# Book Review

*Indigenous Difference and the Constitution of Canada* by Patrick Macklem (University of Toronto Press Inc 2001) 288 pp, bibliography.

In Australia, New Zealand, Canada and in many other countries, indigenous people are now seeking to redefine and renegotiate their relationship with the nation state. Claims for land rights, legal pluralism, cultural autonomy and self-determination are being advanced on the basis of indigenous difference. These claims challenge the principle of equal citizenship, and are often characterised by their opponents as demands for special treatment on the basis of race. This objection carries particular weight in Australia which, unlike Canada and the USA, has no history of recognition of indigenous nations within the nation state.

Canada's ongoing process of treaty-making between First Nations and the Crown has given rise to a different relationship between indigenous people and the state. Some 500 treaties have been made since the beginning of colonization, covering most of the country. In the early colonial times, treaties were made to shore up claims to territorial sovereignty against competition from other European powers, to cement military alliances and to facilitate trade in furs and other natural resources. As the frontier of European settlement extended, from the 1850s, the state entered treaties with the object of relocating and assimilating indigenous people in order to free new lands for settlers. Today, the treaty process continues as a means of resolving claims to aboriginal title (native title) and rights to self-government.

Canada has been willing, through the treaty process, to reach accords with First Nations people that have constitutional significance. The best known example of the recent treaties is the 1998 Nisg'a Final Agreement, negotiated over more than twenty years between the Nisg'a First Nation people of northern British Columbia, the provincial and federal governments. The agreement is much more than a settlement of a land claim. It effectively establishes the Nisga'a aboriginal government as a third level of government. The Agreement provides that in some circumstances, a Nisg'a law prevails over an inconsistent federal or provincial law to the extent of the inconsistency.

Treaty and 'aboriginal rights' of indigenous people have been given constitutional protection by Canada's 1982 Constitution. Section 35(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c11 provides that 'the existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed'. The rights can now be infringed by legislation only if the law in question meets strict requirements of justification.[1] It is not only treaty rights but 'aboriginal rights' that are also affirmed and recognised by s 35(1) of the Constitution. Canadian courts have started to explore the nature and scope of these rights. In *R v Van der Peet*[2] the Supreme Court of Canada held that

1 *R v Sparrow* [1990] 1 SCR 1075; 70 DLR (4th) 385 (requirements for justification of infringement of aboriginal right to fish) ; *R v Badger* [1996] 1 SCR 771; 133 DLR (4th) 324 (applying similar justificatory requirements for infringement of treaty rights).

2 [1996] 2 SCR 507; 137 DLR (4th) 289.

aboriginal rights are those that relate to practices, customs or traditions integral to the distinctive culture of indigenous peoples. In Australia, indigenous practices, customs or traditions are protected as incidents of native title.[3] In Canada, they merit constitutional recognition whether or not they figure as an aspect of a territorial right. This was first established in *R v Adams*, [4] when the Supreme Court held that an Aboriginal right to fish could exist notwithstanding the inability of the claimants to demonstrate aboriginal title to the land in which the activity took place.

The Canadian courts are yet to determine whether, and to what extent, a right of self-determination can exist as an aboriginal right for purposes of s 35(1).[5] In *Delgamuukw v British Columbia*[6] the Supreme Court widened the scope of aboriginal rights when it held that s 35(1) recognised and affirmed aboriginal title, and not merely the cultural practices associated with it. It also accepted that aboriginal title confers a right to engage in a variety of activities, not all of which must be integral to the distinctive culture of the indigenous owners. Indigenous groups had hoped that the court would go further and rule that the appellants' right of aboriginal title encompassed a right of self-government. But the court found that errors of the trial judge prevented it from determining the claim. This was not the first time that the court had dodged the issue.[7]

The Supreme Court's reluctance to rule on the question of self-determination for indigenous people is understandable. For self-determination to be meaningful, First Nations must be conceded an area of autonomy and immunity from the operation of provincial and federal laws. This would require the re-negotiation and redistribution of constitutional power within the Canadian federal system. The process is not one that can be accomplished by the courts.

