The Rule of Law with Indigenous Characteristics

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The rule of law enjoys a sort of evanescent permanence in legal discourse, perceived as the necessary but usually undiscussed foundation of any legitimate legal order, whether it be international or constitutional. Indeed, everyone seems to support the idea of the rule of law, from democracies to authoritarian regimes, from the global north to the global south, from capitalist societies to communist ones.[1] In no small part, its global appeal reflects its nature as an essentially-contested concept, the rule of law being a "construct of desire" without any agreed content.[2] There have been endless debates between partisans of 'thick' and 'thin' understandings of the rule of law, and among those defending universalist views and those permeated by local specificity, like the Chinese Communist Party's "socialist rule of law with Chinese characteristics".[3] Despite the enormous range of views and positions, however, there is a common thread uniting nearly all discussions of the rule of law – in the central position occupied by the state. The emergence of the administration of justice by Indigenous peoples calls for a reconsideration of the very foundation of the concept of the rule of law.

Beaver v. Hill in many ways, is a sadly familiar case before the family law division of the courts of Ontario, Canada, embodying the humdrum daily operation of the rule of law.[4] It tells the story of Brittany Beaver and Kenneth Hill, two persons drawn to each other, starting a relationship that was never formalised by marriage but that resulted in the birth of a son. The couple progressively grew apart, with Kenneth having other relationships and Brittany moving in with a new partner with whom she had another child. Kenneth is a successful and wealthy businessman while Brittany is unemployed; he bought her a house and paid a monthly amount in support. The two, however, could not agree on the amount of support that was warranted in the circumstances, a disagreement that progressively degenerated into an acrimonious debate. Brittany eventually brought an application against Kenneth before the Ontario Superior Court of Justice for sole custody of their son and for child and spousal support, under the relevant provincial statutes. It is at that point that the case took a turn away from the routine unhappiness of family court to raise fundamental questions about the constitutional order in Canada and, ultimately, about the meaning and content of the rule of law. One facet of the story that became central is the fact that both Brittany and Kenneth are Indigenous, members of the Six Nations of the Grand River (the largest First Nation in Canada, bringing together all six nations of the Haudenosaunee Confederacy). Kenneth is Mohawk (Kanienkahagen) and lives on the territory of the reserve, while Brittany is Tuscarora (Ska-Ruh-Reh) and lives off reserve in the city of Waterloo. In his answer before the court to the application brought by Brittany, Kenneth challenged the power of the court to decide the questions at issue, claiming that " it has been transmitted to him by the oral tradition of his people that he is obligated to abide by Haudenosaunee law to the exclusion of Ontario and Canadian Family Law, that the operation of Ontario and Canadian Family Law is inconsistent with his culture and that of his community, and that extending Ontario and Canadian Family Law is not in the best interests of [the child], his family, or Haudenosaunee children generally. He states that he has been advised through his oral tradition that 'Ontario and Canadian legal processes have harmed and continue to harm Haudenosaunee children, families and communities'".[5] As a result, argued Kenneth, his inherent right to be governed by Haudenosaunee law as applied through Indigenous legal processes meant that Canadian and Ontario law did not apply to this dispute and that Ontario courts had no jurisdiction.

The argument developed by Kenneth to support the inherent right of Canadian First Nations to self-governance with respect to family relations essentially rested on section 35(1) of the *1982 Constitution Act of Canada*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[6] The pithy formulation of section 35(1) may be taken as a straightforward recognition of aboriginal (or Indigenous) rights in the country, but it reflects considerable political manoeuvring, last-minute haggling over wording, and significant disagreement over what it means to achieve.[7] Shortly after its adoption, Brian Slattery discussed the possible interpretations of section 35, stating, "[a] critic of the new Constitution could be forgiven for saying that the sections regarding aboriginal rights lead us from darkness to darkness, that they substitute impenetrable obscurity for what was formerly mere shadowy gloom."[8] While there has been significant doctrinal discussion of section 35 in the last forty years, the courts have moved cautiously in their interpretation of the provision.[9] In a series of cases, the Supreme Court developed and later refined a test for assessing whether an existing aboriginal or treaty right was constitutionally protected by section 35. That said, precious little has been said regarding the claims by many Indigenous peoples in Canada that the provision stands for a constitutional recognition of a right to self-governance, apart from a passing mention that it would be treated in the same manner as other rights under section 35.[10]

