The rights of indigenous peoples: the constitutional issues.

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Summary: 1. The definition of indigenous people and the socio-economic characteristics of Canadian autochthonous communities. 2. Aboriginal people as *constituent people.* 3. The different categories of indigenous rights. 3.1. Inherent rights acquired through tradition. 3.2. Identification of *existing rights*. 3.3. A different solution for a similar problem. 4. Treaty rights. 5. The versatile legal nature of treaties: a political agreement, an international treaty or a democratic procedure. 6. Interpretative criteria for aboriginal rights. 7. Issues regarding the acknowledgment of community rights.

1. The definition of indigenous people and the socio-economic characteristics of Canadian autochthonous communities.

The definition of indigenous people is essentially linked to a community of people sharing the same language, race, religion, culture and customs, occupying a specific territory long before a foreign State began to rule the land and its inhabitants. This term mainly refers to those communities that underwent colonization and were subjected to the legal and social orders of foreign States.

First of all, this process has an immediate effect on the territory itself, and only subsequently on its inhabitants who, albeit being natives exercising their authority according to their own socio-political rule and order, are thought to be lacking a legitimate title. In fact, the territories occupied by indigenous peoples are regarded as *terra nullius*.

As a consequence, the territories are exchanged on account of contractual transactions, and are therefore transferred, exchanged, rented, assigned: this took place by means of international treaties, whose signatories were primarily European nations. However, the colonized countries may take part in this process using specific legal instruments, such as territorial leases, unequal or protectorate treaties, which are

all defined by an obvious common feature: the involvement of a weaker contracting party[1].

From this perspective, the definition of 'indigenous community' is synonymous with 'autochthonous community', given they both draw attention to the early, historic presence within a specific territory of a particular group, which was then forced to surrender its exclusive control on the land in favor of another, subsequently enforced legal system.

In this regard, history provides many significant examples. The American continent, for instance, is the native land of Canadian aboriginal communities, as well as of Indians living within the United States; but consider also the populations settled on the Atlantic Coast in Nicaragua[2], which set themselves apart thanks to their ability to resist full assimilation by the Spanish conquerors, first, and by the Nicaraguan authorities, later on. The indigenous community speaks an English-Creole idiom (as a result of its interaction with the British Crown); it is Protestant, and its economy is essentially based on transactions with the British Caribbean countries.

Within the African continent, another example of white domination of autochthonous communities is offered by South African history. In 1910, the South African Union was created, when the United Kingdom united its colonies in the Cape of Good Hope and in Natal, with the formally independent Boer states of Transvaal and of Orange, which had been occupied in 1902. After WWII, the National Party, made up by the white minority, imposed a strict rule of *apartheid* upon the black population[3].

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[1] G. Iannettone, *Interrelazioni afro-asiatiche*,Torino, Giappichelli, 1988, 43 ss.; .; A. I. Asiwajo (dir.), *Partitioned Africans. Ethnic Relations Across Africa's International Boundaries, 1884-1984*, Lagos, University of Lagos Press, 1985; J. Berque, J. P. Charnay, *De l'impérialisme à la décolonisation,* Paris, Minuit, 1965.

[2] Within this area, the *Mestizos* are 182,000; the *Miskitos* are 75,000; the Creole are 26,000; the *Sumus* are 9,000; the *Garafunas* are 1,700 and the *Ramas* are 800. These figures are quoted from M.Léger, *Regional Autonomy on Nicaragua's Atlantic Coast*, in M. Léger (ed.), *Aboriginal Peoples. Self-Government*, Montréal, New York, London, Black Rose Books Ltd., 48.

[3] It is not within the subject matter of this essay to elaborate on the reasons behind the *apartheid* policy within South Africa. On this matter, among many works, please refer to S. Dubow, *Racial Segregation and the Origins of Apartheid in South Africa, 1919-1936*, Oxford, Oxford University Press, 1989; S. Davidson, R. Isaacman, R. Pelissier, *Politics and Nationalism in Central and Southern Africa*, 1919-1935, in A. A. Boahen (ed.), *General History of Africa*, vol VII, Berkley, University of California Press, 1985, 675-695.; Nolutshungu, *South Africa and the Transfers of Power in Africa*, in Gifford, Louis (ed.), *Decolonization and African Independence*, New York, 1988, 477-503. South Africa truly constituted a melting pot of races: there are white people, descending from either the British or from the Boers; black people, also divided in smaller tribes (boscimans, Hottentots); Indonesians and Indians brought over by the British as workforce; a significant number of half-breeds, the product of the

Finally, there are two other examples within the Australian continent: the Aborigines in Australia, and the Maori in New Zealand. The British regarded Australian land as *terra nullius*, as they considered its inhabitants to be such primitives[4] and their society to be void of any true legal organization, that it seemed truly unthinkable to award them any right[5]. Along these lines, in *Attorney General (NSW) v. Brown* of 1847[6], the New South Wales Supreme Court held that the Crown had acquired full legal title on all of the colony's territories, given these had been essentially uninhabited at the time of occupation. Later on, the same opinion was upheld in *Cooper v. Stuart* in 1889, in which Lord Watson ruled that the colony "consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law". This line of reasoning was maintained at least until 1788[7].

In Canada, the aboriginal communities consist of Inuit, Indians and Metis, as is expressly provided by Section 35.2 of the Charter of Rights and Liberties. However, in spite of said formal recognition, there are still significant difficulties in defining the specific and precise content of the recognized Aboriginal rights, as well as in identifying the individuals to whom such rights are actually awarded.

Starting with *Baker Lake*[8] and continuing with *Delgamuukw*[9], the Canadian courts have attempted to provide some indication of the identity of *inherent rights* holders. In particular, it is necessary to determine: a) that aboriginal communities and their ancestors are members of an organized social order; b) that this social order occupies a specific territory, on account of an *Aboriginal title*; c) that said territory is occupied exclusively by that specific group and not by any other organized social structure; d) that the territory's occupation by the natives was already a consolidated fact when the British affirmed their sovereignty[10].

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[4] This belief was widely shared in Great Britain. After having traveled to Australia twice, in 1688 and in 1689, William Dampier wrote that the Australian natives were inferior to any other aboriginal community he had ever encountered. He based his opinion on the observation that they did not possess any clothing, dwellings or weapons: A. Mason, *The Rights of Indigenous Peoples in Land Once Part of the Old Dominions of the Crown*, in *Int'l Comp. L. Quart*., 46, 4, 1997, 814.

[5] As stated by the Privy Council in *Cooper v. Stuart* (1889 14 App. Cas. 286), in a suit concerning New South Wales.

[6] *Attorney General (NSW) v. Brown* (1847) 1 312.

[7] On this matter, however, the Privy Council eventually reversed its opinion (see below).

[8] *Baker Lake v. Min. of Indian Affairs* (1979), 107 D.L.R. (3d) 513 (F.C.A.) The *Inuit* of *Baker Lake* petitioned the court for an injunction, requesting the interruption of several exploration missions for mining purposes which, in the tribe's opinion, would be detrimental to their aboriginal right to occupy the territory, especially in relation to their hunting and fishing activities.

[9] *Delgamuukw* (1997), 153 D.L.R. (4th) 193 (S.C.C.).

[10] G. CHRISTIE, *Aboriginal Rights,* above, 470 ss.; C. BELL, M. ASCH, *Challenging Assumptions*,

Given this historical and political background, the historical aspect of the matter becomes particularly important, that is, determining whether a community already existed well before a new social order was established. This element is valuable in clearly distinguishing native rights from minority rights, in spite of the fact both clusters of rights partially overlap.

Despite the difficulties encountered in defining the concept of minority group, some inspiration can be found in the description formulated by Capotorti, according to which a minority is "is a numerically inferior group compared to the rest of the State's population, which is instead in a dominating position, and its members, even though they possess the State's nationality, own their specific ethnic, religious or linguistic characteristics that are different from those owned by the rest of the population; also, even if only indirectly, they display a sense of group solidarity, aimed at preserving their shared culture, traditions, religion or language"[11]. Unquestionably, there are practical challenges associated with an abstract definition of the concept of minority[12], of which Capotorti himself was aware of, as was proven by a report he completed in the role of general spokesman for the UN Sub-commission on prevention of discrimination and protection of minorities.

Yet, this definition emphasizes that the common link existing between the two communities consists in the same nationality, shared by the individuals belonging to the majority as well as to the minority group. Instead, the element of distinction between an autochthonous community and a minority is provided by the historical element, as indigenous groups have experienced a process of so-called "superimposition" by another group, which established its status as the dominating community. On the contrary, individuals belonging to minorities do not require this historical element: in fact, their distinctive feature consists of their present condition of weakness within a State, when not the lack of safeguards preserving their uniqueness. On account of this distinction, it is possible to extend the minority category to include those communities that, owing to specific historical-political events, have been taken over by a State with which they do not share language,

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[11] F. Capotorti, S*tudy on Persons Belonging to Ethnic, Religious and Linguistic Minorities,* New York, 1979, § 568.

[12] On this matter, plese refer to: A. Pizzorusso, *Minoranze e maggioranze*, Torino, Einaudi, 1993; V. Piergigli, *Lingue minoritarie e identità culturali*, Milano, Giuffrè, 2001,54 ss.; S. Pierre Caps, J. Poumarède, *Droit des minorités et des peuple autochtones*, Paris, Presses Universitaire de France, 1996; R. Toniatti, *Minoranze, diritti delle*, in *Enciclopedia delle scienze sociali*, vol. V, Torino,

religion and culture. An example of this is offered by the community from Alto Adige, living in the Province of Bolzano in Italy: after the peace treaty of Saint-Germain of 1919, it was in fact handed over by Austria to Italy. Likewise, consider the Italian community of Istria: its territory was Italian since 1919, then it was incorporated by Yugoslavia in application of the 1954 Agreement *Memorandum* concerning the territory of Trieste, and afterwards, by Slovenia, following its secession from the Yugoslav republic[13]. Similarly, another possible example is provided by the afro-American community within the United States, as well as by those recently formed communities following massive immigration trends.

