nation v State of Georgia*, above n 45, 17.

50 *Johnson v McIntosh*, above n 44, 574; *Cherokee Nation v State of Georgia*, above n 45, 17, which stated of Native American tribes that "[t]heir relation to the United States resembles that of a ward to his guardian." This case therefore provides the basis for the Federal Government's plenary power over tribes.

sovereignty. Indian nations had "always been considered as distinct, independent political communities".[51] While the tribe was not fully sovereign,[52] the state of Georgia could not apply its laws in Cherokee territory.[53]

The Marshall trilogy left an enduring legacy for federal Indian law, with the *Worcester* decision becoming one of the most often cited in American constitutional law.[54] Instead of patriotically denying any Native American sovereignty, "the Court attempted to forge a compromise that would permit the United States to view itself as a nation under the rule of law while continuing its quest to control the continent".[55] It is possible that political pressures influenced the decision, and that the desire for a strong federal government swayed Marshall CJ's thinking as much as respect for Indian sovereignty and autonomy did.[56] Nevertheless, the judgments display a considerable measure of respect for the historical sovereignty and territorial ownership of Native Americans, and disdain for theories that ignore or subvert this history.

C Qualifying Recognition: Federal and State Limitations on Tribal Sovereignty

1 Federal control

Despite the recognition of tribal sovereignty in the Marshall trilogy and the absence of a broad constitutional empowerment for the Federal Government, the Supreme Court quickly found that Congress had almost unlimited power to legislate for Indians and their tribes. *United States v Kagama*[57] and *Lone Wolf v Hitchcock*[58] established the plenary power doctrine, founded on the subordination of Indian tribes within the United States constitutional system.[59] The plenary legislative authority of Congress did not flow from express constitutional empowerment, but from the United States Government's exclusive

---

51 *Worcester v Georgia*, above n 35, 559.

52 *Worcester v Georgia*, above n 35, 557.

53 *Worcester v Georgia*, above n 35, 561.

54 Wunder, above n 38, 27.

55 Norgren, above n 37, 6.

56 See Stephen Paul McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future" (2002) 37 New Eng LR 733, 735.

57 *United States v Kagama*, above n 39.

58 *Lone Wolf v Hitchcock* (1903) 187 US 553.

59 *United States v Kagama*, above n 39, 379–380: "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States".

sovereignty within its territory,[60] sovereignty which it had exercised "from the beginning".[61] This was a unilateral extension of authority, asserting "colonial hegemony over Indian peoples in Indian country without their consent".[62]

2 *State control*

States historically had no jurisdiction or executive power over tribal reservations, because tribes were held to be semi-sovereign and under federal protection.[63] The bar to state jurisdiction was partially lifted in 1881 by *United States v McBratney*,[64] which held that an offence committed by a non-Indian against a non-Indian on a reservation fell under the jurisdiction of state courts and state criminal codes. However, the *Worcester* principle of non-interference has survived to the modern era. In *Williams v Lee*,[65] the Supreme Court held that the rule in *Worcester* remained, and that without the approval of Congress a state could not infringe a tribe's right to make its own laws and be ruled by them on reservation.[66] It will be seen later in this paper that this position has been modified in the self-determination era.

D Sovereign Recognition in Canada

First Nations were as significant a military threat in Canada as Native Americans were in the United States.[67] Similarly, treaty-making in Canada recognised the nationhood and independence of First Nations tribes.[68] However, the constitutional principles set out in the Constitution Act 1867 made no constitutional acknowledgment of prior aboriginal

---

60 *United States v Kagama*, above n 39, 380: the power of Congress arises "from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else".

61 *Lone Wolf v Hitchcock*, above n 58, 565.

62 Clinton "There is no Federal Supremacy Clause for Indian Tribes", above n 24, 117.

63 *Worcester v Georgia*, above n 35. See Strickland, above n 12, 259–261.

64 *United States v McBratney* (1881) 104 US 621.

65 *Williams v Lee* (1959) 358 US 217.

66 *Williams v Lee*, above n 65, 220. This has been affirmed in *McClanahan v Arizona State Tax Commission* (1973) 411 US 164, 171–172 and *New Mexico v Mescalero Apache Tribe* (1983) 462 US 324, 332.