At the same time, perhaps paradoxically, the Canadian Government has been progressively more open to acknowledging a right to self-governance in policy and statutory instruments. In 2017, the Federal Government proclaimed a set of 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples', the first of which is a recognition of the right of Indigenous Peoples to self-

* Source: 'Rene Provost', McGill Faculty of Law (Web Page) <https://www.mcgill.ca/law/profs/provost-rene>.

determination "including the inherent right to self-government".[11] In 2021, the Canadian Parliament adopted the United Nations Declaration on the Rights of Indigenous Peoples Act, providing for the domestic implementation of UNDRIP, which protects the right of Indigenous Peoples to maintain their institutional structures and juridical systems (Art. 34 UNDRIP).[12] Very recently, in June 2023, the Government of Canada published an Action Plan to detail UNDRIP implementation measures, prepared in consultation with Indigenous nations of Canada.[13] One of the cross-cutting goals of the Action Plan is "ensuring a Canada where Indigenous peoples exercise and have full enjoyment of their rights to self-determination and self-government, including developing, maintaining and implementing their own jurisdiction, laws, governing bodies, institutions and political, economic and social structures related to Indigenous communities". A concrete step giving effect to this embrace of Indigenous self-governance was the enactment of a federal law that provides for the takeover of child protection services by Indigenous Nations, preferably but not necessarily by agreement with the provincial government that normally has the constitutional authority to provide such services.[14] The law's stated purpose is "to affirm the inherent right of self-government" of Indigenous Peoples (Art. 8(1)).[15]

It is admitted that neither policies nor statutes can define the meaning of a constitutional provision like section 35. This does not, however, prevent the government from proactively adopting statutes and policies that give effect to an interpretation of section 35 that affirms a constitutional right to Indigenous self-government. There are two concerns that flow from this approach. The first is that it makes the realisation of a right to Indigenous self-government dependent on the political will of the government to make it a priority; up to this point, successive governments have proven more ready to provide a rhetorical embrace of Indigenous self-governance than to implement it by way of concrete changes to Canadian law and policy. The 2019 federal statute on Indigenous child protection is a rare example of a concrete move towards self-government. The second concern is that it leaves whatever steps taken by governments in Canada at the mercy of the interpretation of section 35 by the courts. As noted earlier, the language of this provision offers nearly no guidance to courts as to the substance of 'existing aboriginal and treaty rights' benefiting from constitutional protection, and issues like the apportioning of public authority are ones that courts are loath to tackle without a strong textual foundation. One of the principles guiding the application of section 35, that the Supreme Court embraced early and reaffirmed often, is that its purpose "is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada".[16] The Court in Van der Peet relied on an article by Mark Walters in which he noted that "[t]he challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently, there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined … a morally and politically defensible conception of aboriginal rights will incorporate both perspectives".[17] In jurisprudence, this has corresponded to debates around the foundation of Canadian sovereignty based on its 'discovery' and the extinguishment or continuity of Indigenous legal traditions since the effective imposition of authority by the French and British Crowns. The problem is that the arcane common law doctrines being discussed and the reconciliation proposed remain grounded in a constitutional framework that is not itself pluralistic, but rather one that is exclusively rooted in Western notions of sovereignty, statehood, constitutionalism, and law. In that sense, the pluralism that is perhaps accessible through an interpretation of section 35, corresponds to what might be termed thin plurinational constitutionalism, a model that has been embraced in modern constitutions in places like Bolivia, Colombia, and Ecuador.[18] The conversation may incorporate both (or multiple) perspectives about law and public authority, but the frame remains monolithic.