Indigenous people generally live in conditions of extreme social weakness and submission, primarily due to the fact they have been considered as defeated communities and have been greatly mistreated or discriminated. As a consequence, indigenous individuals have been isolated, set aside on the margins of society, and relegated to conditions of significant poverty, to the point that a new concept was introduced, specifically identifying a "Fourth World" made up of «*dependent peoples, internal colonies in a variety of modern states*»[14], which are instead regarded as the "First World".

On the other hand, the abovementioned condition of social and economic disadvantage constitutes yet another element separating indigenous people from minority groups, given the latter are not always affected by it. For example, this is the case of the people from Alto-Adige living in the Province of Bolzano in Italy, or the Basque people in País Vasco, or of the Catalan community in Cataluña, or also of the Jewish communities residing in the United States. On the contrary, it is unquestionable that the indigenous communities in the different countries all live in extremely indigent and precarious financial conditions.

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[13] Following WWII, the territories of Trieste and Istria were occupied on one side by the British and U.S. troops, on the other by Tito's army. The victorious countries were in disagreement with regards to the exact definition of the territorial boundaries, and therefore, agreed to consolidate a transitory situation, in which Zone A was subject to the control of the British and U.S. troops, while Zone B was under the command of Yugoslavia. On October 5th 1954, the United States, Great Britain, Italy and Yugoslavia signed the Treaty of London, in application of the Agreement *Memorandum* for the territory of Trieste, which ended the temporary military rule and ordered the evacuation of all British and American troops from Zone A, where Italy was to established a civil administration, thus assigning Zone B to Yugoslavia. The provisions set forth by the Treaty of London and by the Agreement *Memorandum* were replaced in 1975 by the Treaty of Osimo.

[14] J. R. Miller, *Skycrapers Hide the Heavens. A History of Indian-White Relations in Canada*, Toronto, University Press, 1989, 233; G. Manuel, M. Posluns, *The Fourth World: An Indian Reality*, Toronto, Collier Macmillan, 1974; C. Denis, *The Nisga'a Treaty: What Future for the Inherent Right to*

Some data concerning the situation in Canada will support this opinion. It is proved that only 20,000 business deals are completed yearly by members of the aboriginal communities, constituting less than 1% of the entire bulk of transactions carried out in Canada, and half of these take place within the reservations. The majority of these transactions concern business-related activities in general (25%), followed by trade activities (18,8%), use of natural resources (16,9%) and finally, by the construction industry (15.1)[15].

However, if the figures concerning the economic development of aboriginal communities expose a rather serious state, their general social and health conditions are even more critical, revealing a precarious and inadequate living situation, when considering it applies to one of the seven most industrialized countries in the world.

On average, life expectancy for a member of the *First Nations* is inferior to that of a Canadian citizen. In fact, despite the gains in life expectancy, a gap of approximately 6.4 years remains between the Registered Indian and Canadian populations in 2001.

[15] Actual employment distribution per activity between Aboriginal and Canadian individuals (1991), Source: Ministry for Indian Affairs.

ACTIVITY	ABORIGINAL POPULATION	%	CANADIANS	%
Agricolture	10.605	2.3	521.335	3.7
Fishing and Trapping	5.425	1.2	48.165	0.3
Tree-cutting and transportation	10.100	2.2	106.485	0.7
Mining	8.490	1.8	192.030	1.3
Manufacturing	47.700	10.3	2.084.115	14.7
Construction industry	35.630	7.7	933.425	6.6
Transport and Communications	31.930	6.9	1.060.995	7.5
Trade	67.335	14.6	2.445.695	17.2
Financial, Insurance and Real Estate activities	14.150	3.1	810.565	5.7
Trade-related Services	18.050	3.9	802.405	5.6
Government Services	70.160	15.2	1.111.385	7.8
Education	27.515	5.9	975.520	6.8
Health services	38.615	8.3	1.277.340	9
Food and Beverage and Hospitality	43.440	9.4	909.710	6.4
Other industry-related Services	33.310	7.2	944.065	6.6
TOTAL	462.475		14.220.235	

Also, the gap in postsecondary education attainment between the Registered Indian population and the Canadian population has remained constant at about 15 percentage points.

Finally, while there is evidence of a greater number of cases of sensorial *handicap* (hearing, sight and language impairment) among Aboriginal individuals, it is also a fact that in 2000, the incidence of tuberculosis was six times higher in First Nations than across Canada[16].

2. Aboriginal people as *constituent people.*

The States that have acknowledged the presence within their boundaries of ethnically and territorially identified indigenous communities have recently inaugurated a process for the formal recognition to their rights[17].

Most recent Constitutions, regardless of the level of democratic maturity reached by the pertinent country, appear in favor of a formal recognition of both the community and the traditional rights of an ethnic group[18]. There are numerous examples to be made on the matter. Consider, for instance, the Ecuador Constitution (Sections 83-85): it expressly mentions collective rights when referring to indigenous people who define themselves as nationals of ancestral races. Also, it proceeds to a detailed illustration of the recognized and guaranteed collective rights, such as the right to defend, develop and consolidate one's spiritual, cultural, linguistic, social, political and economic identity and traditions; the right to use the natural resources found in the occupied territory; the right to preserve, enhance and manage their cultural and historical heritage; the right to keep all knowledge, skill and practices

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[16] For these figures, refer to Basic Departmental Data, at http://www.ainc-inac.gc.ca/

[17] Such acknowledgment may be achieved by way of a number of different measures, which award diversified safeguards to the various groups living in the territory. In addition, international treaties may also establish duties and obligations for the signatory states, occasionally recommending that the traditional rights of an ethnic group be recognized and upheld. This is the case, for example, of the *Torres Strait* Treaty, between Australia and Papua New Guinea: not only did this agreement define the boundaries of a restricted fishing area, it also required the preservation of the lifestyle of those living within the region, as well as of their share of fishing resources, see S. B KAYE, *The Torres Strait Islands: Constitutional and Sovereignty Questions Post-Mabo*, in *Univ. Queensland L. Journ.*, 18, 1994.

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relating to traditional medicine, including the right to honor sacred sites, as well as to protect all plants, animals, minerals and ecosystems that are deemed vital for the practice of traditional medicine.

Likewise, given Article 4 of the Mexican Constitution acknowledges the multicultural nature of the Mexican society, it therefore compels the law to protect and promote the development of indigenous languages, cultures, traditions, customs, resources and specific systems of social organization[19]. Also, in Argentina, the amendments to the 1994 Constitution have recognized the early presence within the country of native ethnic communities[20].

In the same respect, it is worth mentioning Article 50 of the Estonian Constitution, which provides for the creation of self-government organisms by ethnic minorities[21].

Even in the recently changed democratic environment of South Africa, the interests of native communities have now been awarded formal recognition by means of a new organism and new Constitutional provisions. On one hand, the *Council of Traditional Leaders* has recently been introduced: it is formed by the traditional chiefs and it is competent on all native law issues. Although it has been formally recognized, the Council must still abide by the law. On the other hand, the Constitution has acknowledged the right of every individual belonging to cultural, religious and linguistic communities to promote one's culture, to profess one's religion and to employ one's language. Also, it has established the right to create, enter into and support any association or other social body founded on a cultural, religious and linguistic basis[22].

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[19] On the subject of indigenous communities in Latin America, please refer to M. Léger (ed.), *Aboriginal Peoples. Toward Self-Government*, Montréal, 1994.

[20] The amendments were approved unanimously: see H. Masnatta, *Argentina: verso una Costituzione "integrazionista"* in M. CARDUCCI (ed.), *Il costituzionalismo "parallelo" delle nuove democrazie*, Milano, Giuffrè, 45 ss.

[21] C. A Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, in *UCLA L. Rev.*, 43, 1996, 1994; H. BooyseN, *South Africa: In Need of a Federal Constitution for its Minority Peoples*, in *Loyola Los Angeles int. comp. L. Journ*., 19, 1997, 789 ss. With regard to the African continent, a specific, although often generic, constitutional recognition of community rights can be observed in many constitutions, such as in: Congo (1992), sections 35 e 50; Benin (1990), section 11; Niger (1996), section 3; Burundi (1992), section 8; Gabon (1994), section 2; Mauritania (1991), section 6; Senegal (1992), section 1; Equatorial Guinea (1991), section 4; Guinea (1990), section 1; Ghana (1992), section 39.

[22] See R. Orrù, *La Costituzione di tutti* Torino, Giappichelli, 1998*,* 224; R. L. Pegoraro, A. Rinella, *La nuova Costituzione del Sudafrica (1996-1997)*, in *Riv. trim. dir. pubbl.,* 1997, 304 ss. C. A Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, in *UCLA L. Rev.*, 43, 1996, 1994; H. BOOYSEN, *South Africa: In Need of a Federal Constitution for its Minority Peoples*, in *Loyola Los Angeles int. comp. L. Journ*., 19, 1997,

A rather significant example is also provided by the 1982 Canadian Charter of Rights and Liberties[23], as well as by the *Constitution Act* of the same year. Specifically, as it focused on creating a unified platform of rights shared by all Canadians from coast to coast, the Charter made a serious effort to avoid that the recognition of universally awarded rights could end up concealing the country's multicultural composition. In fact, Section 25 expressly states «The 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 including

> *a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> *b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Furthermore, Section 35, clause 1 of the *Constitution Act* provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed".