The recognition of indigenous self-determination raises difficult issues for Canada, which is seeking to accommodate aboriginal rights while containing the secessionist movement in Quebec. Why should First Nations people, who already enjoy full rights of Canadian citizenship, be accorded a measure of sovereignty not extended to other groups? How is such a concession to be squared with the constitutional principle of the equality of all citizens? Does their claim to a special relationship with the Canadian state rest merely on differences of race and culture? If so, why should rights of self-government not extend equally to other racial and cultural minorities?

3 *Native Title Act 1993* (Cth) s223(2) includes hunting, gathering and fishing rights and interests in the definition of 'native title rights and interests' in s223(1).

4 [1996] 3 SCR 101; 138 DLR (4th) 657.

5 *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1114; 153 DLR (4th) 193, 266.

6 [1997] 3 SCR 1010; 153 DLR (4th) 193.

7 In *R v Pamajewon* [1996] 2 SCR 821; 138 DLR (4th) 204, a First Nation argued that a provincial law that purported to regulate gaming activities on an Indian reserve contravened the community's aboriginal right of self-government. The Supreme Court characterized the claim involved as a right to regulate and conduct high stakes gambling on the reserve, and found that the claim did not relate to a custom, practice or tradition integral to the group's distinctive culture at the time of contact with Europeans.

Patrick Macklem, a Professor of Law at the University of Toronto, sets out to provide some answers to these and related questions. Macklem is a Canadian constitutional law expert of note, with a long-standing interest in aboriginal rights. In his monograph *Indigenous Difference and the Constitution*, he seeks to establish that the constitutional recognition of indigenous difference is not inconsistent with equal citizenship, and that it will promote a just distribution of constitutional power.

Macklem starts with the premise that the Aboriginal peoples of Canada and the Canadian state already stand in a unique constitutional relationship which should be recognised in the distribution of constitutional power. This special relationship is defined by the treaty-making process, the constitutional protection of aboriginal and treaty rights,[8] and by judicial decisions which recognise the existence of a 'trust-like relationship' and special responsibilities of Canada towards First Nations people.[9]

Central to Macklem's thesis is his concept of 'indigenous difference', a collection of factors which, in his view, justifies special constitutional treatment of First Nations peoples. His concept of indigenous difference is based on four sets of historic facts, which give rise to four corresponding sets of indigenous rights, each of which warrants constitutional protection.

(1) Indigenous peoples belong to distinctive aboriginal cultures which were, and still are, threatened by pressures to assimilate. This gives rise to a right of indigenous people to engage in practices, customs and traditions integral to their collective cultural identity. The right merits constitutional protection to enable the survival of the threatened indigenous cultures.

(2) Indigenous peoples occupied much of the land of North America prior to European contact. Their prior occupation of ancestral lands, coupled with their spiritual attachment to the land, entitles indigenous people to protection from unwarranted state interference with their territorial rights.

(3) They also exercised prior sovereignty over land and territory in the pre-contact period. From this fact derives the right of indigenous communities to make laws and to govern themselves.

(4) They participated in the treaty-making process with the Canadian state. This gives rise to a corresponding state obligation to honour the promises made by the Canadian state.

In this matrix, cultural, territorial, sovereignty and treaty rights respectively arise from discrete sets of facts, and warrant constitutional protection for discrete reasons. The author's purpose is to combat an assumption, which he finds in the Supreme Court's interpretation of s35(1) in *Van der Peet*, that it is only cultural

[8] Note that s 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being *Schedule B of the Canada Act 1982* (UK), 1982, c11, quarantines the rights from the constraints of the charter. It provides that '[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.