The assumption that underpins the conversation in Canada around Indigenous self-governance and constitutionalism is that, if the former is not to imply the dismantling of Canada as a sovereign country, then there must indeed be a unitary font from which springs legality in the country. The concept of the rule of law is traditionally taken to stand for the proposition that any public authority, whatever its origins, must be constrained by law to protect against arbitrariness. As such, both historically and conceptually, the rule of law lies at the heart of the idea of a constitution.[19] Indeed, the analysis of the rule of law in legal commentary largely has taken the state as a focus, a reflection of the fact that the rule of law originates in constitutional doctrine like that of A.V. Dicey in English law.[20] The link to the state is even more immediately evident in the continental concepts of État de droit and Rechtsstaat.[21] Even in its thin version, a central ambition of the concept of the rule of law is to subject the exercise of governmental authority to legal regulation. There is here a certain circularity in that we seek to control the state by way of laws emanating from the state. This approach also raises the question of whether the exercise of authority by entities other than the state ought to be subject to the rule of law, as well as the question of whether the rules that regulate nongovernmental authority can only emanate from the state, or whether they could find their basis in non-state actors. The fact that rule of law scholarship, with a few exceptions, focuses on the state is a reflection of the attribution to the state of a monopoly on law. As put by Laura Grenfell, "[t]he modern concept of the rule of law is based on two assumptions: first, the existence of a modern state, and second, that within this modern state paradigm, the state is sufficiently strong and organised to enjoy a monopoly of law. In this sense the rule of law is shorthand for the rule of state law".[22] Law is both a product of and a justification for the sovereignty of the state, leading the UN Secretary-General to remark that "[t]he rule of law is at the heart of State sovereignty".[23]

It is worthwhile to be reminded of the relative novelty of the association between law and the state. Until a few centuries ago, law was an aspect of life, that in a significant manner, reflected social structures other than the state. Going back even further, to the Middle Ages, we see that law was not an instrument of earthly power to be wielded by the prince. Quite the opposite, the law was essentially customary, "an unwritten and unchanging eternal norm" that evolved slowly and invisibly rather than by the fiat of a ruler.[24] The capture of law by the state was a slow and progressive process, extending over many centuries and following patterns that differed from country to country. For very long periods, in Europe, multiple legal regimes overlapped in any given place. Some were applied only to certain classes of society, the nobility with its leges feudorum, the merchants with the lex mercatoria, city dwellers with municipal law; some laws followed geography, with each village and valley having its own custom, often expressed in a distinctive local dialect; some laws followed blood rather than land, on the model of the Ottoman millet system; other laws still attached to religious identity, with canon law acting as a transnational ius commune for Christians across Europe, but also Islamic law and Talmudic law in parallel; the rediscovery of Roman legal texts in the 12th and then again in the 16th century, thanks to the rise of the university, overlaid 'scientific' legal norms that weren't linked to any segment of the population nor to the state but that played an important role in private law matters, especially property law.[25] In many cases, there were courts that corresponded to particular communities or legal regimes, from manorial courts and royal courts to merchant courts and religious courts. There was no neat division between court and law, such that a given court could be called to apply norms from a range of regimes depending on the identity of the parties and the nature of the issue in dispute.[26] As noted by Santi Romano, the rhetorical capture of law by the state was completed through a narrative of the state as a centrifugal force unifying all these previously disparate legal orders, successfully inverting the reality that whereas law may well be imagined without the state, the state cannot exist without law.[27]

The capture of the rule of law by the state, eventually presented as a fundamental attribute of sovereignty, corresponds to a complex legal and political process that owes much to the flux of government authority in states like France and the United Kingdom but also to the colonial expansion of European empires and the role played by law in the assertion of domination over new lands and peoples. It was famously said by Martin Chanock that "law was the cutting edge of colonialism", not merely as a governance tool but fundamentally as an intended 'gift of civilisation'.[28] Indeed, the pervasive reliance on legalism in colonial governance brought with it the myth of the ineluctable centrality of the state to the administration of justice. While it may be admitted that law was not only the handmaiden of colonial domination, but also in a limited sense, a site of resistance for colonised peoples, all these dynamics operated on a matrix reflecting western notions of the rule of law.[29] Even in the post-colonial context, in which the attitudes of newly independent governments towards non-state justice practices and institutions have varied, the legacy of the rule of law has endured in a culture of legalism centred on the state.

Legal pluralism disrupts the vision of law that underpins a necessary and exclusive association between the rule of law and the state. It is a theoretical perspective that aims to account for the reality that, in any society at any time and in any place, multiple normative orders coexist. Legal pluralism rejects monism, centralism, positivism, and prescriptivism as the foundations of the concept of law to instead suggest that law is fragmented, decentralised, contingent, and deliberative.[30] Social life may always breed a multiplicity of legal orders, interacting in relations of competition, coordination, or complementarity, but what legal pluralism seeks to offer is a legal, as opposed to a political, understanding of how such relations can be managed so that law remains a factor of social stability.[31] If the vision of law is pluralised, so then too must the concept of the rule of law. Legal pluralism suggests that there are many normative sites in society beyond the state in which law is created, interpreted, and applied in a manner that reflects the varying degrees of agency of different categories of actors. All these actors, from the state to Indigenous Peoples, religious communities to individuals, are confronted with the plurality of law and the need to maintain their identity and autonomy. For states, and for many First Nations, sovereignty is the concept that captures this need for defending identity and autonomy in the face of other laws and other powers. It is in that sense that sovereignty and the rule of law are closely connected concepts.[32]