With the approval in 1982 of the *Constitution Act* and of the Charter of Rights and Liberties, the prospect of incorporating and blending the aboriginal population within the Canadian legal order was definitely abandoned. Quite the opposite, Sections 25 and 35 expressly recognized the existence and understood the need to protect the unique character of the Indian communities.

Regardless of the charter's emphatic wording, there are however two aspects that must be underlined. First of all, the constitution has included aboriginal rights among its fundamental principles, thus continuing in a historically defined approach and broadening the content of the constituent pact, in an effort to eliminate the intolerant tendency to concentrate exclusively on the differences between the English-speaking and the French-speaking communities. And secondly, in spite of the Constitution's

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[23] On the matter, kindly refer to E. Ceccherini, *La Carta dei diritti e delle libertà del 1982: un difficile equilibrio fra il riconoscimento di diritti universali e la salvaguardia delle competenze provinciali*, in

formal recognition, it is up to the federal and provisional legislatures to spell out and implement the applicable constitutional provisions[24].

The intention of including the *First Nations* among the other constituent peoples was further upheld by Section 37 of the *Constitution Act*, which provided for the calling of a constitutional conference within a year from the adoption of the Constitution, in order to deal with all the issues relating to the aboriginal communities[25]. The meeting would be attended not only by the federal and provincial *Premiers*, but also by representatives of the native populations. The aftermath of the 1983 conference lead to the amendment of Section 35: specifically, it introduced the obligation to summon constitutional conferences, to which autochthonous communities must take part, whenever a constitutional reform bill concerned the revision of Sections 94(24), of Sections 25 or 35 of the *Constitution Act* and of the Charter of Rights and Liberties.

Section 34 was ultimately reformed and it provided for the calling of three more conferences, which actually occurred in 1984, in 1985 and lastly in 1987. Even if these meetings did not produce any tangible result with regard to the aboriginal issue, they still carry significant worth, as they represented an occasion for dialogue and for the exchange of ideas between the various parties[26].

The native rights issue was set aside during the following constitutional conference, which lead to the drafting of the constitutional reform law in Meech Lake (1987), but it was awarded significant exposure in the course of the Charlottetown

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[24] G. Rolla, *Tutela dell'identità culturale e personale negli ordinamenti multietnici: l'esperienza del Canada*, in G. Rolla, E. Ceccherini, *Scritti di diritto costituzionale comparato*, Genova, Ecig, 2004, N. Oliveras Jané, El multiculturalismo, in E. Mitjans, J. M. Castellà (ed.), Canadá. *Introducción al sistema politico y jurídico*, Barcelona, Universitat de Barcelona, 2001

[25] On the role of constitutional conferences in Canada, please refer to E. Ceccherini, *I rapporti fra Federazione e Province in Canada: l'esperienza delle relazioni intergovernative*, in *DPCE*, 2, 2002, 679 ss.

[26] K. Brock, *Finding Answers in Difference: Canadian and American Aboriginal Policy Compared*, in D. M. Thomas (ed.), *Canada and the United States: Differences that Count*. Toronto, Broadview Press, 2000, 346 ss.; O. Mercredi, M. E: Turpel, *In the Rapids: Navigating the Future of First Nations*, Toronto, Viking, 1993; S. Delacourt, *United We Fall; The Crisis of Democracy in Canada*, Toronto, Viking, 1993. For a general overview on the attempted constitutional reforms in Canada, please see: P. J. Monahan, *Meech Lake: The Inside Story*, Toronto, University of Toronto Press, 1991; P. W. Hogg, *Constitutional Law of Canada*, Scarborough, Carswell, 1992, s. 3.5; K. McRoberts, P. J. Monhan (ed.), The *Charlottetown Accord, the Referendum, and the Future of Canada*, Toronto, University of Toronto Press, 1993. N. Olivetti Rason, *Canada, 1982-1992: come non si modifica la Costituzione*, in *Quad. cost*., 1993, 325 ss.; J. R. Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects*, Ottawa, Canada Communication Group Publishing, 1996; B. Pelletier, *La modification constitutionnelle au Canada*, Scarborough, Carswell, 1996; T. Groppi, *Federalismo e Costituzione*, Milano, Giuffrè, 2001, 177 ss.; E. Mitjans Perelló, *De la patriación al referendum: el disacuerdo constitucional*, in E. Mitjans, J. M. Castellà (ed.), above, 57 ss.; E. Palici Di Suni, *Intorno alle*

accord (1992). By virtue of this last agreement, in fact, the indigenous communities were recognized the *inherent right* to self-government; it also provided for the strengthening of treaty negotiation procedures, as well as acknowledging the *First Nations* governments as a third institutional level, alongside the federal and the provincial governments.

3. The different categories of indigenous rights.

3.1. Inherent rights acquired through tradition.

The 1982 Charter clearly stated that both the federal and the provincial legislations were to recognize aboriginal rights, in relation to which it used two different linguistic expressions: *existing rights* and *treaty rights.*

If the Latin adage is true, namely, that *nomina consecuentia rerum*, then it is inevitable that two different categories of rights exist. The first category consists of those rights awarded to the Aborigines long before the European colonization occurred: they were still valid and in force when the *Constitution Act*[27] was adopted and Aboriginal communities would probably still possess them, if only they had not been expressly extinguished in consequence of a treaty or of a parliamentary act. The second category includes those rights that are declared and acknowledged in the treaties drawn up between federal and provincial authorities, on one side, and indigenous communities, on the other[28].

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[27] The opinion on the matter is generally consistent: the term *existing* refers to rights that undoubtedly existed up to the time the *Constitution Act* was adopted and had not been previously extinguished. In this regard, please see: *R*. v. *Eninew* (1983), 7 C.C.C: (3d) 443 (Sask. Q. B.); *Attorney-General for Ontario* v. *Bear Island Foundation* (1984) , 49 O. R. (2d) 353 (H.C.); *R*. v. *Hare and Debassige* (1985), 20 C. C. C. (3d) 1 (Ont. C.A.); *Re Steinhauer and the Queen* (1985), 15 C. R.R: 175 (Alta. Q. B.); *Martin* v. *The Queen* (1985) , 17 C. R.R. 375 (N. B. Q. B.): *R*. v. *Aga wa* (1988), 28 O. A. C: 201.

[28] Similarly, the Australian High Court recognized that Australia – prior to the British settlement – did not constitute *terra nullius*, and for this reason, the traditional indigenous rights could indeed, in certain circumstances, be embraced by *common law*. *Mabo & Ors v. State of Queensland* (1992) 107 ALR 1 (HC) ('*Mabo* No. 2'). More specifically, if the traditional occupants of a particular territory continue to respect and implement their laws and customs, then they can have title to their land. See S. B Kaye, *The Torres Strait Islands,* above; A. Fleras, *Politicising Indigeneity*, above, 213 ss.; C. J. Iorns*, International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, in P. Havemann, *Indigenous Peoples' Rights*, above, 248 ss. The Australian High Court has recently upheld this consistent opinion in *Wik Peoples v. State of Queensland & Ors, Thayorre People v. State of Queensland and Ors* (1996) 141 ALR 129 (HC),

The *pre-existing rights* possessed by Indian communities are awarded in much the same way as inviolable rights, as their inner core may not in any way be attacked. In particular, these rights belong to a legal order that exists beyond the Canadian legal system: in other words, they cannot in any way be limited by the State, as it recognized them as substantially *extra-ordinem*, on account of which they appear to possess a specific inflexibility and to require adequate safeguards.

In order to better define the items within the *existing rights* category, we can refer to the words of the President of the *First Nations* Assembly, National Chief Ovide Mercredi in connection with the aboriginal right to self-government: "Our right to govern ourselves does not come from European Proclamation or treaties; they just recognized what we were doing already. The Proclamation of 1763 did not create aboriginal land rights – it acknowledged them as pre-existing. We believe, as we are told by our Elders, that our peoples were placed on this land by the Creator, with a responsibility to care for and live in harmony with all her Creation. By living this way, we cared for the Earth, for our brothers and sisters in the animal world and for each other.»[29]

Despite the inspired description provided by the Chief, the constitutional foundation of the *existing rights* was identified for the first time by the Supreme Court in *Calder*: indigenous rights were found to be specific, not owing to a concession by the Crown or due to legal recognition or to their definition within a treaty, but only because in the past aboriginal people had been the sovereign inhabitants of that territory[30].

Consequently, as was held in *Sparrow*, «The Government has the responsibility to act in a fiduciary way with respect to aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship»[31].

Such recognition has a consolidated and strong historical background, as the 1763 *British Royal Proclamation* had already acknowledged these rights, which were then embraced by the Canadian government by way of the 1867 *British North America Act*. In addition, Section 25 of the Charter of Rights and Liberties provides

[29] Quoted from: C. Denis, *The Nisga'a Treaty*, above., 38 s.
[30] *Calder et.al.* v. *Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

that no "aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada may be abrogated or derogated from, including: any right or liberty acknowledged by the *Royal Proclamation* of 7 October 1763, and any right or liberty that exists at present, by virtue of treaties (…)"[32].

This opinion was upheld in *Guerin*, as the Judge stated, "the aboriginal title is a legal right originating from the historical Indian occupation and from the possession of tribal territory"[33]. Likewise, in *Delgamuukw*, the Supreme Court deemed oral tradition as valid proof of the existence of an aboriginal right, arguing that its content is tightly linked with and connected to the territory's century-old occupation: "it arises from the prior occupation of Canada by aboriginal peoples".