[9] Such as *R v Sparrow* [1990] 1 SCR 1075, 1108; 70 DLR (4th) 385 (legal relationship between Canada and indigenous people is 'trust-like, rather than adversarial').

differences that qualify for constitutional protection. He wishes to substitute a much broader conception of indigenous difference that will support constitutional recognition of territorial and sovereignty rights as well as cultural rights.[10]

Macklem argues that cultural difference and cultural survival provide an unstable basis for asserting the existence of constitutional rights. The *Van der Peet* approach requires courts to determine what practices, customs and traditions were integral to distinctive aboriginal cultures at the time of first contact with Europeans. This leads to a core-periphery distinction which requires courts, and not aboriginal peoples, to determine which practices, customs and traditions are integral to their culture. Because the test incorporates a pre-contact referent, it is inherently difficult to apply to evolving indigenous cultures. Judicial attempts to define pre-contact practices, traditions and customs can lead to stereotyping and 'snap-freezing' of indigenous cultures. A further difficulty with relying on cultural difference and cultural survival as justifications for constitutional rights is that other non-indigenous groups will mount a similar argument. For these reasons, Macklem prefers to rely on first occupancy as the basis for constitutional recognition of aboriginal territorial rights, while acknowledging that land is constitutive of aboriginal identity and culture.

After explaining the constitutional significance of indigenous difference, Macklem seeks to show that constitutional recognition of aboriginal sovereignty does not violate the principle of equal citizenship. Both substantive and formal equality justify differential treatment in the distribution of a benefit. Formal equality requires that all contenders for a benefit be treated alike, unless there is a valid reason relating to the benefit in question. Substantive equality requires that the benefit should be distributed with a view to ameliorating inequalities and disadvantages.

Macklem argues that provision of a form of aboriginal self-government is justified by both formal and substantive equality. The claim from formal equality is that First Nations possessed sovereignty over their lands and peoples at the time of first contact. They were denied the recognition of sovereign status that the Crown accorded to European nations. To fully recognise their sovereignty now would place them in the position that they would have been in had they been treated as the equals of other nations.

The argument from substantive equality is more complex. The author proposes that constitutional law should not be seen in positivist terms as a fixed set of rules, but as an enterprise for the distribution of power in society. Its aim should therefore be to distribute power in a way that promotes a just constitutional order, in order to achieve substantive equality. The question is how to determine the factors that are relevant to the justice of particular distributions. This cannot be reduced to general rules, but requires an approach that is highly attuned to history and context. Macklem argues that the matrix of factors that he calls 'indigenous difference' is relevant to the justice of the way constitutional power is distributed.

[10] Note that treaty rights are specifically mentioned in s35(1).

Sovereignty is often understood in 'all or nothing' terms. Macklem proposes a less absolute and more pluralist conception of sovereignty, which can accommodate the multiple allegiances of Canadians and allow aboriginal societies the space to flourish. In Chapter 6 of his book, the author discusses how indigenous sovereignty might work within the Canadian state.

Consistently with his view that the method for determining a just constitutional order should be 'empirical, historical, contextual and critical', Macklem disavows any attempt to articulate a theory of the constitutional significance of indigenous difference applicable to all states which have indigenous people. The indigenous people of Australia share with Canada's First Nations some aspects of the cluster that he terms 'indigenous difference', but their historic experience is significantly different. Their argument for redistribution of constitutional power will need to be made out separately. There is much in Macklem's book that will assist them to make out the argument that their aspiration to sovereignty is consistent with the principle of equal citizenship.

The book represents a major contribution to scholarship in the fields of legal pluralism, constitutional law and indigenous rights. It includes an extensive bibliography providing links to interdisciplinary and materials and reports. Fortunately for the reader, it is also written in an accessible style that includes liberal use of summaries and links. Australian readers may find that the book challenges their command of recent Canadian history (who can recall what the Charlottetown Accord was?) It is for this reason that this review has commenced with a summary of the events that provide the context for the book.

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