The restraining function of the rule of law must be applied to all sources of public authority in society. Thus, the precepts that are articulated with respect to the rule of law as attaching to the state must be reimagined so that they can also attach to the authority and laws of other actors, including Indigenous Peoples. Allen offers that "[p]roperly understood, the rule of law is not a shield against the abuse of law, as it is sometimes portrayed. It is the moral ideal of governance according to law in its primary sense—the sense in which it enforces a scheme of rights and duties that provides for each individual a domain of liberty, secure from the threat of domination either by public officials or powerful private interests". The focus on rights and duties as well as individual liberty speaks directly to a particular social structure of public authority: liberal constitutionalism. If the rule of law is to play its necessary mediating function among multiple sources of public authority in a given society, then it must be detached from this singular model and enlarged to accommodate other models. In the Canadian context, this calls for reimagining the rule of law so that it can bridge the claims of autonomy and dignity, or indeed sovereignty, of First Nations like the Haudenosaunee and the sovereignty of the Canadian state. The Constitution of Canada, however section 35 is interpreted, can never completely fulfil this function because it is rooted in a vision of the rule of law that does not make space for competing approaches to the rule of law.

Brittany and Kenneth argued around these ideas before the courts of Ontario, but ultimately the point was never resolved. In a

manner that is symptomatic of the reaction of Canadian courts to claims of self-governance, the Ontario Superior Court and Court of Appeal determined that the issue was not ripe for decision because the collective interests at stake had not been sufficiently considered at that stage of the proceedings.[34] Arguably, one might say that the rule of law itself has not been sufficiently (re)considered to offer the intellectual scaffolding needed to build a Canadian lawscape that encompasses state and Indigenous justice in a fair and respectful manner.

END NOTES

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[1] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004). A perhaps unique exception was the Islamic State or Daesh, which rejected the rule of law (and state sovereignty, democracy, and human rights) as corrupt notions: René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021) 114 5.

[2] Mark Fathi Massoud, 'Ideals and Practices in the Rule of Law: An Essay on Legal Politics' (2016) 41 *Law & Social Inquiry* 489, 494.

[3] Randall Peerenboom, 'Fly High the Banner of Socialist Rule of Law with Chinese Characteristics!' (2015) 7 *Hague Journal on the Rule of Law* 49.

[4] *Beaver v Hill* (2017) 4 R.F.L. (8th) 53 (Ontario Superior Court, Chappel J.); *Beaver v Hill* (2018) 143 O.R. (3rd) 519 (Ontario Court of Appeal, Lauwers, van Rensburg & Nordheimer JJ.A.); leave to appeal dismissed, *Beaver v Hill* (2020) CanLii 1839 (Supreme Court of Canada).

[5] *Beaver v Hill* (n 4) [23].

[6] *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

[7] See Louise Mandell & Leslie Pinder, 'Tracking Justice: The Constitution Express to Section 35 and Beyond' cited in Lois Harder & Steven Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (UBC Press, 2015) 181.

[8] See Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8(2) *Queen's Law Journal* 232.

[9] A recent, representative case is *R v Desautel* (2021) SCC 17 (Supreme Court of Canada).

[10] *R v Pamajewon* [1996] 2 SCR 821, [24]; see Naiomi Metallic, 'Breathing Life into Our Living Tree and Strengthening Our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act' cited in Richard Alpert et al, (eds), *Rewriting the Canadian Constitution* (Forthcoming) <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2177&context=scholarly_works>.

[11] Justice Canada, 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples', *Canada's System of Justice* (Web Page, 2018) <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

[12] United Nations Declaration on the Rights of Indigenous Peoples Act 2021 c 14; United Nations, Declaration on the Rights of Indigenous Peoples, GA Res, A/RES/61/295 (2 October 2007).

[13] Justice Canada, 'United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan', *The Action Plan* (Web Page, June 2023) <https://justice.gc.ca/eng/declaration/ap-pa/ah/index.html>.