In the Court's opinion, the historical occupation of land is significant for two reasons: from a merely substantial point of view, but also given that the *aboriginal title* partially originates from the "pre-existing rights system of aboriginal law"[34].

Following this line of reasoning, the Canadian Supreme Court, in *Van der Peet*[35], held that

> «The doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America. Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates

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[32] P. W. Hogg, M. E. Turpel, *Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues*, in *Can. Bar Rev.*, 74, 1995, 215 s. A. Fleras, *Politicising Indigeneity*, above, 197 ss.

[33] *Guerin* v. *The Queen* (1984) 2 S.C:R. 335 and in *Roberts v. Canada* (1989) 1 S. C. R.. 322, 340.

[34] Subsequent to a line of cases claiming the opposite, in a 1971 case concerning land rights (Milirrpum v. Nabalco Pty Ltd, or the Gove Land Rigths case, 1971 17 F. L. R. 141), the Privy Council acknowledged it did not agree with the belief that "in the Aboriginal world there was nothing recognisable as law at all". In fact, Justice Blackburn held that "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me". Likewise, the Australian High Court recognized that Australia – prior to the British settlement – did not constitute *terra nullius*, and for this reason, the traditional indigenous rights could indeed, in certain circumstances, be embraced by *common law*. *Mabo & Ors v. State of Queensland* (1992) 107 ALR 1 (HC) ('*Mabo* No. 2'). More specifically, if the traditional occupants of a particular territory continue to respect and implement their laws and customs, then they can have title to their land. See S. B Kaye, *The Torres Strait Islands,* above; A. Fleras, *Politicising Indigeneity*, above, 213 ss.; C. J. Iorns*, International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, in P. Havemann, *Indigenous Peoples' Rights*, above, 248 ss. The Australian High Court has recently upheld this consistent opinion in *Wik Peoples v. State of Queensland & Ors, Thayorre People v. State of Queensland and Ors* (1996) 141 ALR 129 (HC), claiming that sheep farming rights do not necessarily extinguish the native titles of the Aborigines.

aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status»

Given this review, it is inevitable to notice that the historical element represents the crucial interpretative principle guiding the debate depicting aboriginal rights as *inherent rights*. Specifically, the legal significance of the historical element is provided by the formal constitutional recognition of said rights, as well as by the court decisions that have exposed the existence of a genuinely different legal system.

To a degree, the rulings rendered by the Canadian Supreme Court indeed follow in the steps of the *Privy Council*, as well as of the Australian High Court. Subsequent to a line of cases claiming the opposite, in the 1971 lands right case of *Milirrpum v. Nabalco Pty Ltd. (the Gove Land Rights case)*[36], the *Privy Council* acknowledged it did not agree with the belief that "in the Aboriginal world there was nothing recognisable as law at all". In fact, Justice Blackburn held that "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me".

Later on, in *Mabo&Ors v. State of Queensland* (Mabo no. 2)[37], the Australian High Court expressly recognized that Australia – prior to the British settlement – did not constitute *terra nullius*, and for this reason, the traditional indigenous rights could indeed be recognized by *common law.*

The case originated from a petition submitted by the Meriam tribe, with regard to the possession of land in the Murray Islands in the Torres Strait, off the coast of Queensland. The Meriam claimed they had occupied that land, which was annexed to Queensland in 1789, before the Europeans settled in the area: for this reason, they argued that the annexation could not have extinguished their land rights. The Australian High Court held that the *Cooper* opinion of 1889 was unfair, discriminatory and incompatible with the United Nations International Pact on Civil and Political Rights, with the fundamental values defended by Common law and with those presently upheld by the Australian society. In particular, if the traditional

[36] 1971 17 F. L. R. 141

occupants of a particular territory continue to respect and implement their laws and customs, then they can have title to their land[38].

However, the conclusions reached by both the Australian High Court and by the Canadian Supreme Court seemed to also benefit from several international opinions, especially when considering two specific elements.

The first aspect concerns the appropriate interpretation of Section 27 of the International Pact on Civil and Political Rights. In this regard, the UN Human Rights Committee understood that with respect to the exercise of the cultural rights sanctioned by Section 27, the survival of a specific culture may also be guaranteed by safeguarding a particular lifestyle based on the use of natural land-related resources[39]. As a result, it is possible to establish an indissoluble bond between the land traditionally occupied by indigenous peoples and their culture, to the point that the latter may not exist without the former[40].

The second aspect, instead, refers to the opinion expressed by the International Court of Justice. In its *advisory opinion* on West Sahara, the Court ruled against its representation as *terra nullius*, when in 1884 Spain established Rio de Oro as its protectorate. Specifically, the grounds for the Court's negative response were: a) that the Western Sahara territory had been inhabited by peoples who, albeit nomadic, were nonetheless socially and politically organized in tribes, lead by chiefs who could also represent them; b) that Spain had not occupied said territory on account of it was *terra nullius*, but it had proclaimed Rio de Oro as its protectorate merely on the basis of an agreement reached with the local tribe chiefs.

Consequently, it is now apparent how the Australian and Canadian superior courts, as well as the International bodies have come to share the same perspective on common aspects.

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[38] S. B. Kaye, above, 45 ss.; A. Fleras, *Politicising Indigeneity. Ethno-Politics in White Settler Dominions,* in P. Havemann (ed.), *Indigenous Peoples' Rights*, Auckland, 1999, 213 ss.; C. J. Iorns, *International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zeeland,* in P. Havemann (ed.), above., 248 ss.; A. Mason, above, 817 ss. The Australian High Court has recently upheld its consistent opinion in *Wik Peoples v. State of Queensland & Ors, Thayorre People v. State of Queensland and Ors* (1996) 141 ALR 129 (HC).

[39] General Comments, The Human Rights Committee, General Comment No. 23 (50) (art. 27) 15th Session, 1994), (1994) 1 HRR 1, par. 7.

[40] The UN Human Rights Committee often dealt with this matter. For example, consider *Ominayak and the Lake Lubicon Band* v. *Canada* (communication n. 167/1984 adopted on 26 March 1990, U.N. Doc. A/45/40 1); Kitok v. Sweden (U. N. Doc. A/36/40; Lansman v. Finland (U.N. doc.

In conclusion, the existence of a legally recognized right originates from well-established tradition and consolidated customs, which although not codified, still constitute solid evidence of steady compliance to customary practices. As a result, it is possible to adopt an unvarying perception of the world, which, by focusing on the repetition of human behavior and on the transmission of tradition through generations, comes to identify said immutable components as the essential building blocks of society[41].

3.2. Identification of *existing rights*.

Given the rather generic formulation of *existing rights*, several problems may be encountered when attempting a more specific classification of the category. Besides, courts have made an effort to provide some guidelines to assist in the definition of the precise content of *inherent rights*: for instance, they have included fishing rights, hunting rights – such as was held in *Sparrow*[42] of 1990, which acknowledged the rights of the *Musqueam* Nation to fish in the British Columbia waters, arguing that this community had "*pre-existing inherent rights*".

This case - a cornerstone in the relationship between federal (and provincial) government and aboriginal groups – concerned an Indian who was fishing with a net prohibited by federal law. The defendant claimed that this law contravened Section 35.1 of the *Constitution Act*, which recognized the ancient aboriginal hunting and fishing rights. The Court held that acknowledging *Aboriginal rights* did not prevent federal or provincial law from providing rules on the same matters, when aimed at protecting various (animal) species. However, in the instant case, the Judge understood that the State was required to allow for the Indians' need for food.

Therefore, this case suggested that two distinct interests needed to be balanced against each other: the protection of the environment and the *inherent rights* of autochthonous peoples. Said rights had to be restricted in the least detrimental way, that is, only when they needed to be balanced against a primary interest, such as the conservation of a natural resource or public safety. In brief, the Supreme Court upheld

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[41] R. David, C. Jauffret-Spinosi, *I grandi sistemi giuridici contemporanei*, Padova, Cedam, 2004, 476 s.

[42] *Sparrow* (1990) 1 S. C. R. 1075: «Rights that are recognised and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91 (24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or

the opinion expressed in *Delgamuukw*, arguing that *Aboriginal rights* could be limited by state authorities, on condition that said restrictions were aimed at promoting "*compelling and substantial*" purposes[43]. More exactly, the Court claimed that the exercise of any aboriginal right could not be restricted by imposing a general limitation such as that of public interest, given this formulation would be so broad and indefinite, it would justify any degree of restriction, to the point of possibly allowing an unconstitutional infringement of these rights.

Another significant step was taken in *Van der Peet*[44], in which the *Aboriginal Rights* were essentially defined as "*way of life rights*", the recognition of which required evidence of the fact that:

1) Aboriginal law is a usage, a tradition or a custom that is central, necessary and an integral part of that specific culture of the aboriginal society;
2) The customs and traditions must not be exercised only marginally or occasionally;
3) Regular practices, traditions and customs must be an integral part of that culture since before contact with European settlers;
4) A number of features of an Aboriginal community must be specific and unique in nature: therefore, the activities connected with the search for food cannot constitute *Aboriginal rights*, as this activity is performed in virtually every organized society;

In view of these considerations, the Court concluded that it was not possible to compile a single catalog of *inherent rights* that would be the same and valid for all the communities living on Canadian land: the *"distinctiveness"* of each community would in fact give rise to rights that are different and unique to each group[45].

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[43] On this matter, please see J. Matthews Glenn, A. C. Drost, *Aboriginal Rights and Sustainable Development in Canada*, in *Intern. Comp. L. Quart*., 48, 1999, 180 ss.

