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Special Issue: Indigenous Governance

Articles

Socrates, Odysseus, and Federalism
Jean Leclair

This essay briefly develops an epistemological, anthropological, normative, and legal/constitutional theory of federalism through which we could envisage anew the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that of Quebeckers and Anglo-Canadians. According to this understanding, federalism is not only characterized by a recognition of the inescapable pluralism of Canadian society, but also of the close interaction between the constituent parts of that plural society — an interaction constantly torn between centrifugal and centripetal forces. Because of the bi- or multifocal perspective commanded by this understanding of federalism, none of these interlaced components may be ignored. Concepts such as sovereignty, nationalism, and rights revolve around a single centre. Federalism requires the recognition that the Self is not of one essence and that a community cannot be envisaged in ignorance of other legitimate collectivities surrounding it. In the perspective defended here, federalism is not a monoconceptual but rather a hyphenated notion forcing one to reconcile dyads such as self–other, us–them, autonomy–solidarity, power–justice, etc. Federalism also acknowledges an uncertainty in our world and in ourselves that other concepts tend to obscure. As such, federalism, at an epistemological
level, requires that we be suspicious of monocular outlooks.

Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonised Space
Lisa Strelein and Tran Tran

The business of decolonisation involves engaging with former colonial laws, policies and practices in order to create a ‘space’ for Indigenous peoples to express their unique identities, cultures and ways of knowing. In postcolonial contexts, transitional justice measures have been used as a mechanism to enable the decolonisation of legal spaces. However, decolonisation does not always guarantee a post colonial state. As a transitional justice mechanism, native title in Australia has evolved via the common law to recognise the relationships that Indigenous peoples have with their land and waters. However, native title has been accused of limiting the ability of native title holders to engage effectively in governance structures. Drawing on parallels in the Canadian context, we consider the limitations of native title law as a tool for decolonisation and the constraints imposed by Australia’s federal constitutional structure. The paper then outlines the legal regime established under native title discussing how it operates outside the realm of ‘government’. We then consider the way in which native title holders engage with Indigenous and non-indigenous governance within this ‘private sector’ before discussing whether native title has

been able to provide a decolonised space within Australia's governance system.

Eagle Soaring on the Emergent Winds of Indigenous Legal Authority
Larry Chartrand

This paper discusses the nature of Indigenous peoples' social order systems and highlights some fundamental "legal" principles that perhaps exemplify many Indigenous nation's legal traditions to a greater or lesser degree depending on the particular nation. They are:

> The Principle of Progress as Renewal, The Principle of Balance, The Principle of Life-Wide Legal Agency Equality, and The Principle of Decentralized Normativity and Decision-making.

In discussing these principles, the author through his own personal experiences and connection to traditional teachings, reveals the interconnectedness of indigenous legal thought and spirituality and how there is really no essential distinction between the two concepts. The point is also made that the legal cultures of Indigenous and Western societies may be different in nature, process and structure than European-based social order systems, but they were and are no less effective. In addition, the paper discusses issues concerning the right to assert control over justice and legal order within Indigenous communities. It identifies concerns with a domestic Aboriginal rights approach and prefers to ground the claim in the paradigm of international human rights instruments which are significantly less colonial and discriminatory than Canada's Aboriginal rights jurisprudence. The paper ends with some thoughts on strategies for renewal of Indigenous legal thought, principles and processes so that the Eagle can fly freely once more.

Indigenous Cultural Rights and Identity Politics in Canada
Avigail Eisenberg

This paper explores how the recognition and protection of Indigenous cultural practices became one of the central ways in which courts use the Constitution Act, 1982 to recognize and protect Indigenous rights. It considers the Court's 1996 'distinctive culture test' as a response to issues about cultural identity and citizenship raised in the Canadian politics and scholarship in the 1970s and 1980s. Whereas serious challenges and risks can develop when judges attempt to assess the cultures of Indigenous people, these challenges are a conventional part of co-existence in diverse societies to which there are effective responses. These challenges ought to be viewed as ones that public institutions are obligated to address in order to develop just and fair relations between Indigenous peoples and the Canadian state. That they have not done so effectively is uncontested, but that they don't have the capacity to do so, I argue, is mistaken and can be misleading in seeking a solution to problems found in the jurisprudence. The key problem with the distinctive culture test is the specific message it conveys that Indigenous culture can be protected by courts without the state recognizing the right to self-determination, rather than the fact that it sanctions the legal interpretation of Indigenous cultural practices.

What Does Indigenous Participatory Democracy Look Like? Kahnawakà:ke's Community

Decision Making Process
Kahente Horn-Miller

With the 1979 Community Mandate to move towards Traditional Government, the community of Kahnawà:ke has consistently requested more involvement in decision-making on issues that affect the community as a whole. The Kahnawà:ke Community Decision Making Process is a response to the community's call for a more culturally relevant and inclusive process for making community decisions and enacting community laws. The Process is a transitionary measure to assist and facilitate the legislative function of Kahnawà:ke governance. This paper examines the development of the process and how it functions in the modern setting of Kahnawà:ke with the goal of illustrating Indigenous participatory democracy in action.

Book Review

Book Review of Felix Hoehn
Reconciling Sovereignties. Aboriginal Nations and Canada
Janna Promislow