67 Nichols, above n 34, 141–143.

68 James Tully "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal, 2000) 41.

sovereignty.[69] There was no doubt about the indivisible sovereignty of the Crown,[70] given the British conception of absolute sovereignty and the law of nations.[71]

This legal history means that nowhere in the Canadian constitutional jurisprudence dealing with the distribution of sovereignty is there any "sustained examination of the assertion of Canadian sovereignty over Aboriginal people in Canada".[72] Jurisdictional disputes in matters pertaining to aboriginal peoples concern the relative competences of the federal and provincial legislatures, rather than whether the State has the authority to regulate aboriginal peoples or aboriginal peoples have the authority to regulate themselves.[73]

E Recognition of Sovereignty as a Normative Paradigm

The paradigm of judicial recognition of inherent (but dependent) sovereignty, as set out in the Marshall trilogy, is a unique categorisation of indigenous status. It puts indigenous peoples in their proper historical situation as prior "sovereigns" of their homelands (if not as militarily powerful, technologically developed, or politically organised as the colonising powers),[74] and therefore comes close to recognising the equality of nations. The view that federalism drives these and other United States Supreme Court Indian law decisions does not diminish the significance of the sovereignty paradigm.[75]

And yet, the Supreme Court's early respect for indigenous autonomy stood in contrast to the positions of the State of Georgia, which proceeded with the removal of the Cherokee, and President Jackson, who supported removal.[76] Federal and state attitudes towards Indian autonomy in this period were based on a double-pronged "removal"

---

69 Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 107–108.

70 *R v Sparrow* [1990] 1 SCR 1075, 1103.

71 Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 113–114.

72 Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 115.

73 Macklem *Indigenous Difference and the Constitution of Canada*, above n 5, 117.

74 See *Worcester v Georgia*, above n 35, 549.

75 Stephen McSloy argues that federalism drives Indian law decisions: "Justices Rehnquist, Brennan, and Scalia all have (or had) their miner's headlamps on, dragging the canary hither and yon in search of doctrine, testing the boundaries of the federal/state relationship and the interrelationships among the three branches, including their own. The usual result, however, is that the bird dies": McSloy "The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future", above n 56, 738.

76 Norgren, above n 37, 122–130.

policy, founded on a racist assumption that Native Americans should make way for European settlers so that the vast lands they traditionally held could be put to good use. On the one hand, the policy recognised Indian autonomy. Tribal law and sovereignty was protected by removing tribes from white society, with some of the treaties expressly recognising tribal sovereignty;[77] furthermore, the Removal Act of 1830 required the tribes' consent, despite President Jackson's desire to remove them unilaterally.[78] But on the other hand, the removal policy made a mockery of Native American sovereignty by alienating Native American lands and forcing the indigenous inhabitants to move across the Mississippi River against their will (or with questionable "consent", based on an ultimatum of state control).[79]

Despite the alienation of tribal lands under the removal policy, the sovereign recognition paradigm has managed to survive turbulent policy shifts to remain a powerful source of indigenous autonomy in the United States today—a point to be analysed further below.

IV ASSIMILATION

The most enduring paradigm in the United States and Canada over the last 150 years is assimilation. Will Kymlicka views it as the foremost paradigm of ethnic justice in the 19th century: the view that assimilation benefited both the minority and the majority cultures and nations was "shared by virtually all theorists … on both the right and left".[80] In Canada and the United States, the assimilation of indigenous peoples into mainstream society was seen as good for all: indigenous peoples would benefit from civilisation, while mainstream society would be freed from a difficult and threatening outside "problem". Assimilative policies have had many detrimental effects on indigenous peoples in the two countries, resulting in the loss of traditional lands, languages, and culture. This section examines the legislative, judicial, and executive actions that were conducted in the name of assimilation.

---

77 Clinton "There is no Federal Supremacy Clause for Indian Tribes", above n 24, 120–122.

78 Clinton "There is no Federal Supremacy Clause for Indian Tribes", above n 24, 136; Ch 148, 4 Stat 411 (28 May 1830); 25 USC § 174.

79 See Getches, Wilkinson, and Williams, above n 12, 120–155, and especially 152–155. For an example of the ultimatum of state control see the preamble to the Treaty of Dancing Rabbit Creek with the Choctaw Nation, 1830: "Whereas … the State of Mississippi has extended the laws of the said State to persons' property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws": Clinton, Goldberg, and Tsosie, above n 12, 86. (The preamble was not ratified because of this hint of duress.)

80 Will Kymlicka "Introduction" in Will Kymlicka (ed) *The Rights of Minority Cultures* (Oxford University Press, Oxford 1995) 5–6.