[44] *Van der Peet v. the Queen* (1996) 137 DLR (4th) 289 (SCC). The Court rendered two other decisions on the same day: together they form the "*Van der Peet* trilogy". *R*. v. *N. T.C. Smokehouse*, (1996) 2 S. C. R. 672, 4 C. N. L. R. 130 e *R.* v. *Gladstone*, (1996) 2 S. C. R. 723, 4 C. N. L. R. 65.

[45] This decision gave rise to several different comments, among which see, M. ASCH, *From Calder to Van der Peet. Aboriginal Rights and Canadian Law, 1973-96*, in P. HAVEMANN, *Indigenous Peoples' Rights*, above, 435; K. Wilkins*,...But We need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government*, in *Univ. Toronto L. Jour*., 49, 1999, 63 ss.; I. Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication*, above, 274 ss. Some have underlined the risk that referring to the necessary nature of a particular behavior in order to prove the existence and persistence of an aboriginal culture may be construed in a particularly restrictive fashion, thus preventing the acknowledgement of many other autochthonous customs: see R. L. Barsch, J. Youngblood Henderson, *The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of*

In *Delgamuukw*, the Court held that the *Aboriginal rights* consist of the sum of all daily practices together with the use of all the products of the earth and of the water within a specific territory, exactly as it happened in the past, before the European colonization.

Likewise, in *Van der Peet*, Justice Lamer concluded:

> «Aboriginal rights are not general and universal: their scope and content must be determined on a case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community».

4. Treaty rights.

Canadian Aborigines do not possess only *existing rights*, as we have previously mentioned and for which a specific classification cannot be established: they are also awarded so called *treaty rights*. Specifically, together with *existing rights*, Section 35 of the *Constitution Act* requires the Canadian legal order to recognize and affirm treaty rights, for which Section 25 sanctions full respect, as it does for the rights mentioned in the 1763 *British Proclamation Act*.

Treaties represent a peculiarity of the Canadian legal order, given it traditionally attempted to solve every dispute between settlers and aboriginal peoples by way of accords and agreements.

Native Canadians came in contact with white settlers at the beginning of the Eighteenth century: in particular, they came across French Jesuit missionaries established along the banks of the Great Lakes[46]. Later, Dutch and British settlers began to move to the southern portion of the Great Lakes, along the Atlantic Coast and near the Appalachian Mountains. The simultaneous presence of settlers coming from different countries and who were in constant economic competition with each

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as the necessary component for the identification of an ancient right; more so, see B. W. Morse, *Permafrost Rights*, cit., 106 ss.

[46] From an anthropological point of view, the encounter between two different cultures – European and Indigenous – has been examined by many authors. One for all, S. Poliandri, *Collettivismo e individualismo nel processo evolutivo del* potlatch *dei* Southern Kwakiutl*. 1849-1930*, in *Riv. st. can.*,

other eventually lead to a battle for the control over increasingly larger areas of land. All Indian tribes, with the exception of the *Haudenoshonee*, supported the French in their battle against the British (1754-1763) until its conclusion, sanctioned by the Peace treaty of Paris, which saw the King of France surrender all claims on Acadia together with his sovereignty on Canada and on Breton Cap[47].

The reason why the Indians preferred the French instead of the British is associated with the form of the settlement operated by the Europeans: the French were primarily traders and were mostly interested in achieving full charge of all means of communication and routes. The British, instead, were not only involved in trade, but they were also farmers: for this reason, they constituted a serious threat to Indian settlements.

In spite of the French defeat, the *First Nations* did not believe their independence was over, also because they had never been subjugated by either the French or the British. However, the relationship between the British and the Indians continued to be troubled until 1763, when the *Royal Proclamation* was signed, allegedly the first attempt to demarcate boundaries and define jurisdiction between the *First Nations* and the British Crown.

On principle, it represented an agreement between two sovereign populations. In reality, the conviction that the British were to be favored is revealed by the document's wording. The agreement referred to the Crown's *dominion* and *sovereignty* on the land occupied by the British settlers. In particular, while it provided that the British criminal and civil jurisdiction was not effective within the Indian territory, yet it required that any crime against British nationals would be tried by British authorities, even (if committed?*) on Indian land.

Still, the indigenous communities were recognized as *Nations*: their land could not in any way be confiscated or transferred to the colonizing government, which in return could not authorize any British subject to occupy or to purchase Indian land. In fact, Indian land rights could be acquired only by the Crown and according to a well-defined procedure.

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[47] The relationship with the French was never truly troubled: in 1665, Louis XIV had adopted several directives requesting that the colony's Governor treat the indigenous peoples with fairness and equity, and that he never resort to violence. Also, it made it illegal to confiscate any of the land the Indians occupied. On the role played by the French domination on aboriginal rights, see A. Émond, *Existe-t-il un titre indien originaire dans les territories cédés par la France en 1763?,* in *McGill L. Journ*., 41,

The provisions of the *Royal Proclamation* were submitted to the *First Nations* the year after, in 1764 in Niagara, where the related Treaty was signed. Almost two thousand Indian chiefs took part in the talks, together with the representatives of the autochthonous communities of Nova Scotia, of Mississippi, of the north side of the Hudson Bay, and possibly, of the Sioux tribes.

Regardless of the fairly elusive character of some of its provisions we mentioned previously, the Niagara Treaty ratified an alliance between the Crown and the indigenous communities, while trying to prevent further abuse and fraud in the purchase of Indian land, as well as in business transactions with the autochthonous communities[48]. The agreement was consolidated in the following years and the Indian loyalty towards the Crown was confirmed in 1812, during the war between Canada and the United States. The exchange of gifts sanctioned by the Treaty occurred for many years after that and still today, the Niagara Treaty constitutes a legal source for Aboriginal rights[49].

Then again, treaties have not been truly capable of preserving the rights of autochthonous peoples, yet alone award them the same status recognized to settlers. Many treaties prior to 1850, in fact, demanded that the Crown offer a trivial monetary compensation to Indian tribes in exchange for the use of their land: this was also ensured by the circumstance that until 1830, all Indian land was subject to British military administration[50]. Instead, the treaties negotiated between 1850 and 1871 by the provincial commissioner for Upper Canada, William Benjamin Robinson – reason for their name, *Robinson Treaties* – provided that the land title be transferred only upon annual installments. These agreements intended to confine the Natives to specific areas administered by the Government, which in return promised to provide education, as well as economic and health assistance. Subsequently, between 1871 and 1912, 11 more treaties were signed in the Provinces of Ontario, Manitoba and Saskatchewan, which were then known as the *numbered treaties*. These agreements awarded the Indians several hunting and fishing rights, as long as they waived their

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[48] G. Otis, A. Émond, *L'identité autochtone dans les traités contemporains* cit., 550.

[49] J. Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, in M. Asch (ed.), *Aboriginal and Treaty Rights in Canada*, above, 155 ss.

[50] P. Martino, *Il* treaty federalism *canadese: la tutela costituzionale dei diritti ancestrali derivanti dai trattati*, in *DPCE*, 2005, to be published; K. Brock, *Finding Answers in Difference: Canadian and American Aboriginal Policy Compared*, in D. M. Thomas (ed.), *Canada and the United States: Differences that Count*. Toronto, Broadview Press, 2000, 342; F. Ziccardi, *La condizione attuale delle tribù indiane in Canada*, in *Canada Ieri e Oggi 2,* Atti del VII Convegno Internazionale di Studi

ancestral land rights. Finally, in 1923, similar treaties were completed with the Chippewa and the Mississauga tribes.

5. The versatile legal nature of treaties: a political agreement, an international treaty or a democratic procedure.

The constitutional conversion of treaties, completed in 1982, calls for an equivalent change in their interpretation. Specifically, the treaties signed prior to 1982 openly codified a condescending approach towards the Indian population, in favor of the white community. More so, they struggled to become established as legal documents. In 1929, in *R. v. Syliboy*, the Supreme Court held that the defendant could not invoke a treaty right acknowledged by an agreement negotiated between the *Mi'kmaq* tribe and the Province's governor in1752, seeing that the Indian community could not be regarded as a legal person entitled to negotiate a treaty. Consequently, the treaty provisions awarding hunting rights within specific areas to the members of the Indian tribe could not be considered as legally binding. Treaties became mere political agreements and they are not guaranteed legal protection before the court[51]. In view of this, the clarification introduced by Section 35 takes up a completely different, and rather significant, meaning: treaties completed between federal and provincial authorities, on one side, and the Indian communities on the other do not constitute a primary source of law, rather they are ensured constitutional treatment[52]. More exactly, treaty rights assume the status of atypical source of law: in other words, they now possess a legal strength that can override federal and provincial laws, since Section 25 expressly provides that no rule may abrogate or derogate from any treaty provision (and in general, from any of the Aboriginal rights)[53].

It is worth mentioning that laws concerning the rights of autochthonous cultural identities are generally characterized by the specific nature of the law-making procedure. In fact, prior to the introduction of said rights, state authorities and representatives of the various autochthonous communities must reach special

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[51] P. Macklem, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001, 137; P. Martino, see above.

[52] This constitutes an expanding trend within the Commonwealth countries. For instance, consider that in 1987, the New Zealand High Court held that the status of the *Waitangi* Treaty could be considered as being almost constitutional, on grounds of a so called principle of "*partnership*" between the two communities that formed the nation. See A. Fleras, *Politicising Indigeneity*, above, 187 ss.

[53] Pentrey, *The Rights of Aboriginal Peoples of Canada and the Constitutional Act, 1982*, in *U.B.C. L.*

agreements, in accordance with the similar decision-making process employed by international legislative assemblies, that is, based on the principle of unanimity rather than on the majority rule[54]. In this way, the opinion that regards negotiated agreements between state government authorities and autochthonous communities as genuine international treaties is substantially confirmed[55].