[14] *Act respecting First Nations, Inuit and Métis children, youth and families 2019* c 24.

[15] The Province of Québec, later joined by a number of other provinces, has challenged the constitutionality of parts of this statute by way of a reference to the Québec Court of Appeal: *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis* (2022) QCCA 185 (Québec Court of Appeal). The case, at present under deliberation on appeal at the Supreme Court of Canada, may bring the Supreme Court to finally speak directly to the constitutional protection of the right to self-government under section 35 of the *1982 Constitution Act*.

[16] *R v Van der Peet* [1996] 2 SCR 507, [49] (Supreme Court of Canada, Lamer CJ).

[17] Mark Walters, 'British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*' (1992) 17 *Queen's Law Journal* 350, 412-3.

[18] See e.g. Daniel Bonilla Maldonado, *La Constitución Multicultural* (Siglo del Hombre Editores, 2006).

[19] T.R.S. Allen, "The Rule of Law", in David Dyzenhaus and Malom Thornburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 201, 205.

[20] Judith N Shklar, 'Political Theory and the Rule of Law' in Allan Hutchinson and Patrick Monahan (eds), *The rule of law: Ideal or ideology* (Carswell, 1987) 5–6; Mark D Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge University Press, 2020).

[21] Matthias Kötter and Gunnar Folke Schuppert, 'Applying the Rule of Law to Contexts beyond the State', in James R Silkenat, James E Hickey and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer International Publishing, 2014) 72.

[22] Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press, 2013) 4.

[23] UN Secretary-General, Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004) [48].

[24] Raoul Charles Caenegem, *Legal History: A European Perspective* (Bloomsbury Publishing, 1990) 123; Pietro Costa, 'The Rule of Law, an Outline of Its Historical Foundations' in Christopher May and Adam Winchester (eds), *Handbook on the rule of law* (Edward Elgar, 2018) 138.

[25] Jean-Louis Gazzaniga, *Introduction Historique Au Droit Des Obligations* (Presses Universitaires de France-PUF, 1992) 51–53; Caenegem (n 25) 115–6; Paul R Hyams, 'What Did Edwardian Villagers Understand by 'Law'' (1996) *Medieval Society and the Manor Court* 69; Paolo Grossi, L'ordine giuridico medievale (Ed Laterza 2017).

[26] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(375) *Sydney Law Review* 375, 377–8. I have explored and expanded these thoughts in considering how the rule of law relates to the administration of justice by non-state armed groups in conflict zones in Provost (n 1) 56–66.

[27] Santi Romano, *The Legal Order* (Mariano Croce tr, Taylor & Francis, 2017) 51–53.

[28] Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, 1985) 4; Martin Chanock, 'The Law Market: The Legal Encounter in British East and Central Africa' in Wolfgang Mommsen and Jaap De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Bloomsbury Publishing, 1992) 279–280.

[29] Sally Engle Merry, 'Law and Colonialism' (1991) 25 *Law and Society Review* 889, 917–918; Chanock (n 28) 306.

[30] These are complex ideas more fully explained in: Roderick A Macdonald and David Sandomierski, 'Against Nomopolies' (2006) 57(4) *Northern Ireland Legal Quarterly* 610; René Provost, 'Interpretation in International Law as a Transcultural Project' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), Interpretation in International Law (Oxford University Press, 2015). More generally, see Brian Z Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford University Press, 2021).

[31] Geoffrey Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 438, 442–6.

[32] Allen (n 19) 215; Jeremy Webber, 'Contending Sovereignties' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford handbook of the Canadian Constitution* (Oxford University Press, 2017).

[33] Ibid 218.

[34] Further to the Court of Appeal decision, after appeal was denied by the Supreme Court of Canada in 2020 (n 4), the case was returned to the Superior Court. No further judgment seem to have been issued, likely because Kenneth Hill passed away in January 2021: Russel Alexander, 'Case Involving Wealthy Indigenous Businessman is Testing Appeal Court's Patience', *CanLII Connects* (online, 9 July 2019) <https://canliiconnects.org/en/commentaires/67167>; Expositor Staff, 'Six Nations Entrepreneur Ken Hill dies at 62', The Expositor (online, 18 January 2021) <https://www.brantfordexpositor.ca/news/local-news/six-nations-entrepreneur-ken-hill-dies-at-age-62>.

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