The main purpose would be to authorize said agreements by way of a procedure resembling the one used to negotiate international treaties, so as to sanction – at least symbolically – a principle that in a way promotes "shared sovereignty" on the land.

Therefore, any effort directed at converting the relations between institutional bodies and indigenous authorities into tangible legislative terms must be preceded by negotiations: this appears to be a constant and well-established feature of the history of relations between natives and Canadian authorities, to the point of becoming a constitutional convention in this sense. In fact, the treaties between Aboriginal communities and Canadian authorities represent a commonly used source of law to define the rights awarded to the Natives, before as well as after the *patriation.*

Many different elements seem to confirm the existence, in this regard, of a constitutional convention. First of all, the Government has frequently confirmed its intention to proceed in this direction, through its actions and words[56]; in some of its most famous decisions, even the Supreme Court pointed out the need to settle all possible disagreements within the Canadian society by promoting negotiation and participation of all social parties involved. Ever since its first *Reference* on the *patriation*[57] of the Constitution, the Court recognized the validity of such a procedure, expressly referring to the principle of «*un degré appréciable de consentement provincial*». Also, in the more recent *Reference* on the secession of Quebec[58], the Court pinned down four essential principles of the Canadian legal order: not only did it identify the principle of federalism and of constitutionalism, intended as principle of

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[54] R. E. Goodin, *Designing Constitutions: The Political Constitution of a Mixed Commonwealth*, in R. Bellamy, D. Castiglione, *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford, 1996, 228 ss.

[55] I. Schulte-Tenckhoff, *Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties*, in *Rev. const. st*., 4, 1998, 239ss.

[56] In 1973, the federal authorities confirmed their intention to reach an agreement with those tribes that had not yet complied and that mostly occupied the territories of British Columbia, of Quebec, of Labrador and of the North; see M. Asch, N. Zlotkin, *Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations*, in M. Asch (ed.), *Aboriginal and Treaty Rights in Canada*, cit., 208 ss.

[57] *Re Resolution to Amend Constitution* (1981) 1 S.C. R. 753.

legality, rather it highlighted the principles of protection of minorities and of democracy. These two principles must be construed as integral parts of the same structure, as they substantiate the opinion that all the different pieces of the mosaic composing the Canadian society must find their proper collocation. However, said placement may not result from the mere assertion of the principle of majority, rather it must originate from a process based on negotiation and consensus[59].

Moreover, specifically with regard to autochthonous minorities, the recent *Delgamuukw* ruling has confirmed the opinion that all issues relating to the interaction between Natives and federal and provincial authorities must be regulated using the mechanisms of participation and negotiation[60].

Specifically, the Court held,

> «Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.»

The same opinion was expressly and recently reaffirmed in *Haida Nation* v. *British Columbia (Minister of Forests)*[61]. Even in this instance, the Supreme Court clearly recognized the Government's duty to consult the aboriginal community in order to settle all interests involved. In particular, the court claimed that,

> «The duty to consult and accommodate is part of a process of a fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution». (…)
>
> Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition (…) This promise is realized and sovereignty claims reconciled through the process of honourable negotiation (…). This, in turn, implies a duty to consult and, if appropriate, accommodate.

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[59] This goal has been set, but maybe not yet reached through the use of treaties. In fact, there are often disagreements after their completion. For instance, consider the court cases that followed the *James Bay* and *Northern Quebec Agreement* (1975): after more than twenty years, there have been up to seven rulings by provincial courts on the matter, which have substantially limited the Province's right to fully use the natural resources in its Northern territory for hydroelectric purposes. See M. Asch, N. Zlotkin, *Affirming Aboriginal Title*, above, 219 and footnote 58.

[60] *Delgamuukw* (1997), 153 D. L. R. (4th) 193 (S. C. C.).

In view of these elements, it is possible to identify a general legal principle, according to which all social parties representing the Canadian social and institutional pluralistic nature must turn to negotiation to achieve some kind of result.

6. Interpretative criteria for aboriginal rights.

The definition of *inherent rights*, both existing and treaty rights, was not the only issue under debate: in fact, another important argument has been the interpretation of treaties negotiated between Canadian authorities and autochthonous communities. The Supreme Court has generally embraced a rather far-reaching reading of these legal sources: for instance, in *Nowegijick* v. *The Queen*[62], it established that in case of dubious wording, all treaties and laws concerning Indians must be construed in their favor. In addition, in *Delgamuukw*, the Court reiterated the opinion that aboriginal rights are to be construed as superior to common law: however, it also held that some restrictions must apply, even if they shall conform to the special fiduciary relationship existing between the Crown and the autochthonous communities[63].

In *R*. v. *Badger*[64], the very same court declared that treaties were "sacred": as a result, any limitation to indigenous rights introduced by a treaty must be defined in a restrictive way. Also, this ruling established that the provisions set forth by treaties are to be considered as binding for the involved parties, as well as for private individuals. In particular, these agreements recognize that hunting rights – provided they are directed to procure food and provisions for the tribe members – may be exercised on privately-owned land as well, unless said property right is manifestly in conflict with the hunting activity. According to the Court, said exception to the private property right is allowed on grounds that the Indians, upon signing the Treaty, were not able to fully comprehend the notion of private property, and for this reason, this right cannot be raised against them[65].

Besides, it is true that the trouble encountered in defining the existence and the actual implementation of autochthonous rights has represented a valuable

[62] *Nowegijick* v. *The Queen* (1983), 144 D. L. R. (3d) 193 (S. C. C.).
[63] J. Matthews Glenn, A. C. DrosT, *Aboriginal Rights* above, 179 ss.
[64] *R*. v. *Badger*, (1996) S. C. J., n°39, 10.
[65] P. Macklem*, The Impact of Treaty 9 on Natural Resource Development in Northern Ontario*, in M.

incentive for federal authorities, encouraging them to execute new treaties with tribes. Specifically, while the federal government was interested in specifying the rights and duties of the Aboriginal communities by way of procedures based on full consensus in order to fulfill the common interest of all citizens[66], the Natives instead were determined to finally enjoy well-established and indisputable land rights, so as to avoid initiating lengthy and costly litigation[67]. Their purpose was not limited to obtaining a positive definition of the substance of *inherent rights*, for which many ambiguities still awaited further clarification. Rather, they planned to renegotiate the relationship existing between *Natives* and *non-Natives* on different and modern grounds.

The awareness that the traditional interpretative approach towards aboriginal rights is inadequate is revealed by the words of many Supreme Court rulings. In particular, in the *Sparrow* decision, the court held that

«an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations (...) the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. (...). the right to do so may be exercised in a contemporary manner».

The Canadian authorities have finally realized that the relationship between these two different cultures can no longer be regulated by traditions and customs alone: in a modern world and on account of the spreading globalization trend, the socio-economic development of indigenous communities cannot thrive on fishing and hunting only.

Besides, the Supreme Court has brought attention to the fact that indigenous rights need to be construed in light of current values and not in the way they existed at the time the treaties were signed[68].

The issues of environmental protection, of the development of transportation and of land use must be balanced with the interests of autochthonous communities:

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[66] This goal has been proclaimed, yet maybe not reached by way of treaties. In fact, there are often disagreements even after their completion. For instance, consider the court cases that followed the *James Bay* and *Northern Quebec Agreement* (1975): after more than twenty years, there have been up to seven rulings by provincial courts on the matter, which have substantially limited the Province's right to use the natural resources in its Northern territory for hydroelectric purposes. See M. Asch, N. Zlotkin, *Affirming Aboriginal Title*, above, 219 and footnote 58.

[67] G. Otis, A. Emond, *L'identité autochtone dans les traités contemporains,* above, 554.

[68] S. Volterra, *I diritti delle minoranze delle donne e dei "gruppi deboli" in Canada*, in S. Gambino, G. Fabbrini (eds.), *Regione e governo locale fra decentramento istituzionale e riforme. Esperienze e*

although strenuous efforts have been made to reinterpret such rights, they do not seem to adequately respond to these new challenges.

Therefore, in the *Sparrow* case, the court held that «Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time».

In the end, treaties may at times be in conflict with so-called *Aboriginal titles*, consequently determining their consensual extinction, with the purpose of regulating – and thus meeting the needs of - different aspects of life within autochthonous communities in a more modern and suitable way.

An example of this new approach is provided by the recent *Nisga'a* Treaty: it does not expressly mention the extinction of indigenous rights, rather it confirms the role played by the treaty, as the only exclusive and complete source of law providing for tribal rights. Particularly, it recites: "The Final Agreement will constitute the full and the final settlement, and will exhaustively set for the aboriginal title, rights and interest within Canada of the Nisga'a Nation and its people in respect of the Nisga'a lands and other lands and resources in Canada, and the scope and geographical extent of all treaty rights of the Nisga'a Nation, including all jurisdictions, powers, rights, and obligations of Nisga'a government". Yet, neither the Indian tribes, nor legal commentators share this opinion on extinction: especially legal authors have found that it contradicts with Section 35 of the 1982 *Constitution Act*, which expressly acknowledges *Aboriginal titles*, therefore implicitly prohibiting their extinction by way of primary sources of law (albeit possessing constitutional status, such as treaties). Moreover, the so-called *extinguishing policy* would be in conflict with the principles affirmed by the Supreme Court, as it acknowledged the inalienable nature of aboriginal rights, given they are founded on a historically-established fiduciary relationship between the Crown and indigenous communities[69].

In the *Sparrow* case, the Court also argued that the rights of autochthonous communities cannot be regarded as extinct, not even in presence of an abundant and detailed set of laws opposing traditional rights. When opting to extinguish the legal situation of tribe members, intention must be "clear and plain". Consequently, as was specified in *Delgamuukw*, a provincial law cannot legitimately carry out the extinction of indigenous rights, given that the condition set forth by the *Sparrow* decision –

namely, a "clear and plain" intention - can only be satisfied by a legislative measure expressly intended for the regulation of Indian rights. Besides, such a legislative effort pertains to the federal government only, as sanctioned by Section 91.24 of the *Constitution Act*, by virtue of which only the federal parliament is competent on the matter of «Indians and lands reserved for the Indians».

Then again, this opinion appears to conflict with several other rulings rendered by the Supreme Court, all expressly in favor of awarding full force and validity to treaty provisions that extinguished some of the ancestral rights pertaining to specific territories[70].

A third option, capable of balancing and reconciling these conflicting opinions, could be to apply the theory of "mutual recognition", according to which the Crown and the Indian tribes may renegotiate the terms of their agreements without mentioning the "extinction" of any *Aboriginal title*, while simultaneously recognizing that the parties involved are substantially equal. More exactly, this theory would move away from the assumption that the white legal order (possessing the power of extinction) is superior to the indigenous customary set of rules (subjected to extinction)[71].

The issue of aboriginal right extinction has been tackled in different legal orders as well. Even the Australian legal system has confronted the matter and it seems to have solved it by establishing that any state law opposing the acknowledgement of aboriginal rights is illegitimate, as in breach of Section 10.1 of the 1975 Racial Discrimination Act, which sanctions the immunity from law of all tribe members on matters relating to land rights. The 1975 document is awarded greater legal force on account of its nature as an implementation legislative measure for the UN International Pact on the abolition of every type of discrimination and it is in line with the International Pact on Civil and Political Rights ratified by Australia.

7. Issues regarding the acknowledgment of community rights.

The course followed in the recognition of community rights in Canada has brought to light the tensions opposing the unique territorial and cultural features

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[70] [70] *Sioux* v. *Québec* (*A. G.)* (1990) 1 S. C. R. 1025, 70 D. L. R. (4th) 427, in which the court held that ancestral rights could not be extinguished lacking the Indians' consent; likewise, see *Ontario (P. G.)* v. *Bear Island Foundation* (1991) 2 R.C. S. 570, 83 D. L. R. (4) 381; *Howard* v. *R*. (1994) 1 R. C. S. 299, 90 C. C. C. C.

possessed by some groups and the movement favoring a universal expansion of rights in the name of equality.

From a comparative point of view, it is possible to show how difficult it is – especially with regard to fundamental rights – to search for a steady balance between the need to unify and the desire to enhance territorial uniqueness. Then again, a comparative analysis can also point out how such balance should be strengthened on an institutional level, by virtue of specific constitutional means or formulas. Finally, it may highlight the instances in which social claims have been able to prevail over territorial claims, as well as cases when the rights to territorial identity have been acknowledged by derogating to universal human rights.

The pendulum is constantly swinging: a position of balance between community and personal rights, between personal or community identity, can still be achieved, but only by way of a Constitution. More exactly, codifying specific principles and procedures can prove beneficial in drafting rules aimed at preventing the outbreak of paralyzing conflicts.

The contradiction existing between respect for tradition and desire for a universal expansion of individual rights may be only apparent, should we consider them as tightly linked, inevitably complementary terms. The protection of tradition and of diverse cultural identities represents an essential and valuable standard for the specification, implementation and regulation of internationally codified personal rights: referring to tradition cannot in any way be equivalent to indifference towards personal rights within a specific legal system.

However, setting aside every theoretical argument, the practical use of these principles has produced several conflicts within the Canadian courts: it has indeed been approached in a rather puzzling way, specially in consideration of the respect due to the principle of equality. In fact, is it truly possible to assert that rules on cultural integrity can drive a legal system to ignore the principles concerning fundamental rights, when these are in conflict with tradition-based rules?[72]

In this regard, the cases relating to gender equality provide significant insight. This area of law has been the setting of dramatic conflict between universal rights and the rights of autochthonous communities: they have put forward a difficult choice,

between the protection of principles specific to the Western culture, and values that are held in the highest regard by aboriginal communities.

For example, much consideration has been awarded to the conflict between the rights of autochthonous national identities, and the claims submitted by indigenous women invoking equality between men and women.

In 1974, in the *Lavell*[73] case, the Supreme Court was called to decide upon a discrimination charge between men and women belonging to Indian tribes: in its opinion, the court denied that the different treatment used constituted a case of discrimination, arguing that in actual fact all Indian women were awarded the same treatment.

This condition of discrimination lasted at least until 1985, when the *Indian Act* was amended so as to remove all provisions in conflict with Section 15 (rule against discrimination) and Section 28 (principle of equality between men and women) of the Charter of Rights and Liberties[74]. However, in 1986, the Supreme Court rejected a petition requesting that the application of the provincial law on the distribution of assets subsequent to divorce and on the right to occupy the family home be extended to all Indian women, claiming that such laws could not be enforced within reservations[75].

Therefore, it should not come as a surprise that when advocating the affirmation of the equality principle, the aboriginal women lobbied for the recognition of federal and provincial rules, and in particular, in favor of the implementation of the Charter of Rights and Liberties, rather than for the acknowledgement of the traditional indigenous rules[76].

Another significant example of the gap existing between the Indian culture and the Canadian legal order can be found in the criminal law system. In 1993, a couple from the *Hollow Water* tribe in Manitoba (a reservation about 160 Kilometers North-East from Winnipeg), who was found guilty of frequently and repeatedly

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[73] *Attorney General of Canada* v. *Lavell and Belard*, 1974 S. C. R. 1349, S. Volterra, *La donna nella giurisprudenza*, above, 247; Ead.., *I diritti delle minoranze*, above, 527.

[74] In light of Section 27 of the UN Covenant on Civil and Political Rights on the protection of the cultural integrity of ethnic groups, the Canadian authorities did not allow an Indian woman to return to her tribe, after she had divorced a white man. The UN Human Rights Committee (*Lovelace v. Canada*) claimed this contravened the principle of gender equality, recognized by the international document, given the same treatment was not adopted in the case of a man who had been married to a non Indian woman, see F . De Varennes, *Language, Minorities and Human Rights*, Boston-Londra, 1996, 169.

[75] E. Palici Di Suni, above, 154.

abusing their daughters, was sentenced to serve three years on probation within the reservation, under the supervision of the elders of the community. The unquestionably lenient sentence can be justified on account of the fact that the Court adopted the concept of guilt employed by the Indian tribes, according to which the offender is also a victim for which punishment cannot consist in the removal from the community, but rather the community has the duty to take care of the offender and to help him recover his good conduct. Without doubt, this theory is in conflict with the criminal policy of any given Western legal system, which tends to rigidly differentiate the offender from the victim: especially in view of this, the preferred option is to remove the offender from society and isolate him in specifically established places, mainly to show consideration for the victim who may quite reasonably need to be far from the perpetrator of the crime in order to overcome the experience[77].

The other disputed element regarding the rights of autochthonous communities is represented by their diverging relationship with two other government levels that are competent in the community's territory: the federal state and the provinces. The affirmation of Indian rights has progressively lead the way to the recognition of a right to self-government within the territories inhabited by Indian tribes. However, this principle has not been easily accepted: the Provinces were first to criticize it, as they intended to maintain the competence they had been awarded by the *British North America Act*, in fear that recognizing the Indian's right to self-government would eventually strip them of their competence. Even the Supreme Court has proved skeptical on the matter, arguing that the recognition of the right to self-government involves a thorough investigation of the historical and cultural conditions of each single tribe[78].

On the other hand, these positions are balanced by a significant episode, that is, the signing of the *Nisga'a* treaty by the British Columbia legislative assembly. In August of 1998, the Canadian Ministry for Indian Affairs and for the North, together with the British Columbia Premier Glen Clark and with Joe Gosnell, President of the *Nisga'a* native populations reached an agreement. After twenty-five years of consultation and more than a century of discussion, the abovementioned treaty awarded the *Nisga'a* populations the right to self-government on more than 2000

[77] E. Larocque, *Re-examining Culturally Appropriate Models in Criminal Justice Applications*, in M. Asch (ed.), *Aboriginal and Treaty Rights in Canada*, above, 75 ss.

square Kilometers, including all natural resources within the area; it authorized the creation of a centralized government with laws similar to the regulations adopted by the other local governments, and finally, it approved funding for an amount of 190 million dollars, payable in fifteen years[79].

It is the first time that British Columbia drafts an agreement with an autochthonous tribe and it is significant that it conferred such far-reaching competence to a self-government authority. Possibly, the intention was to introduce a new, additional level of government, next to the federal, provincial and local ones, even if in order to do so, it would probably be necessary to proceed in the direction of a constitutional reform[80].

It is unquestionable, however, that even devolving only a limited amount of competence from the State or from the Province may produce conflict between the Indian authorities and the provincial government: this is indeed confirmed by the ample caseload on the subject. In particular, a matter of debate has been the implementation of aboriginal treaty provisions in relation to those individuals who, albeit living within Indian Territory, do not belong to the tribe. Recently, in *R. v. Decorte*[81], the Canadian Supreme Court held that the reservation police could legally exercise their duties even beyond the reservation's boundaries and in relation to individuals not belonging to the First Nations.

The case pertained to Cecil Decorte, who refused to take an alcohol test at a checkpoint: as a result, two Indian policemen, who were exercising their duties by virtue of the *Anishinabek Police Service Agreement 1999-2004*, decided to take him into custody. Decorte appealed, claiming he had illegitimately been detained, given the arrest had taken place beyond the reservation's border and had not been performed by officers of the Provincial police.

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[79] The members of *Nisga'a* tribe in Canada are approximately 6000, 2500 of which live in villages located in the *Nass River Valley*, north of Vancouver, and in Prince Rupert, in British Columbia. Before being ratified, the treaty must be approved by the tribe members: votes in favor must exceed 50% of the suffrage and any abstension from voting shall be considered as a negative vote. Then, the treaty will be voted by the provincial legislature and finally by the federal one, see *Trattato Nisga'a*, in *Canada contemporaneo*, 50, October 1998.

[80] The attempt to establish self-government institutions on a constitutional level was carried out by the *Charlottetown* agreement (1992), J. Morin, J. Woehrling, *Les Constitutions du Canada et du Québec du règime français à nos jours*, Montrèal, 1994, 441 ss., P. Hogg, M. E. TurpeL, *Implementing Aboriginal Self-Government*, cit., 202 ss. On the matter of constitutional amendments in Canada in general, please refer to, N. Olivetti Rason, *Canada 1982-1992: come non si modifica la Costituzione*, in *Quad*. *cost*., 1993, 325 ss.; T. Groppi, *La partecipazione degli Stati membri*, cit., 149 ss. E. Palici Di Suni, above, 151 s.

The Court, instead, upheld the full validity of the police operation, arguing they were authorized by a trilateral agreement negotiated by the federal, provincial and territorial authorities - the First Nations Policing Policy of 1996 - which intends «to improve the administration of justice for First Nations through the establishment of First Nations police services that are professional, effective, and responsive to the particular needs of the community». By virtue of this agreement, the Ontario Police Services Act provided that Indian policemen were conferred the same authority and competence of police officers in the exercise of their 'specific duties'. Said duties were outlined by the *Anishinabek Police Service Agreement 1999-2004*, which defines that the *Anishinabek* police force «exercises the powers of a police officer in and for the Province of Ontario», with the purpose of serving primarily, but not exclusively, the aboriginal communities.

As we have pointed out before, autochthonous communities have always aspired to possessing jurisdiction over their territory: for this reason, most of their consultations with the federal authorities have been focused on this target.

In this regard, an important sign is given by the official proclamation* of the *Nunavaut* territory, which in the *unuktit* language, the language of the *inuit*, means "our land": completed on April 1, 1999, it joined the other two territories, *Yukon* and the territories of the North-West. This new land, managed by the *inuit*, covers an area of 1.900.000 square Kilometers, almost 20% of the entire Canadian territory: its extension is greater than that of the provinces of Terranova, Prince Edward Island, New Scotland, New Brunswick and Quebec put together and it includes seven out of twelve of the greater Canadian islands, as well as two thirds of the national coasts[82].

This formal recognition was the conclusion to a succession of requests submitted by the Canadian *Inuit Taparisat* (the national political body representing the *Inuit*), which provided evidence of the existence of an Eskimo ancestral title to the Canadian arctic territories[83]. The new territory has approximately 24.000 residents, of

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[82] These dimensions can help to give an approximate idea of the territory's abundance of resources, which have not yet been entirely taken advantage of. Presently, *Nunavut* possesses lead and zinc mines, Cobre, gold, Plata and diamond deposits. Except for the mining activity, other important economic activities are: increasing tourism, fishing, CAZA and, in a smaller percentage, the craft industry.

[83] The steps that lead to the creation of the *Nunavut* territory are: 1976 – the *Inuit Tapisarat* requested the creation of a territory in relation to the movement advocating land rights within the North-Western Territories; 1977 – the *Inuit* Land Commission for the North-Western Territories advised the government to establish a new territory and a new government in recognition of the autochthonous political institutions; 1979 – the Canadian government introduces a new district within the North-

which 18.000 (85% of the total) are *Inuit.* As in the other Territories, there is an autonomous legislative assembly, made up of 19 members, which elects its own government. The executive is composed of ten ministers located in the eleven territorial communities that make up *Nunavut*; also, the law has provided for the setting up of a territorial court. The devolution of all powers will take place gradually and shall be completed in 2009.

Primarily, the federal government's intention in connection with the creation of this new territory has been to promote the area's economy and to improve the Indians' quality of life, but most of all, to encourage the implementation of an educational and cultural development strategy, in order to preserve the *Inuit* traditions and language. As a result of this, the *Nunavut* territory is different from the other bilingual territories and Provinces, given that it has three official languages: English, French and *inuktitut*[84].

The territorial claims of the Canadian Indians have therefore been given a legislative response, even if past and present events seem to reveal that it is utterly impossible to award extensive autonomy to each of the tribes living within the territory. The prevailing risk for Canada would in fact consist in its transformation on exclusive ethnic grounds: specifically, there would be a tremendous multiplication of the number of ethnic groups claiming rights, privileges or greater autonomy, in name of the right to diversity. The excessive proliferation of these groups would not determine the end of the national State in favor of a multicultural State; instead it would only lead to a series of local, ethnic-based claims.[85].

Territories (which substantially corresponded to the current *Nunavut* territory); 1980 – the delegates of the legislative assembly for the North-Western Territories vote in favor of the territory's division; 1982 – a popular referendum takes place and 56% of the Territories' population is in favor of the division; 1990 – a general consensus is reached between the *Inuit*, the federal and the territorial government with regard to the creation of a new Territory; 1992 – the majority of voters in the Territory expresses its favor in relation to Nunavut's new borders; that same year, the *Inuit* approve the terms for the definition of their territorial claims; 1993 – the *Inuit*, the Canadian and Territory governments sign an agreement establishing the *Nunavut* territory; consequently, the Canadian Parliament passes the *Nunavut* Act and the Agreement on the *Nunavut* Territorial Claims Agreement Act***; the new legislation provides for the institution of a Committee, in charge of drafting the Territory's constitution: in 1995, the Committee releases a report containing the detailed plan to complete the Territory's creation; on 15 February 1999, the *Nunavut* residents elect the first deputies of their new legislative assembly. The chronological sequence of events is quoted from the website www.inac.gc.ca

[84] *Nunavut*, in *Canada contemporaneo*, 54, April 1999. For further information on the *Inuits* of *Nunavut*, C. Pitto, Nunavut: *come cambia la carta geopolitica del Canada*, in S. Gambino, C. Amirante (ed.), *Il Canada un laboratorio costituzionale. Federalismo, Diritti, Corti*, Padova, 2000, 327 ss..

[85] U. Fabietti, *L'identità etnica*, Roma, 1998, 123 s. G. Rolla, *L'autonomia costituzionale delle*

At the same time, there has been evidence of rising nationalistic fervor and hostility towards minorities in some Eastern countries, as confirmed also by the electoral speeches of some nationalist parties. For instance, in 1995 in Hungary, the Independent Party of Small Owners has managed to come in second, behind the socialist party[86]. More so, in Slovakia, strong nationalist movements began to develop right after the country declared its independence in 1993[87]. Likewise, in Romania, the two governing political parties, the Romanian party for National Unity and the Party for Great Romania, have always resisted extending rights to minorities, especially to Hungarian minorities - approximately two million people settled in the Transilvania region – living within the state[88].

Besides, assuming an exasperated attitude in the protection and promotion of the uniqueness of each indigenous community may take on a double connotation: a positive one, because by undertaking such a strategy it is possible to safeguard their cultural identity; or else, a negative one, should the same policy become a method of gradually discriminating them, by perpetuating their condition of economic and cultural disadvantage compared to society's leading groups.

Canada found itself at a deadlock when, subsequent to the submission of a petition by the Indian community claiming the right to commercial fishing, the Supreme Court answered that such an entitlement was contrary to the tribe's traditional relationship with fish, which was mainly aimed at providing food for the community, and therefore, it could not be subjected to market rules[89].

All things considered, the greatest risk is that the courts' opinion of indigenous rights will tend to fossilize in view of ancient traditions; consequently, it may further stereotypes that will eventually end up damaging, rather than protecting, the indigenous communities, merely on the assumption that the ambition and desires of the community have remained unchanged since those defined and demanded at the time of the 1763 *Royal Proclamation.* In brief, the greatest danger is that by following

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stato, Torino, Giappichelli, 1998, 7 ss; . S. JR: Noël, *Canadian Responses to Ethnic Conflict*, in J. McGarry, B. O'Leary (eds), *The Politics of Ethnic Conflict Regulation*, London-New York, 1993, 41 ss.

[86] I. Pogany, *Constitution Making or Constitutional Transformation in Post-Communist Societies*, in R. Bellamy, D. Castiglione (ed.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford, 1996, 164 ss.

[87] I. Pogany, *Constitution Making*, above, 168.

[88] I. Pogany, *Constitution Making*, above, 172.

[89] *R.* v. *Vanderpeet* (1993) 5 W. W. R. 459, 80 B. C. L. R. (2) 75 (C. A.), G. Otis, A. Emond, *L'identité*

an interpretation aimed at preserving the 'integrity' of Indian customs and traditions, no chance will be given to a possible interaction between the two cultures living together on Canadian land.

Multiculturalism and the enhancement of differences may ultimately give life to a new version of segregation, as it could fuel conflicting views and loosen the unitary connective tissue.

In addition, a rigid implementation of multiculturalism disregards that fact that society and culture are dynamic, ever-changing entities: they are not unaffected, rather they are continuously influenced by each other. In the end, multiculturalism cannot only stand for separation, but also for communication[90].